

THIS BOOK CONTAINS THE OFFICIAL
REPORTS OF CASES

DECIDED BETWEEN

FEBRUARY 2, 2007 and JULY 26, 2007

IN THE

Supreme Court of Nebraska

NEBRASKA REPORTS
VOLUME CCLXXIII

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

For the benefit of the State of Nebraska

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	xiii
LIST OF CASES DISPOSED OF BY FILED MEMORANDUM OPINION	xix
LIST OF CASES DISPOSED OF WITHOUT OPINION	xxi
LIST OF CASES ON PETITION FOR FURTHER REVIEW	xxiii
CASES REPORTED	1
HEADNOTES CONTAINED IN THIS VOLUME	1057

SUPREME COURT
DURING THE PERIOD OF THESE REPORTS

MICHAEL G. HEAVICAN, Chief Justice
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

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 Daniel E. Bryan, Jr. Vicky L. Johnson	Beatrice Auburn Wilber
Second	Cass, Otoe, and Sarpy	Randall L. Rehmeier William B. Zastera David K. Arterburn Max Kelch	Nebraska City Papillion Papillion Papillion
Third	Lancaster	Jeffre Chevront Earl J. Withoff Paul D. Merritt, Jr. Karen B. Flowers Steven D. Burns John A. Colborn Jodi Nelson	Lincoln Lincoln Lincoln Lincoln Lincoln Lincoln Lincoln
Fourth	Douglas	J. Patrick Mullen John D. Hartigan, Jr. Joseph S. Troia Gerald E. Moran Gary B. Randall Patricia A. Lamberty J. Michael Coffey Sandra L. Dougherty W. Mark Ashford Peter C. Bataillon Gregory M. Schatz J Russell Derr James T. Gleason Thomas A. Otepka Marlon A. Polk W. Russell Bowie III	Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha

JUDICIAL DISTRICTS AND DISTRICT JUDGES

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

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 J. Patrick McArdle Steven B. Timm	Falls City Wilber Beatrice
Second	Cass, Otoe, and Sarpy	Robert C. Wester John F. Steinheidter Todd J. Hutton Max Kelch Jeffrey J. Funke	Papillion Nebraska City Papillion Papillion Papillion
Third	Lancaster	James L. Foster Gale Pokorny Mary L. Doyle Laurie Yardley Jean A. Lovell Susan I. Strong	Lincoln Lincoln Lincoln Lincoln Lincoln Lincoln
Fourth	Douglas	Stephen M. Swartz Lyn V. White Thomas G. McQuade Edna Atkins Lawrence E. Barrett Joseph P. Camiglia Marcena M. Hendrix Darryl R. Lowe John E. Huber Jeffrey Marcuzzo Craig Q. McDermott Susan Bazis	Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha Omaha
Fifth	Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Curtis H. Evans Gerald E. Rouse Frank J. Skorupa Patrick R. McDermott Marvin V. Miller Linda S. Caster Seniff	York Columbus Columbus David City Wahoo 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 Kurt Rager Douglas L. Luebe Kenneth Vampola	Blair Dakota City Hartington Fremont
Seventh	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Richard W. Krepela Donna F. Taylor Ross A. Stoffler	Madison Madison Pierce
Eighth	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	August F. Schuman Alan L. Brodbeck Gary G. Washburn	Ainsworth O'Neill Burwell
Ninth	Buffalo and Hall	David A. Bush Philip M. Martin, Jr. Gerald R. Jorgensen, Jr. Graten D. Beavers	Grand Island Grand Island Kearney Kearney
Tenth	Adams, Clay, Fillmore, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster	Jack R. Ott Robert A. Ide Michael Olfner	Hastings Holdrege Hastings
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	Kent E. Florom Cloyd Clark Kent D. Turnbull Carlton E. Clark Edward D. Steenburg Anne Paine	North Platte McCook North Platte Lexington Ogallala McCook
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Charles Plantz James T. Hansen G. Glenn Camerer James M. Worden Randin Roland	Rushville Chadron Gering Gering Sidney

**SEPARATE JUVENILE COURTS
AND JUVENILE COURT JUDGES**

County	Judges	City
Douglas	Douglas F. Johnson Elizabeth Crnkovich Wadie Thomas Christopher Kelly Vernon Daniels	Omaha Omaha Omaha Omaha Omaha
Lancaster	Toni G. Thorson Linda S. Porter Roger J. Heideman	Lincoln Lincoln Lincoln
Sarpy	Lawrence D. Gendler Robert B. O'Neal	Papillion 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 272

DEREK ALAN ALDRIDGE	RYAN ROBERT KNUTSON
STEPHEN ROBERT BAXLEY	ROBERT IAN LAPIDOW
ASHLEY DE BOETTCHER	ERIC JAMES LARSON
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AMY CHRISTINE BROOKS	TIMOTHY BROCK MCCLELLAN
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JENNIFER HELEN CERUTTI	ALLYSON A. MENDOZA
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LUKE THOMAS DEAVER	KATHLEEN LYNN NESSER
CHRISTINE FRANCES DELGADO	JESSICA RENEE NOLL
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BRANDT BENJAMIN FENNER	ROSE TENDE OWHONDA
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BRUCE JOSEPH WONER
DAVID LEE ZWISLER

TABLE OF CASES REPORTED

A.E., State on behalf of v. Buckhalter	443
Aaron Ferer & Sons Co.; Ferer v.	701
Adoption of Kailynn D., In re	849
Alston v. Hormel Foods Corp.	422
Archie; State v.	612
Baer, In re Estate of	969
Bag 'N Save; Trospen v.	855
Baird; Williams v.	977
Bakewell; State v.	372
Beaver City, Village of; Knapp v.	156
Bennett; Stewart v.	17
Bennett v. Saint Elizabeth Health Sys.	300
Betterman v. Department of Motor Vehicles	178
Brandon M., In re Interest of	47
Brotherhood's Relief & Comp. Fund; Jackson v.	1013
Brummels v. Tomasek	573
Brunk v. Nebraska State Racing Comm.	737
Buckhalter; State on behalf of A.E. v.	443
Burns v. Nielsen	724
Central Resources; Coral Prod. Corp. v.	379
Cerny v. Todco Barricade Co.	800
Chase 3000, Inc. v. Nebraska Pub. Serv. Comm.	133
City of Gordon v. Montana Feeders, Corp.	402
City of Grand Island; Maxon v.	647
City of Gretna; County of Sarpy v.	92
City of Ogallala; Rohde v.	689
City of Omaha; McNally v.	558
City of Omaha; Richter v.	281
City of Omaha; Tadros v.	935
Clapper; State v.	750
Conley; Washington v.	908
Coral Prod. Corp. v. Central Resources	379
Counsel for Dis., State ex rel. v. Dortch	667
Counsel for Dis., State ex rel. v. Taylor	57
Counsel for Dis., State ex rel. v. Williams	53
County of Sarpy v. City of Gretna	92
Cumming v. Red Willow Sch. Dist. No. 179	483
Dalton S., In re Interest of	504
DeMarco Bros. Co.; Olivotto v.	672

Department of Motor Vehicles; Betterman v.	178
District Judges; State ex rel. Upper Republican NRD v.	148
Dockery; State v.	330
Doe v. Omaha Pub. Sch. Dist.	79
Domjan v. Faith Regional Health Servs.	877
Dortch; State ex rel. Counsel for Dis. v.	667
Estate of Baer, In re	969
Estate of Nemetz, In re	918
Estate of Potthoff, In re	828
Estate of Rose, In re	490
Evans; Reid v.	714
Faith Regional Health Servs.; Domjan v.	877
Farmland Foods v. State	262
Ferer v. Aaron Ferer & Sons Co.	701
Fickle v. State	990
Finney v. Finney	436
Flowers; State ex rel. Stivrins v.	336
Gale; State ex rel. Johnson v.	889
Geddes v. York County	271
Glad Tidings v. Nebraska Dist. Council	960
Gordon, City of v. Montana Feeders, Corp.	402
Gozzola; State v.	309
Grand Island, City of; Maxon v.	647
Gretna, City of; County of Sarpy v.	92
Hauptman, O'Brien v. Turco	924
Heineman; Nebraska Coalition for Ed. Equity v.	531
Hernandez; State v.	456
Hormel Foods Corp.; Alston v.	422
Houston; Tyler v.	100
Hudson; State v.	42
Ichtertz v. Orthopaedic Specialists of Neb.	466
In re Adoption of Kailynn D.	849
In re Estate of Baer	969
In re Estate of Nemetz	918
In re Estate of Potthoff	828
In re Estate of Rose	490
In re Interest of Brandon M.	47
In re Interest of Dalton S.	504
In re Interest of Jeffrey K.	239
In re Interest of Michael U.	198
In re Trust of Rosenberg	59
International Nutrition; Travelers Indemnity Co. v.	943
Jackson v. Brotherhood's Relief & Comp. Fund	1013
Jacobson; State v.	289
Japp v. Papio-Missouri River NRD	779

TABLE OF CASES REPORTED

xv

Jeffrey K., In re Interest of	239
Johnson, State ex rel. v. Gale	889
Johnson v. Knox Cty. Partnership	123
Kailynn D., In re Adoption of	849
Kayla T., State on behalf of v. Risinger	694
Knapp v. Village of Beaver City	156
Knox Cty. Partnership; Johnson v.	123
Kolbeck; Worth v.	163
Kuehn; State v.	219
Larkin; Ottaco Acceptance, Inc. v.	765
Lasen; Platte Valley Nat. Bank v.	602
Livengood v. Nebraska State Patrol Ret. Sys.	247
Maldonado; Zitterkopf v.	145
Malolepszy v. State	313
Mata; State v.	474
Maxon v. City of Grand Island	647
McKinney; State v.	346
McNally v. City of Omaha	558
Merrill; State v.	583
Metropolitan Prop. & Cas. Ins. Co.; Sayah v.	744
Michael U., In re Interest of	198
Miner; State v.	837
Mogensen v. Mogensen	208
Montana Feeders, Corp.; City of Gordon v.	402
Moore; State v.	495
Morrow; State v.	592
Muse; State v.	99
Nebraska Coalition for Ed. Equity v. Heineman	531
Nebraska Dist. Council; Glad Tidings v.	960
Nebraska Pub. Serv. Comm.; Chase 3000, Inc. v.	133
Nebraska State Patrol Ret. Sys.; Livengood v.	247
Nebraska State Patrol; Zach v.	1
Nebraska State Racing Comm.; Brunk v.	737
Nebraska State Racing Comm.; VanHorn v.	737
Nemetz, In re Estate of	918
Neth; Robbins v.	115
Neth; Wilczewski v.	324
Nielsen; Burns v.	724
Ogallala, City of; Rohde v.	689
Olivotto v. DeMarco Bros. Co.	672
Omaha, City of; McNally v.	558
Omaha, City of; Richter v.	281
Omaha, City of; Tadros v.	935
Omaha Pub. Sch. Dist.; Doe v.	79
Orthopaedic Specialists of Neb.; Ichtertz v.	466
Ottaco Acceptance, Inc. v. Larkin	765

Papio-Missouri River NRD; Japp v.	779
Pfeil v. State	12
Phelps; State v.	36
Platte Valley Nat. Bank v. Lasen	602
Polk Cty. Rec. Assn. v. Susquehanna Patriot Leasing	1026
Potthoff, In re Estate of	828
Pratt; State v.	817
Red Willow Sch. Dist. No. 179; Cumming v.	483
Reid v. Evans	714
Richter v. City of Omaha	281
Risinger; State on behalf of Kayla T. v.	694
Robbins v. Neth	115
Rohde v. City of Ogallala	689
Rose, In re Estate of	490
Rosenberg, In re Trust of	59
Saint Elizabeth Health Sys.; Bennett v.	300
Sarpy, County of v. City of Gretna	92
Sayah v. Metropolitan Prop. & Cas. Ins. Co.	744
Sommer; State v.	587
State ex rel. Counsel for Dis. v. Dortch	667
State ex rel. Counsel for Dis. v. Taylor	57
State ex rel. Counsel for Dis. v. Williams	53
State ex rel. Johnson v. Gale	889
State ex rel. Stivrins v. Flowers	336
State ex rel. Upper Republican NRD v. District Judges	148
State; Farmland Foods v.	262
State; Fickle v.	990
State; Malolepszy v.	313
State on behalf of A.E. v. Buckhalter	443
State on behalf of Kayla T. v. Risinger	694
State; Pfeil v.	12
State v. Archie	612
State v. Bakewell	372
State v. Clapper	750
State v. Dockery	330
State v. Gozzola	309
State v. Hernandez	456
State v. Hudson	42
State v. Jacobson	289
State v. Kuehn	219
State v. Mata	474
State v. McKinney	346
State v. Merrill	583
State v. Miner	837
State v. Moore	495
State v. Morrow	592
State v. Muse	99
State v. Phelps	36
State v. Pratt	817
State v. Sommer	587

TABLE OF CASES REPORTED

xvii

State v. Thurman	518
State v. York	660
State; Zwygart v.	406
Steven L.; Susan L. v.	24
Stevenson v. Wright	789
Stewart v. Bennett	17
Stivrins, State ex rel. v. Flowers	336
Susan L. v. Steven L.	24
Susquehanna Patriot Leasing; Polk Cty. Rec. Assn. v.	1026
Tadros v. City of Omaha	935
Taylor; State ex rel. Counsel for Dis. v.	57
Thurman; State v.	518
Todco Barricade Co.; Cerny v.	800
Tomasek; Brummels v.	573
Travelers Indemnity Co. v. International Nutrition	943
Trosper v. Bag 'N Save	855
Trust of Rosenberg, In re	59
Turco; Hauptman, O'Brien v.	924
Tyler v. Houston	100
Upper Republican NRD, State ex rel. v. District Judges	148
VanHorn v. Nebraska State Racing Comm.	737
Village of Beaver City; Knapp v.	156
Washington v. Conley	908
Wilczewski v. Neth	324
Williams; State ex rel. Counsel for Dis. v.	53
Williams v. Baird	977
Worth v. Kolbeck	163
Wright; Stevenson v.	789
York County; Geddes v.	271
York; State v.	660
Zach v. Nebraska State Patrol	1
Zahl v. Zahl	1043
Zitterkopf v. Maldonado	145
Zwygart v. State	406

LIST OF CASES DISPOSED OF
BY FILED MEMORANDUM OPINION

No. S-04-715: **Otte v. Neth.** Reversed and remanded with directions. Miller-Lerman, J.

No. S-05-582: **Vacek v. Carl.** Affirmed. McCormack, J.

No. S-05-1039: **McTygue v. Neth.** Affirmed. Connolly, J.

No. S-05-1064: **Farmers State Bank v. Elson.** Affirmed. Gerrard, J.

No. S-05-1489: **Cole v. Stennis.** Affirmed. Stephan, J. Heavican, C.J., not participating.

No. S-06-268: **State on behalf of Havens v. Havens.** Reversed and remanded with directions. McCormack, J.

Nos. S-06-724, S-06-725: **State v. Sims.** Affirmed as modified. Connolly, J.

No. S-06-732: **State v. Davis.** Reversed and remanded with directions. Wright, J. Heavican, C.J., not participating.

No. S-06-838: **In re Grand Jury of Douglas Cty.** Appeal dismissed. Miller-Lerman, J.

LIST OF CASES DISPOSED OF
WITHOUT OPINION

No. S-05-964: **Jacobson v. Department of Motor Vehicles.** Oral motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-05-1486: **In re Estate of Knapp.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. S-05-1529: **Stejskal v. Department of Admin. Servs.** Stipulation allowed; appeal dismissed with prejudice.

No. S-06-120: **Hicks v. Burlington Northern Santa Fe Ry. Co.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. S-06-603: **State ex rel. Tyler v. Houston.** Appeal dismissed as moot.

No. S-06-698: **State v. Tyler.** Motion sustained; appeal dismissed as moot.

No. S-06-813: **State v. Carter.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-06-1181: **State v. Johnson.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-06-1288: **Sondag v. Neth.** Stipulation allowed; matter remanded to district court with directions to dismiss appeal. May 18, 2006, order of director of Department of Motor Vehicles to remain in effect and to commence on February 27, 2007.

No. S-06-1367: **Kenley v. Neth.** By order of the court, appeal dismissed. See rule 10A.

No. S-07-053: **State v. Baker.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-07-096: **Ameritas Invest. Corp. v. McKinney.** Motion of appellee for summary dismissal sustained. See, rule 7B(1); Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 2006).

Nos. S-07-221, S-07-228: **Pelster v. Cheyenne Cty. Sch. Dist. No. 17-0001**. Motions of appellant to dismiss appeal sustained; appeal dismissed.

No. S-07-533: **State ex rel. Counsel for Dis. v. Finney**. Judgment of suspension.

No. S-07-596: **State v. Long**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-07-640: **State ex rel. Counsel for Dis. v. Davis**. Judgment of suspension.

No. S-07-661: **State v. Rehbein**. Appeal dismissed. See rule 7A(2).

No. S-34-060005: **Brinegar v. Nebraska State Bar Commission**. Appeal dismissed as moot.

LIST OF CASES ON PETITION
FOR FURTHER REVIEW

No. A-04-1098: **R & S Investments v. Auto Auctions**, 15 Neb. App. 267 (2006). Petition of appellant for further review overruled on February 22, 2007.

No. A-04-1189: **Davis v. Fraternal Order of Police**, 15 Neb. App. 470 (2007). Petition of appellant for further review overruled on May 25, 2007, as untimely filed.

No. A-04-1373: **Cook v. Cook**. Petition of appellant for further review overruled on April 11, 2007.

No. A-04-1473: **Keup v. Department of Corr. Servs.** Petition of appellant for further review overruled on June 6, 2007.

No. A-05-200: **Weigert-Stathes v. American Fam. Mut. Ins. Co.** Petition of appellee for further review overruled on June 20, 2007.

No. A-05-206: **Reed v. City of Omaha**, 15 Neb. App. 234 (2006). Petition of appellant for further review overruled on February 22, 2007.

No. A-05-467: **City of Ashland v. Strode**. Petition of appellant for further review overruled on July 11, 2007.

No. A-05-492: **Jura v. Player's, Inc.** Petition of appellant for further review overruled on March 26, 2007, for lack of jurisdiction.

No. A-05-508: **In re Estate of Petereit**. Petition of appellant for further review overruled on May 17, 2007.

No. A-05-518: **Henningsen v. Pacesetter Homes**. Petition of appellant for further review overruled on March 21, 2007.

No. A-05-541: **Bosiljevac v. Board of Trustees of City of Omaha**. Petition of appellee for further review overruled on July 11, 2007.

No. A-05-622: **Wiedel v. Wiedel**. Petition of appellant for further review overruled on April 11, 2007.

No. A-05-652: **Barger v. Abboud**. Petition of appellee for further review overruled on July 11, 2007.

No. A-05-695: **Yenney v. Nebraska Dept. of Motor Vehicles**, 15 Neb. App. 446 (2007). Petition of appellee for further review overruled on May 17, 2007.

No. A-05-713: **Omaha Cold Storage Terminals v. Patterson**, 15 Neb. App. 548 (2007). Petition of appellee for further review overruled on July 11, 2007.

No. A-05-786: **State v. Hoover**. Petition of appellant for further review overruled on March 28, 2007.

No. A-05-817: **Schrier v. Schrier**. Petition of appellee for further review overruled on March 14, 2007.

No. A-05-861: **State v. Akins**. Petition of appellant for further review overruled on June 13, 2007.

Nos. A-05-920 through A-05-922: **State v. Ajamu**. Petitions of appellant for further review overruled on April 25, 2007.

No. A-05-956: **Wright v. County of Douglas**. Petition of appellant for further review overruled on July 11, 2007.

No. A-05-963: **State v. Leonor**. Petition of appellant for further review overruled on May 9, 2007.

No. A-05-1051: **In re Estate of Corbin**. Petition of appellee for further review overruled on July 11, 2007.

No. A-05-1067: **Knittel v. State**. Petition of appellant for further review overruled on June 20, 2007.

No. A-05-1120: **Siebert v. AGO, Inc.** Petition of appellant for further review overruled on June 20, 2007.

No. A-05-1160: **Omaha Police Union Local 101 v. City of Omaha**. Petition of appellee for further review overruled on June 27, 2007.

No. A-05-1189: **Brandt v. Heil**. Petition of appellant for further review overruled on June 13, 2007.

No. S-05-1328: **Davis v. Crete Carrier Corp.**, 15 Neb. App. 241 (2006). Petition of appellee for further review sustained on April 11, 2007.

No. A-05-1361: **State v. Lopez-Mariscal**. Petition of appellant for further review overruled on June 27, 2007.

No. A-05-1465: **Canterbury v. Istas**. Petition of appellee for further review overruled on February 28, 2007.

No. A-05-1490: **Tyler v. Woodard**. Petition of appellant for further review overruled on March 28, 2007.

No. A-05-1522: **State v. Sledge**. Petition of appellant for further review overruled on April 18, 2007.

No. A-06-010: **State ex rel. Tyler v. Houston**, 15 Neb. App. 374 (2007). Petition of appellant for further review overruled on April 11, 2007, as moot.

No. A-06-027: **Pusch v. Pelshaw**. Petition of appellant for further review overruled on February 14, 2007.

No. A-06-070: **State v. Claussen**. Petition of appellant for further review overruled on March 14, 2007.

No. A-06-079: **State v. Hale**. Petition of appellant for further review overruled on May 17, 2007.

No. A-06-100: **State v. Lopez**. Petition of appellant for further review overruled on June 6, 2007.

No. A-06-114: **State v. Myers**, 15 Neb. App. 308 (2006). Petition of appellant for further review overruled on May 17, 2007.

No. A-06-126: **Schuman v. Roether**. Petition of appellant for further review overruled on July 11, 2007.

No. A-06-144: **Sommerfeld v. City of Gibbon**. Petition of appellant for further review overruled on July 11, 2007.

No. A-06-153: **State v. Owen**. Petition of appellant for further review overruled on April 18, 2007.

No. A-06-235: **In re Interest of Fedalina G.** Petition of appellant for further review overruled on March 28, 2007.

No. S-06-275: **State v. McCulloch**, 15 Neb. App. 616 (2007). Petition of appellee for further review sustained on July 11, 2007.

No. A-06-281: **State v. Lovette**. Petition of appellant for further review overruled on March 28, 2007.

No. A-06-282: **State v. Hernandez**. Petition of appellant for further review overruled on January 31, 2007.

No. A-06-282: **State v. Hernandez**. Petition of appellant pro se for further review overruled on January 31, 2007.

No. A-06-337: **Johnson v. Johnson**, 15 Neb. App. 292 (2006). Petition of appellant for further review overruled on January 31, 2007.

No. A-06-365: **Villarreal v. Villarreal**. Petition of appellant for further review overruled on February 14, 2007.

No. A-06-390: **State v. Fisher**. Petition of appellant for further review overruled on June 13, 2007.

No. A-06-400: **State v. Benish**. Petition of appellant for further review overruled on May 14, 2007, as filed out of time.

No. A-06-400: **State v. Benish**. Petition of appellant pro se for further review overruled on May 14, 2007, as filed out of time.

Nos. A-06-404, A-06-405: **State v. McCray**. Petitions of appellant for further review overruled on May 9, 2007.

No. A-06-421: **State v. Price**. Petition of appellant for further review overruled on April 11, 2007.

No. A-06-446: **State v. Peeks**. Petition of appellant for further review overruled on February 12, 2007, as filed out of time. See rule 2F(1).

No. S-06-449: **State v. Nelson**. Petition of appellant for further review sustained on March 28, 2007.

No. A-06-462: **State v. Lawver**. Petition of appellant for further review overruled on February 22, 2007.

No. A-06-509: **State v. Payne**. Petition of appellant for further review overruled on January 31, 2007.

No. A-06-544: **In re Interest of Aleisha L.** Petition of appellant for further review overruled on March 14, 2007.

No. A-06-545: **In re Interest of Ashlei L.** Petition of appellant for further review overruled on March 14, 2007.

No. A-06-550: **State v. Brown**. Petition of appellant for further review overruled on March 14, 2007.

No. A-06-555: **State v. Davlin**. Petition of appellant for further review overruled on February 14, 2007.

No. A-06-581: **State v. Harr**. Petition of appellant for further review overruled on March 28, 2007.

No. A-06-619: **Gonzales v. Dun-Par**. Petition of appellant for further review overruled on March 28, 2007.

Nos. A-06-635 through A-06-639: **State v. Curry**. Petitions of appellant for further review overruled on June 13, 2007.

No. A-06-647: **State v. Campbell**. Petition of appellant for further review overruled on May 17, 2007.

No. A-06-674: **In re Interest of Austin M.** Petition of appellant for further review overruled on February 22, 2007.

No. A-06-692: **In re Interest of Hailey M.**, 15 Neb. App. 323 (2007). Petition of appellee for further review overruled on March 14, 2007.

No. A-06-703: **State v. Atchison**, 15 Neb. App. 422 (2007). Petition of appellant for further review overruled on April 11, 2007.

No. A-06-717: **In re Interest of Savannah S. et al.** Petition of appellant for further review overruled on April 11, 2007.

No. A-06-756: **In re Interest of Tabbitha H. & Joshua K.** Petition of appellant for further review overruled on February 28, 2007.

No. A-06-784: **State v. Parnell**. Petition of appellant for further review overruled on May 17, 2007.

No. A-06-790: **State v. Lemuz**. Petition of appellant for further review overruled on May 18, 2007. See rule 2F(1).

No. A-06-794: **State v. White**, 15 Neb. App. 486 (2007). Petition of appellant for further review overruled on June 6, 2007.

No. A-06-804: **State v. Sears**. Petition of appellant for further review overruled on July 11, 2007.

No. A-06-812: **In re Interest of Amber M. et al.** Petition of appellant for further review overruled on April 18, 2007.

No. S-06-831: **State v. Scheffert**. Petition of appellant for further review sustained on May 23, 2007.

No. S-06-841: **In re Interest of Xavier H.** Petition of appellant for further review sustained on April 25, 2007.

No. A-06-843: **In re Guardianship & Conservatorship of Rosemary D.** Petition of appellant for further review overruled on March 28, 2007.

No. A-06-878: **State v. Cervantes**, 15 Neb. App. 457 (2007). Petition of appellant for further review overruled on April 11, 2007.

No. A-06-879: **Licklitter v. Farmers Coop. Elev. Co.** Petition of appellant for further review overruled on April 25, 2007.

No. A-06-882: **In re Interest of Amber K. et al.** Petition of appellant for further review overruled on May 9, 2007.

No. A-06-882: **In re Interest of Amber K. et al.** Petition of appellee Richard K. for further review overruled on May 9, 2007.

No. A-06-932: **State v. Applegate**. Petition of appellant for further review overruled on April 25, 2007.

No. A-06-933: **Lonsdale v. Big Sky Energy Equip.** Petition of appellant for further review overruled on June 6, 2007.

No. A-06-935: **State v. Hymond**. Petition of appellant for further review overruled on February 28, 2007.

No. A-06-939: **State v. Valverde**. Petition of appellee for further review overruled on June 29, 2007, as untimely filed.

No. A-06-955: **Stricker v. Neth**. Petition of appellant for further review overruled on June 8, 2007, as untimely filed.

No. S-06-957: **State v. York**. Petition of appellant for further review sustained on February 22, 2007.

No. A-06-958: **State v. Prien**. Petition of appellant for further review overruled on April 25, 2007.

No. A-06-970: **State v. Lopez**. Petition of appellant for further review overruled on April 11, 2007.

No. A-06-971: **State v. Schumacher**. Petition of appellant for further review overruled on March 21, 2007.

No. A-06-973: **State v. Terry**. Petition of appellant for further review overruled on June 6, 2007.

No. A-06-991: **State v. Hatch**. Petition of appellant for further review overruled on May 9, 2007.

No. A-06-997: **State ex rel. Bonner v. McSwine**. Petition of appellant for further review overruled on June 13, 2007.

No. A-06-999: **State v. Wells**. Petition of appellant for further review overruled on March 14, 2007.

No. A-06-1013: **State v. Scheil**. Petition of appellant for further review overruled on March 28, 2007.

No. A-06-1023: **State v. Krutilek**. Petition of appellant for further review overruled on May 17, 2007.

No. A-06-1040: **Lawler v. Lawler**. Petition of appellant for further review overruled on June 13, 2007.

Nos. A-06-1050, A-06-1051: **In re Interest of Markus K. & Justin K.** Petitions of appellant for further review overruled on June 13, 2007.

No. A-06-1059: **George v. Department of Corr. Servs.** Petition of appellant for further review dismissed on February 22, 2007, for lack of jurisdiction. See rule 7A(2).

No. A-06-1069: **Villarreal v. Anderson**. Petition of appellant for further review overruled on April 25, 2007.

No. A-06-1077: **State v. Lindteigen**. Petition of appellant for further review overruled on April 11, 2007.

No. A-06-1078: **State v. Shelby**. Petition of appellant for further review overruled on February 26, 2007, as untimely filed.

No. A-06-1135: **State v. Kite**. Petition of appellant for further review overruled on June 20, 2007.

No. A-06-1145: **In re Conservatorship of Heuertz**. Petition of appellant for further review overruled on June 6, 2007.

No. A-06-1174: **State v. Gallagher**. Petition of appellant for further review overruled on July 11, 2007.

No. A-06-1210: **State v. Washington**. Petition of appellant for further review overruled on April 11, 2007.

No. A-06-1225: **State v. Lopez**. Petition of appellant for further review overruled on April 11, 2007.

No. A-06-1226: **State v. Lorenzana-Lopez**. Petition of appellant for further review overruled on April 11, 2007.

No. A-06-1227: **State v. Lopez**. Petition of appellant for further review overruled on April 11, 2007.

No. A-06-1228: **State v. Dan**. Petition of appellant for further review overruled on June 20, 2007.

No. A-06-1290: **In re Interest of Lauren B.** Petition of appellant for further review overruled on March 14, 2007.

No. A-06-1294: **State v. Lange**. Petition of appellant for further review overruled on April 25, 2007.

No. A-06-1296: **Widtfeldt v. Tax Equal. & Rev. Comm.**, 15 Neb. App. 410 (2007). Petition of appellant for further review overruled on June 6, 2007.

No. A-06-1296: **Widtfeldt v. Tax Equal. & Rev. Comm.**, 15 Neb. App. 410 (2007). Petition of appellant for further review overruled on July 13, 2007.

No. A-06-1322: **State v. Anderson**. Petition of appellant for further review overruled on April 11, 2007.

No. A-06-1340: **Wieck v. Galvan**. Petition of appellant for further review overruled on June 6, 2007.

No. A-06-1381: **State v. Enamorado**. Petition of appellant for further review overruled on June 20, 2007.

No. A-06-1425: **State v. Starr**. Petition of appellant for further review overruled on June 20, 2007.

No. A-06-1432: **State v. Trussel**. Petition of appellant for further review overruled on July 11, 2007.

No. A-06-1438: **Powers v. Mangiameli**. Petition of appellant for further review overruled on March 14, 2007.

No. A-06-1447: **McElroy v. Paden**. Petition of appellant for further review overruled on July 11, 2007.

No. A-07-011: **State v. Oknewski**. Petition of appellant for further review overruled on July 11, 2007.

No. A-07-026: **Widtfeldt v. Tax Equal. & Rev. Comm.** Petition of petitioner-appellant for further review overruled on April 18, 2007.

No. A-07-107: **Finnell v. Jacobsen**. Petition of appellant for further review overruled on March 28, 2007.

No. A-07-199: **Watkins v. Regan**. Petition of appellant for further review overruled on May 9, 2007.

CASES DETERMINED
IN THE
SUPREME COURT OF NEBRASKA

LOREE ZACH ET AL., APPELLEES, V.
NEBRASKA STATE PATROL, APPELLANT.
727 N.W.2d 206

Filed February 2, 2007. No. S-05-449.

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. **Statutes: Judgments: Appeal and Error.** The meaning of a statute is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
4. **Workers' Compensation: Jurisdiction: Statutes.** As a statutorily created court, the Workers' Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute.
5. **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.
6. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.
7. **Workers' Compensation: Proof.** A compensable injury caused by an occupational disease must involve some physical stimulus constituting violence to the physical structure of the body.

Petition for further review from the Nebraska Court of Appeals, INBODY, Chief Judge, and CARLSON and CASSEL, Judges, on appeal thereto from the Nebraska Workers' Compensation Court. Judgment of Court of Appeals reversed, and cause remanded with directions.

Jon Bruning, Attorney General, and Lisa D. Martin-Price for appellant.

Terry M. Anderson and Steven M. Lathrop, of Hauptman, O'Brien, Wolf & Lathrop, P.C., for appellees.

Jeffrey D. Patterson, of Bartle & Geier Law Firm, for amicus curiae Nebraska Association of Trial Attorneys.

Dallas D. Jones and Jenny L. Panko, of Baylor, Evnen, Curtiss, Gruit & Witt, L.L.P., for amici curiae Crete Carrier Corporation et al.

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

STEPHAN, J.

The issue presented in this appeal is whether a work-related injury caused by a mental stimulus is compensable under the Nebraska Workers' Compensation Act, Neb. Rev. Stat. §§ 48-101 to 48-1,117 (Reissue 1998 & Cum. Supp. 2002). Based upon long-established precedent, we conclude that it is not.

BACKGROUND

Trooper Mark Zach of the Nebraska State Patrol died on September 27, 2002, as the result of a self-inflicted gunshot wound. His surviving spouse and children, whom we shall refer to as "claimants," brought this action for death benefits under the Nebraska Workers' Compensation Act. Claimants alleged that while on patrol in Madison County, Nebraska, approximately 2 weeks prior to his death, Zach stopped several persons and discovered that one of them was armed with a pistol. Zach communicated the serial number of the weapon to a dispatcher, but due to a miscommunication or error, the weapon was not at that time identified as stolen. Claimants alleged that the weapon and two of the individuals stopped by Zach were subsequently involved in a bank robbery in Norfolk, Nebraska, which resulted in multiple fatalities. Claimants alleged that on the day following the robbery, Zach was advised by State Patrol officials that two of the persons he had stopped were involved in the bank robbery; that weapons taken during a previous burglary were used in the robbery; and that due to a miscommunication at the time of the stop, there had been a failure to identify the pistol used in the robbery as one of

the weapons involved in the previous burglary. Claimants alleged that upon learning this, Zach felt responsible and became very distraught. In support of their claim for workers' compensation benefits, claimants alleged:

6. [Claimants'] decedent suffered an "accident" resulting in a "personal injury" inasmuch as the sudden stimulus (i.e., being advised of the consequences of an error) caused Zach's brain to undergo physical changes which, in turn, led Zach to a state of mind which overrode [sic] his will to the extent that even knowledge of the consequences of the act of suicide did not prevent Zach from taking his own life.

7. That [claimants'] decedent suffered an "occupational disease" inasmuch as the exposure to the stress of his employment resulted in an identifiable mental disease which disease, in turn, led Zach to a state of mind which overrode his will to the extent that even knowledge of the consequences of the act of suicide did not prevent Zach from taking his own life; that the stress put upon Zach which led to his mental disease is due to causes and conditions which are characteristic of and peculiar to law enforcement inasmuch as law enforcement officers are repeatedly charged with the community's safety, repeatedly exposed to stressful situations and suffer a peculiar and extreme degree of stress when faced with the fatal consequences of their law enforcement activities.

The trial judge of the workers' compensation court granted the Nebraska State Patrol's motion to dismiss, concluding that claimants had failed to state a claim upon which relief could be granted. The judge interpreted our decisions as requiring some physical stimulus before work-related mental stress can be a compensable injury, as the result of either an accident or an occupational disease. The judge concluded as a matter of law that "the mere talking or being informed of a problem does not rise to the level of violence to the physical structure of the body" as required by § 48-151(4) and our decision in *Bekelski v. Neal Co.*, 141 Neb. 657, 4 N.W.2d 741 (1942). A review panel of the workers' compensation court reversed, and remanded the case for trial, interpreting our opinion in *Tarvin v. Mutual of Omaha Ins. Co.*, 238 Neb. 851, 472 N.W.2d 727 (1991), to require trial of any workers' compensation claim

alleging physical changes to the brain. The Nebraska State Patrol appealed.

In a two-to-one opinion, the Nebraska Court of Appeals affirmed. *Zach v. Nebraska State Patrol*, 14 Neb. App. 579, 710 N.W.2d 877 (2006). The majority agreed with the review panel's interpretation of *Tarvin*. The dissent did not read *Tarvin* to hold that a biochemical alteration of the brain constitutes violence to the physical structure of the body within the meaning of the Nebraska Workers' Compensation Act. The dissent reasoned that the Legislature's use of the phrase "'violence to the physical structure of the body'" in § 48-151(4) required "more than mere physical change to establish a compensable injury." *Zach*, 14 Neb. App. at 590, 710 N.W.2d at 885.

We granted the petition for further review filed by the Nebraska State Patrol.

ASSIGNMENTS OF ERROR

The Nebraska State Patrol assigns, restated, that the Court of Appeals (1) erred as a matter of law by expanding the coverage of the Nebraska Workers' Compensation Act beyond that intended by the Legislature when it presumed that being advised of the consequences of an error at work constituted an "accident" and (2) erred in interpreting *Tarvin, supra*, or if the interpretation was correct, that *Tarvin* is inconsistent with previous holdings of this court.

STANDARD OF REVIEW

[1,2] 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.*

[3] The meaning of a statute is a question of law. *Bohaboj v. Rausch*, 272 Neb. 394, 721 N.W.2d 655 (2006); *Turco v. Schuning*, 271 Neb. 770, 716 N.W.2d 415 (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

STATUTORY PRINCIPLES AND DEFINITIONS

[4] As a statutorily created court, the Workers' Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute. *Foster v. Bryan LGH Med. Ctr. East*, 272 Neb. 918, 725 N.W.2d 839 (2007); *Hagelstein v. Swift-Eckrich*, 257 Neb. 312, 597 N.W.2d 394 (1999). In reviewing a judgment of that court, we are likewise constrained by the definitions and concepts of liability which the Legislature has articulated in the Nebraska Workers' Compensation Act. We therefore begin with the statutory principles and definitions applicable to this case.

The basic principle of workers' compensation is stated in § 48-101:

When personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation therefor from his or her employer if the employee was not willfully negligent at the time of receiving such injury.

Key terms used in this principle are specifically defined by the Nebraska Workers' Compensation Act. "Accident means an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." § 48-151(2). "Occupational disease means only a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade . . . and excludes all ordinary diseases of life to which the general public is exposed." § 48-151(3).

Injury and personal injuries mean only violence to the physical structure of the body and such disease or infection as naturally results therefrom. The terms include disablement resulting from occupational disease arising out of and in the course of the employment in which the employee was engaged and which was contracted in such employment.

§ 48-151(4).

The fact that suicide is alleged as the immediate cause of Zach's death does not bar the claim because it is also alleged that Zach experienced physical changes in his brain which overrode

his will to the extent that even knowledge of the consequences of the act of suicide did not prevent it. See *Friedeman v. State*, 215 Neb. 413, 339 N.W.2d 67 (1983). The critical query is whether such changes and the resulting fatal consequence can constitute a compensable injury under either an “accident” or an “occupational disease” theory, in view of the allegation that they were caused by a mental stimulus, i.e., being advised of the consequences of a work-related error.

DOES OPERATIVE PETITION ALLEGE COMPENSABLE INJURY
RESULTING FROM ACCIDENT?

Both the review panel and the Court of Appeals concluded that the operative petition stated a workers’ compensation claim based upon accidental injury. This court first addressed the issue of compensability of an accidental injury resulting from a mental stimulus in *Bekelski v. Neal Co.*, 141 Neb. 657, 4 N.W.2d 741 (1942). In that case, an elevator operator witnessed the accidental death of a passenger who was caught between the elevator floor and a floor of the building. Although the operator suffered no physical injury, she experienced extreme emotional shock immediately after the accident and was hospitalized for several days due to elevated heart rate and blood pressure. For some time after the incident, she suffered head and back pain. In addressing the operator’s accidental injury claim, this court determined that the elevator malfunction was an unexpected and unforeseen event which happened suddenly and violently, producing objective symptoms of injury including elevated heart rate and blood pressure. We then addressed the “more perplexing problem” of whether there was violence to the physical structure of the operator’s body, as required by the Nebraska Workers’ Compensation Act. *Bekelski*, 141 Neb. at 659, 4 N.W.2d at 743. The court framed the issue as whether “disabling shock and nervousness, when unaccompanied by an impairment of the physical structure of the body, is compensable under our compensation law.” *Id.* Resolving this question in the negative, the court reasoned:

It seems to us that the legislature required, not only that there should be an accident attended by objective symptoms arising out of and in the course of the employment, but that the accident must be accompanied by violence to

the physical structure of the body. The language indicates a clear distinction between physical and bodily injury on the one hand and mental, nervous and psychiatric injury unaccompanied by violence to the physical structure of the body on the other. The plain import of the words used eliminates from the operation of the law disabilities resulting from mental disturbances, nervousness and psychiatric ailments when violence to the physical structure of the body cannot be established.

Bekelski, 141 Neb. at 660, 4 N.W.2d at 743. Based on this rationale, the court concluded that because the elevator operator suffered no physical injury in the elevator incident, she was not entitled to workers' compensation benefits.

The issue of whether a compensable injury may result from a mental stimulus was next addressed in *Sorensen v. City of Omaha*, 230 Neb. 286, 430 N.W.2d 696 (1988). There, a firefighter claimed that he sustained stress-related physical and psychological injuries as a result of a demotion and harassment by his employer. A physician diagnosed the firefighter's symptoms, including stomach pain, nausea, vomiting, psychomotor retardation, and rectal bleeding, and opined that these physical symptoms were related to job stress. Finding no dispute regarding the fact that mental rather than physical stimulus caused the injuries, we applied the reasoning of *Bekelski* in concluding that the essential element of violence to the physical structure of the body was not established. We specifically declined to adopt an approach utilized by other jurisdictions which holds that a distinct physical injury caused by a mental stimulus is compensable, noting that this approach was inconsistent with the Nebraska Workers' Compensation Act as interpreted and applied in *Bekelski*. See, also, *Dyer v. Hastings Indus.*, 252 Neb. 361, 562 N.W.2d 348 (1997) (finding depression caused by workplace harassment was result of mental rather than physical stimulus and not compensable as accidental injury).

The critical distinction between mental and physical stimulus as the basis for a compensable injury is illustrated by *Johnston v. State*, 219 Neb. 457, 364 N.W.2d 1 (1985). There, a state employee patronizing a state cafeteria poured and drank what she believed to be coffee from a coffee urn. In fact, it was urn cleaner. She was diagnosed with caustic irritation of the mouth and pharynx, as

well as superficial injuries to her esophagus. In addition, she experienced panic attacks, anxiety, and subtle symptoms of depression. Relying on *Bekelski v. Neal Co.*, 141 Neb. 657, 4 N.W.2d 741 (1942), the State argued that she could not recover workers' compensation benefits for mental injuries in the absence of a proven physical injury. While agreeing that this was the applicable legal rule, we concluded that a physical injury occurred when the employee ingested the cleaner, and therefore all of her resulting injuries were compensable.

Tarvin v. Mutual of Omaha Ins. Co., 238 Neb. 851, 472 N.W.2d 727 (1991), did not alter the principle first articulated in *Bekelski* and consistently applied by this court. In *Tarvin*, a worker claimed disabling depression and anxiety caused by job-related stress and pressure. Although there was no evidence of trauma, the worker claimed that he suffered violence to the physical structure of the body based upon the testimony of a physician that job-related stress caused the worker's neurochemical level to become imbalanced and prevented normal transmission of messages from his brain. Another physician testified that job-related stress did not cause a chemical alteration of the brain and that the employee's mental condition and resulting disability were attributable solely to conditions which preceded his employment. The compensation court determined that the worker failed to prove a compensable injury. Applying a "clearly erroneous" standard of review, we concluded that based upon the medical evidence, the compensation court "in resolving a factual question, could reasonably have concluded, and did conclude, that [the employee] failed to prove that his condition was caused by employment." *Id.* at 857, 472 N.W.2d at 732. We affirmed on that basis without reaching the issue of whether the injury would have been compensable if it had been related to the worker's employment. Thus, while the issue presented in this case was raised in *Tarvin*, it was not decided.

In this case, the allegation that Zach's brain underwent physical changes simply identifies objective symptoms of an injury. There is no allegation that such changes were caused by any physical stimulus. To the contrary, it is specifically alleged that the changes to Zach's brain were caused by "being advised of the consequences of an error," which is clearly a mental stimulus. Based upon principles articulated in *Bekelski* and subsequent cases, an

injury caused by a mental stimulus does not meet the requirement in § 48-151(4) that a compensable accidental injury involve “violence to the physical structure of the body.” Accordingly, the Court of Appeals and the review panel of the Workers’ Compensation Court erred in concluding that the operative petition stated a claim for accidental injury arising out of and in the course and scope of Zach’s employment with the Nebraska State Patrol.

DOES OPERATIVE PETITION ALLEGE COMPENSABLE INJURY
RESULTING FROM OCCUPATIONAL DISEASE?

The trial judge concluded that the underlying condition leading to Zach’s death was “mental stress” and that “whether it be deemed from an ‘accident’ or an ‘occupational disease’ [it] must be accompanied by a prior physical insult to the physical structure of the body” under *Bekelski v. Neal Co.*, 141 Neb. 657, 4 N.W.2d 741 (1942). Because of its remand, the review panel found it unnecessary to address the issue of whether “one must show violence to the physical structure of the body in order to recover for an occupational disease.” The Court of Appeals did not specifically address this issue. Because we have concluded that injury caused by a mental stimulus is not compensable as an injury caused by accident, we must address the alternative theory that Zach sustained a compensable injury as a result of an occupational disease. *Bekelski* did not address this issue because the case was decided in 1942, and the Legislature did not amend the compensation act to include occupational disease until 1943. See 1943 Neb. Laws, ch. 113, § 1, p. 397.

The issue turns on the meaning of the first two sentences of § 48-151(4). The first sentence provides: “Injury and personal injuries mean only violence to the physical structure of the body and such disease or infection as naturally results therefrom.” *Id.* The second sentence states: “The terms include disablement resulting from occupational disease arising out of and in the course of the employment in which the employee was engaged and which was contracted in such employment.” *Id.* The question is whether both sentences, or only the second, apply to injuries caused by occupational disease.

[5,6] 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. *Nebraska Liq. Distrib. v. Nebraska Liq. Cont. Comm.*, 272 Neb. 390, 722 N.W.2d 10 (2006); *Young v. Midwest Fam. Mut. Ins. Co.*, 272 Neb. 385, 722 N.W.2d 13 (2006). 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. *Gilbert & Martha Hitchcock Found. v. Kountze*, 272 Neb. 251, 720 N.W.2d 31 (2006); *Salts v. Lancaster Cty.*, 269 Neb. 948, 697 N.W.2d 289 (2005). The first sentence of § 48-151(4) defines the terms “injury” and “personal injuries” without distinction as to cause, i.e., accident or occupational disease. The use of the word “only” limits the definition to disease or infection naturally resulting from violence to the physical structure of the body. The second sentence refers to the “terms” defined in the first sentence, i.e., “injury” and “personal injuries,” and states that they “include disablement resulting from occupational disease.” The plain meaning of the two sentences, read together, is that disability due to occupational disease is compensable only if it results from violence to the physical structure of the body.

Although not presented with the precise issue before us in this case, we stated in *Ludwick v. TriWest Healthcare Alliance*, 267 Neb. 887, 894, 678 N.W.2d 517, 523 (2004), that “under the Nebraska Workers’ Compensation Act, an injury has occurred as the result of an occupational disease when violence has been done to the physical structure of the body and a disability has resulted.” We noted, for clarification, that the “concept of disability is the same in both accident and occupational disease cases.” *Ludwick*, 267 Neb. at 895, 678 N.W.2d at 524. The cases in which we have recognized a compensable injury caused by an occupational disease have involved some type of physical stimulus constituting violence to the physical structure of the body. See, e.g., *Ludwick, supra* (reaction to latex exposure); *Morris v. Nebraska Health System*, 266 Neb. 285, 664 N.W.2d 436 (2003) (same); *Jorn v. Pigs Unlimited, Inc.*, 255 Neb. 876, 587 N.W.2d 558 (1998) (respiratory dysfunction caused by exposure to hog dust); *Berggren v. Grand Island Accessories, Inc.*, 249 Neb. 789, 545 N.W.2d 727 (1996) (seizure disorder caused by exposure to industrial solvents).

[7] We conclude that under current Nebraska law, a compensable injury caused by an occupational disease must involve some

physical stimulus constituting violence to the physical structure of the body. Because the injury in this case is alleged to have resulted entirely from a mental stimulus, no claim is stated for injury caused by occupational disease.

POLICY CONSIDERATIONS

The Nebraska Workers' Compensation Act is intended to provide benefits for employees who are injured on the job, and the terms of the act are to be broadly construed to accomplish its beneficent purposes. See *Vonderschmidt v. Sur-Gro*, 262 Neb. 551, 635 N.W.2d 405 (2001). In light of this statutory intent and purpose, as well as advances in medical knowledge with respect to the causes of mental illness, a persuasive argument can be made that work-related injuries such as that alleged in this case should be compensable. However, that policy decision is not ours to make.

Nebraska is one of only five states having workers' compensation statutes which define compensable injury in terms of violence to the physical structure of the body. See, Del. Code Ann. tit. 19, § 2301(15) (2005) (Delaware); Idaho Code Ann. § 72-102(18)(c) (2006) (Idaho); La. Rev. Stat. Ann. § 23:1021(8)(a) (Cum. Supp. 2007) (Louisiana); Mo. Ann. Stat § 287.020.3(5) (West Cum. Supp. 2006) (Missouri). Of these states, both Idaho and Louisiana allow compensation for injuries caused by mental stimulus, but their compensation acts contain additional separate and express provisions governing this subject. See, Idaho Code Ann. § 72-451 (2006); La. Rev. Stat. Ann. § 23:1021(8)(b) through (d) (Cum. Supp. 2007) (setting forth specific requirements that must be met for mental injury to be compensable). Nebraska does not have similar provisions in its compensation act.

We are not persuaded by the holding of the Supreme Court of Delaware that a disabling work-related mental disorder is compensable under a statute requiring a showing of violence to the physical structure of the body, whether or not preceded by a physical injury. See *State v. Cephas*, 637 A.2d 20 (Del. 1994). As this court first noted in *Bekelski v. Neal Co.*, 141 Neb. 657, 660, 4 N.W.2d 741, 743 (1942), the language used in our statute "indicates a clear distinction between physical and bodily injury on the one hand and mental, nervous and psychiatric injury unaccompanied

by violence to the physical structure of the body on the other.” We conclude here, as we did more than 60 years ago in *Bekelski*, that while the Nebraska Workers’ Compensation Act should be construed liberally, “it should not be extended to cases which by plain language are excluded from its scope.” 141 Neb. at 661, 4 N.W.2d at 744. Whether to allow compensation for work-related injuries caused by a mental stimulus is a question that involves economic and social policy considerations that fall within the province of the Legislature.

CONCLUSION

For the reasons discussed, we conclude that the Court of Appeals erred in affirming the judgment of the Workers’ Compensation Court review panel which reversed the order of dismissal entered by the trial judge. We therefore reverse the judgment of the Court of Appeals and remand the cause to that court with directions to remand the matter to the review panel with directions to affirm the order of dismissal entered by the trial judge.

REVERSED AND REMANDED WITH DIRECTIONS.

CHRISTOPHER M. PFEIL, APPELLEE, V.
STATE OF NEBRASKA, APPELLANT.
727 N.W.2d 214

Filed February 2, 2007. No. S-05-896.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. ____: _____. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
4. **Final Orders: Appeal and Error.** An order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.
5. **Actions: Judgments: Final Orders.** For the purposes of Neb. Rev. Stat. § 25-1902 (Reissue 1995), a special proceeding includes every special statutory remedy which

is not in itself an action. A judgment rendered by the district court that is merely a step or proceeding within the overall action is not a special proceeding. A special proceeding which affects a substantial right is, by definition, not part of an action.

6. **Actions: Statutes.** A special proceeding, within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995), entails civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes.

Appeal from the District Court for Cedar County: ROBERT V. BURKHARD, Judge. Appeal dismissed.

Earl G. Greene III, of Pansing, Hogan, Ernst & Bachman, L.L.P., for appellant.

Terry M. Anderson and Steven M. Lathrop, of Hauptman, O'Brien, Wolf & Lathrop, P.C., for appellee.

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

HEAVICAN, C.J.

INTRODUCTION

Christopher M. Pfeil was injured in an accident with a snowplow operated by an employee of the State of Nebraska. Pfeil brought suit under the State Tort Claims Act (Act), Neb. Rev. Stat. §§ 81-8,209 to 81-8,235 (Reissue 2003). The State alleged as an affirmative defense that Pfeil failed to comply with the presentment requirements of the Act. The crux of the State's argument is that the filing of Pfeil's suit in district court acted as a withdrawal of his claim filed on the same day with the State Claims Board (Board), and as a result, the State was not given its statutorily permitted 6 months to consider Pfeil's claim. See § 81-8,213. The district court found Pfeil had complied with the Act. The State appeals. As an initial matter, we must consider whether this appeal was taken from a final, appealable order. We conclude that it was not.

FACTS

Pfeil's claim arises out of an injury he received as the result of an accident which occurred on December 16, 2000, during the course of his employment in Cedar County, Nebraska. Pfeil ultimately filed a claim for workers' compensation benefits as a result

of the injuries he incurred. At that time, Pfeil was represented by counsel, but retained new counsel on December 11, 2002.

On that date, Pfeil's new counsel contacted a company retained by the State to investigate and adjust tort claims filed against the State. The purpose of the communication was to determine whether a claim had been filed against the State by Pfeil's initial counsel on behalf of either Pfeil or his employer. Through a representative, the company declined to provide such information, though the parties stipulated that the existence of such a claim would have been known to the company.

As a result of the inability to determine whether a claim had been filed, a claim was filed with the Board on Pfeil's behalf on December 12, 2002. On that same date, Pfeil also filed a petition against the State in the district court. The parties stipulated that if Pfeil or his counsel were called, each would testify that the claim and petition were filed on the same day because the deadline for filing both expired on December 16, 2002, or 2 years after the accident, see § 81-8,227, and that counsel was unaware of whether the necessary claim had been filed. The parties also stipulated that if called, Pfeil or his counsel would testify that the petition filed in district court was not intended to withdraw the claim filed before the Board.

On June 23, 2003, Pfeil sent a letter to the Board withdrawing his claim due to the State's failure to act upon the claim within 6 months. See § 81-8,213. On June 24, Pfeil filed an amended petition in the district court. In its answer, the State alleged as its second affirmative defense that Pfeil failed to comply with the Act.

Upon Pfeil's motion, the district court held a separate trial on the issue of Pfeil's compliance with the Act. The district court concluded that Pfeil had complied with the Act, finding that the petition filed December 12, 2002, was not intended to withdraw Pfeil's claim against the State.

On November 13, 2006, this court issued an order to show cause why this case should not be dismissed for lack of jurisdiction because the district court's order was not a final, appealable order. In its response, the State argues that this appeal affects a substantial right and was made during a special proceeding, and is thus final.

ASSIGNMENTS OF ERROR

On appeal, the State assigns that the district court erred in determining Pfeil had complied with the Act.

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. *New Tek Mfg. v. Beehner*, 270 Neb. 264, 702 N.W.2d 336 (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. *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006). 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.*

[4] An order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered. *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001). See, also, Neb. Rev. Stat. § 25-1902 (Reissue 1995).

As an initial matter, we note that the order denying the State's affirmative defense did not determine the action or prevent a judgment since the denial of the defense in fact allowed Pfeil's suit to continue. In addition, the order was not made on summary application in an action after judgment was rendered. See, generally, *Keef v. State*, *supra*. Nor does the State contend that one of these two categories is applicable. The initial question presented here is whether the district court's order was made during a special proceeding.

WAS DISTRICT COURT'S ORDER MADE IN SPECIAL PROCEEDING?

[5,6] For the purposes of § 25-1902, a special proceeding includes every special statutory remedy which is not in itself an action. *Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004). A judgment rendered by the district court that is merely a step or proceeding within the overall action is not a

special proceeding. *Id.* A special proceeding which affects a substantial right is, by definition, not part of an action. *Id.* Generally, a “special proceeding,” within the meaning of § 25-1902, entails civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes. *Keef v. State, supra.* Examples of special proceedings include juvenile court proceedings, *In re Guardianship of Rebecca B. et al.*, 260 Neb. 922, 621 N.W.2d 289 (2000); probate actions, *In re Estate of Peters*, 259 Neb. 154, 609 N.W.2d 23 (2000); and workers’ compensation cases, *Thompson v. Kiewit Constr. Co.*, 258 Neb. 323, 603 N.W.2d 368 (1999).

The State argues that the district court’s order was made during a special proceeding because Pfeil’s cause of action arose under the Act, which is codified in chapter 81 and thus is not encompassed in chapter 25 of the Nebraska Revised Statutes.

However, this misapprehends the nature of chapter 81 of the Nebraska Revised Statutes. The intent of the Act was to waive the State’s sovereign immunity, thus allowing the State to be sued for the torts of its officers, agents, or employees. See §§ 81-8,209 and 81-8,215. We recognize that some aspects of chapter 81 could be identified as resembling a special proceeding. For example, the Act sets forth presentment and notice requirements with regard to allowable tort claims. See §§ 81-8,212 and 81-8,213. These requirements allow the State the opportunity to consider claims prior to the institution of suits against it. We conclude, however, that a reading of the Act as a whole indicates that once suit is instituted, an action against the State is intended for the most part to be treated as any other negligence action. This intent is expressed in § 81-8,216, which provides that the district courts shall follow the rules of civil procedure applicable to private litigants in actions against the State. The denial of an affirmative defense would be treated as interlocutory and, as such, not final in such instances. See, generally, *Keef v. State, supra.*

In this case, Pfeil has alleged a negligence cause of action against the State. Beyond the presentment and notice conditions set forth in chapter 81, Pfeil’s tort action against the State follows the procedures set forth in chapter 25 of the Nebraska Revised Statutes. We therefore conclude that Pfeil’s action is encompassed by chapter 25, and the district court’s order

denying the State's affirmative defense was not made in a special proceeding.

Having concluded that the district court's order was not made during a special proceeding, we conclude that the State's appeal was not from a final, appealable order. As such, this court lacks jurisdiction to consider this appeal.

CONCLUSION

Based on the foregoing reasons, we dismiss the appeal for lack of jurisdiction.

APPEAL DISMISSED.

PAUL D. STEWART AND BEVERLY A. STEWART, APPELLEES, v.
DARLENE A. BENNETT, TRUSTEE OF THE DARLENE A.
BENNETT REVOCABLE TRUST, APPELLANT.

727 N.W.2d 424

Filed February 2, 2007. No. S-05-1100.

1. **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.
2. **Contracts: Waiver.** It is axiomatic that a party cannot waive the invalidity of a contractual provision by entering into a contract containing such a provision.
3. **Estoppel.** The doctrine of judicial estoppel holds that one who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding.
4. _____. Absent judicial acceptance of the inconsistent position, the application of the rule of judicial estoppel is unwarranted because no risk of inconsistent results exists.
5. **Pleadings.** A party cannot judicially admit conclusions of law in the pleadings because the pleadings admit only facts.
6. **Contracts: Attorney Fees: Public Policy.** In the absence of a uniform course of procedure or authorization by statute, contractual agreements for attorney fees are against public policy and will not be judicially enforced.
7. **Contracts: Public Policy.** Public policy presents the principles under which the freedom of contract or private dealings are restricted by law for the good of the community.
8. **Statutes: Legislature: Presumptions.** The Legislature is presumed to know the general condition surrounding the subject matter of the legislative enactment, and it is presumed to know and contemplate the legal effect that accompanies the language it employs to make effective the legislation.

9. **Legislature: Attorney Fees: Public Policy.** In enacting Neb. Rev. Stat. § 25-824 (Reissue 1995), the Legislature has made a statement of public policy against granting attorney fees in actions that are not frivolous.

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

Lance D. Ehmcke, Joel D. Vos, and Jeremy J. Cross, of Heidman, Redmond, Fredregill, Patterson, Plaza, Dykstra & Prah, L.L.P., for appellant.

Thomas A. Fitch, of Fitch Law Office, for appellees.

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

McCORMACK, J.

BACKGROUND

This case presents an action originally brought by Paul D. Stewart and Beverly A. Stewart to establish a holdover tenancy under the terms and conditions of an expired lease agreement with the landowner, Darlene A. Bennett, trustee of the Darlene A. Bennett Revocable Trust. Bennett denied the existence of a hold-over tenancy and asserted that any rule of law establishing a hold-over tenancy in this case would be an unconstitutional taking of property without due process. Bennett counterclaimed for liquidated damages as specified in the lease for failure to relinquish possession.

The district court found that under the undisputed facts presented, no holdover tenancy was created. Accordingly, the district court granted Bennett's motion for summary judgment and dismissed the Stewarts' petition against Bennett. The Stewarts do not appeal the determination that there was no creation of a holdover tenancy, and that issue is not before us in this appeal.

Both parties originally sought attorney fees under paragraph 26 of the lease, which stated that if either party files suit to enforce the terms of the lease, the prevailing party shall be entitled to recover court costs and reasonable attorney fees. After the district court dismissed the Stewarts' petition, but before ruling on Bennett's counterclaim, the Stewarts challenged the validity of the attorney fee provision. Bennett responded that the Stewarts

were barred from asserting that the attorney fee provision was against public policy, since they were the first party to ask for attorney fees under the provision. Bennett also alleged that any jurisprudence determining such provision to be against public policy was unconstitutional.

Citing *Parkert v. Lindquist*, 269 Neb. 394, 693 N.W.2d 529 (2005), and the cases discussed therein, the district court denied attorney fees. The court overruled Bennett's constitutional challenge to holdover tenancy law, explaining that because it determined that there was no holdover tenancy, the issue was moot. The court did not specifically address Bennett's argument that the rule recognized in *Parkert* was unconstitutional. Bennett appeals.

ASSIGNMENTS OF ERROR

Bennett asserts that the district court erred in (1) finding that Bennett was not entitled to attorney fees under paragraph 26 of the lease agreement, (2) failing to rule that the judicially created public policy against awarding attorney fees provided for in a contractual provision violates the separation of powers clause of the Nebraska Constitution, and (3) failing to rule that the judicially created notice requirement to terminate farm tenancies violates the separation of powers clause of the Nebraska Constitution.

STANDARD OF REVIEW

[1] This case presents questions of law, upon which the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision by the trial court. See *Stewart v. Advanced Gaming Tech.*, 272 Neb. 471, 723 N.W.2d 65 (2006).

ANALYSIS

The sole issue in this appeal is whether the district court erred in failing to grant attorney fees to Bennett. Bennett asks us to revisit our previously established rule that a contractual provision for attorney fees, where such fees are not provided by statute or uniform course of procedure, is against public policy and will not be judicially enforced. See *Parkert v. Lindquist*, *supra*. Alternatively, Bennett asserts that some form of equitable defenses, i.e., the doctrines of unclean hands, waiver, and estoppel, should operate to preclude recognition of the voidness of the fee provision in this case. She reasons that the Stewarts were the

first to request fees in their unsuccessful petition against Bennett and because the Stewarts had signed the lease with the fee provision. Finally, Bennett seeks a declaration that our case law on holdover tenancies is unconstitutional. Although no such tenancy was found in this case, Bennett asserts that the issue should be addressed under an exception to the mootness doctrine.

We decline to overrule the line of cases which clearly hold that the attorney fee provision at issue in this case is invalid. Because it is uncontested that no holdover tenancy was created, we will not address Bennett's attacks on the constitutionality of holdover tenancy jurisprudence.

DOCTRINES OF UNCLEAN HANDS, WAIVER, AND ESTOPPEL

Bennett first asserts various equitable defenses which Bennett argues preclude the Stewarts from benefiting from any public policy invalidation of the attorney fee provision. Bennett is unable to cite any case law directly applicable to this point. Rather, Bennett relies on generalized references to the doctrines of unclean hands, waiver, and estoppel to argue that because the Stewarts signed the lease agreement with the attorney fee provision and also because they requested such fees in their original petition, they could not later assert that the attorney fee provision was void as against public policy.

[2] The doctrines of unclean hands, waiver, and estoppel clearly do not apply to the Stewarts' claim that the attorney fee provision is invalid. First, it is axiomatic that a party cannot waive the invalidity of a contractual provision by entering into a contract containing such a provision. As to the idea that by asking the court for fees under the provision, equity precludes the Stewarts from later denying the validity of the provision, we first note that the underlying claim is an action at law in which some of these equitable defenses simply do not apply. See, *Mason v. City of Lincoln*, 266 Neb. 399, 665 N.W.2d 600 (2003); *Buckingham v. Wray*, 219 Neb. 807, 366 N.W.2d 753 (1985). In any case, there is no evidence that the Stewarts acted inequitably, unfairly, or dishonestly in their initial claim for attorney fees. See, e.g., *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002). There is not any evidence that the Stewarts gained any benefit from their unsuccessful claim under

the attorney fee provision or that Bennett detrimentally relied on the Stewarts' prior claim.

[3] Closer to the point is Bennett's assertion of the doctrine of judicial estoppel, which holds that one who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding. *Vowers & Sons, Inc. v. Strasheim*, 254 Neb. 506, 576 N.W.2d 817 (1998). The doctrine protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding. *Id.*

[4] However, the doctrine of judicial estoppel does not apply in this case because the district court never accepted the claim that the attorney fee provision was applicable. "Absent judicial acceptance of the inconsistent position, application of the rule is unwarranted because no risk of inconsistent results exists." *Vowers & Sons, Inc. v. Strasheim*, 254 Neb. at 514, 576 N.W.2d at 824.

[5] This court has said that a party will be bound by allegations in the pleadings and cannot subsequently take a position inconsistent thereto, as such allegations are judicial admissions. See, *Jorgensen v. State Nat. Bank & Trust*, 255 Neb. 241, 583 N.W.2d 331 (1998); *Ryder Truck Rental v. Transportation Equip. Co.*, 215 Neb. 458, 339 N.W.2d 283 (1983). But we have clarified that a party cannot judicially admit conclusions of law in the pleadings because the pleadings admit only facts. See *Jorgensen, supra*. The Stewarts' implicit allegation that the attorney fee provision was valid was a conclusion of law.

"AMERICAN RULE"

Having concluded that the Stewarts are not estopped from asserting that the attorney fee provision at issue is invalid as against public policy, we next address Bennett's argument that we should overrule our cases on this point. Bennett argues that our determination that attorney fee provisions violate public policy in the absence of a uniform course of procedure or statutory authorization is representative of a minority view of what exceptions apply to the so-called American rule, and he urges us to reconsider. Bennett also asserts that our failure to except privately contracted fee provisions is a judicial declaration of public policy that

encroaches on the exclusive powers of the Legislature to make public policy determinations and that our American rule jurisprudence therefore violates separation of powers.

The “American rule” stands generally for the proposition that “a prevailing party may not also recover an attorney fee from his opponent.” *Holt County Co-op Assn. v. Corkle’s, Inc.*, 214 Neb. 762, 767, 336 N.W.2d 312, 315 (1983). The justification for this general rule is that “a defendant should not be unduly influenced from vigorously contesting claims made against him.” *Id.* See, also, 20 Am. Jur. 2d *Costs* § 55 (2005) (purpose of American rule requiring each party to bear own costs in litigation is to avoid stifling legitimate litigation by threat of specter of burdensome expenses being imposed on unsuccessful party).

There are exceptions to the American rule, and these exceptions vary from state to state. All states create an exception to the general rule in cases where the legislature has expressly allocated those fees to the winning party. Most jurisdictions, including Nebraska, also have an exception to the American rule where attorney fees are granted pursuant to the court’s inherent authority to do all things necessary for the proper administration of justice and equity within the scope of their jurisdiction. See, *Holt County Co-op Assn.*, *supra*; *Mangiante v. Niemiec*, 98 Conn. App. 567, 910 A.2d 235 (2006).

[6] Many jurisdictions have also created an exception where the attorney fees are provided for through contractual agreement. This court, however, has repeatedly held that in the absence of a uniform course of procedure or authorization by statute, contractual agreements for attorney fees are against public policy and will not be judicially enforced. See, *Parkert v. Lindquist*, 269 Neb. 394, 693 N.W.2d 529 (2005); *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001); *GFH Financial Serv. Corp. v. Kirk*, 231 Neb. 557, 437 N.W.2d 453 (1989); *First Nat. Bank v. Schroeder*, 218 Neb. 397, 355 N.W.2d 780 (1984); *Quinn v. Godfather’s Investments*, 217 Neb. 441, 348 N.W.2d 893 (1984); *City of Gering v. Smith Co.*, 215 Neb. 174, 337 N.W.2d 747 (1983).

[7] Public policy is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good. Public policy presents the

principles under which the freedom of contract or private dealings are restricted by law for the good of the community. See *Hood v. AAA Motor Club Ins. Assn.*, 259 Neb. 63, 607 N.W.2d 814 (2000).

[8,9] It is the Legislature's function through the enactment of statutes to declare what is the law and public policy. *Myers v. Nebraska Invest. Council*, 272 Neb. 669, 724 N.W.2d 776 (2006). Neb. Rev. Stat. § 25-824 (Reissue 1995) provides for attorney fees to the prevailing party when the court determines that the underlying action was brought in bad faith. The Legislature, in enacting this statute, was presumably aware of our understanding of the American rule and the exceptions to that rule in our state. See, *In re Guardianship of Rebecca B. et al.*, 260 Neb. 922, 621 N.W.2d 289 (2000); *State v. Schnabel*, 260 Neb. 618, 618 N.W.2d 699 (2000). The Legislature is presumed to know the general condition surrounding the subject matter of the legislative enactment, and it is presumed to know and contemplate the legal effect that accompanies the language it employs to make effective the legislation. *Ludwig v. Board of County Commissioners*, 170 Neb. 600, 103 N.W.2d 838 (1960). By implication, in § 25-824, the Legislature has made a statement of public policy against granting attorney fees in actions that are not frivolous.

Having found that the public policy relevant to this case was embodied by an expression of the Legislature, we can find no merit to Bennett's argument that our case law recognizing this public policy violated the alleged exclusive realm of the Legislature to determine public policy questions. We decline to reconsider our case law on this issue.

CONVERSION TO YEAR-TO-YEAR TENANCY

In Bennett's third assignment of error, Bennett complains that the district court did not rule on the constitutionality of case law establishing the circumstances in which a holdover tenancy can be established by the conduct of the parties after expiration of the terms of a lease. See, e.g., *Stuthman v. Stuthman*, 245 Neb. 846, 515 N.W.2d 781 (1994); *Otto v. Hongsermeier Farms*, 217 Neb. 45, 348 N.W.2d 422 (1984). The district court did not reach this issue because it determined that no holdover tenancy had been established under the facts presented in this case. Finding no error

in this determination, we need not address the last assignment of error.

CONCLUSION

We affirm the judgment of the district court.

AFFIRMED.

SUSAN L., APPELLANT, V.
STEVEN L., APPELLEE.
729 N.W.2d 35

Filed February 2, 2007. No. S-06-102.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law, which requires an appellate court to reach a conclusion independent from that of the trial court.
2. **Child Custody: Kidnapping: Jurisdiction: States.** The Convention on the Civil Aspects of International Child Abduction seeks to establish procedures to ensure a child's prompt return to the state of his or her "habitual residence" where removed or retained therefrom.
3. ____: ____: ____: _____. The Convention on the Civil Aspects of International Child Abduction is applicable to any child "habitually resident" in a contracting state immediately before any breach of custody or access rights.
4. ____: ____: ____: _____. The Convention on the Civil Aspects of International Child Abduction does not seek to establish a child's "habitual residence" as a general jurisdictional mandate for custody disputes.
5. **Child Custody: Kidnapping: States.** Under the Convention on the Civil Aspects of International Child Abduction, grave risk of harm is essentially an affirmative defense to the return of the child.
6. **Child Custody: Kidnapping: Jurisdiction: States.** The Convention on the Civil Aspects of International Child Abduction makes no statement as to the relevancy of grave risk of harm in deciding jurisdiction or the appropriate forum for resolution of custody issues involving a child not wrongfully removed or retained.
7. **Constitutional Law: Jurisdiction: Legislature.** The jurisdiction of the district courts conferred by the terms of the Nebraska Constitution, as thus conferred, is beyond the power of the Legislature to limit or control; while the Legislature may grant to the district courts such other jurisdiction as it may deem proper, it cannot limit or take away from such courts their broad and general jurisdiction which the constitution has conferred upon them.
8. **Constitutional Law: Jurisdiction.** The term "jurisdiction," as used in Neb. Const. art. V, § 9, denotes the concept of legal power to interpret and administer the law in the premises.

9. ____: _____. The constitutional grant of jurisdiction to the district court, while original, is not exclusive.
10. **Courts: Jurisdiction.** Where courts have concurrent jurisdiction, the first to assume jurisdiction retains it to the exclusion of the other.
11. **Child Custody: Jurisdiction: Statutes.** Neb. Rev. Stat. §§ 43-1230 and 43-1240 (Reissue 2004) do not deprive the district court of its broad and general original jurisdiction over child custody.
12. **Constitutional Law.** The fact that the exercise of discretion will not be strictly homogeneous does create a lack of uniformity in the constitutional sense.
13. **Constitutional Law: Due Process.** Due process as required by Neb. Const. art. I, § 3, need not take place in Nebraska.

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

Sheri A. Wortman, of McHenry, Haszard, Hansen, Roth & Hupp, P.C., for appellant.

Christopher A. Furches, of Johnson, Flodman, Guenzel & Widger, for appellee.

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

McCORMACK, J.

NATURE OF CASE

In October 2000, the Supreme Court of British Columbia, Canada, issued an original custody determination granting “sole interim custody” of Steffany L. to her mother, Susan L. In accordance with the order, Susan moved with Steffany to Lincoln, Nebraska, and they have lived in Nebraska since then. After Steffany reported sexual abuse by her father, Steven L., during visitation in Canada, Susan asked that the district court for Lancaster County “assume jurisdiction over the final determination of paternity, custody and support.” Her request was under the Convention on the Civil Aspects of International Child Abduction (Hague Convention), Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89, as implemented by the International Child Abduction Remedies Act (ICARA), 42 U.S.C. §§ 11601 to 11611 (2000 & Supp. III 2003).

Because the Canadian court refused to cede jurisdiction to Nebraska, and Steven still resides in British Columbia, the Uniform

Child Custody Jurisdiction and Enforcement Act (UCCJEA), Neb. Rev. Stat. §§ 43-1226 to 43-1266 (Reissue 2004), provides that Nebraska does not have jurisdiction to modify the custody determination. Susan asserted, however, that the application of the UCCJEA to bar the district court's jurisdiction in this case was preempted by the Hague Convention and that the UCCJEA violated the Nebraska Constitution in various respects. The district court concluded it did not have jurisdiction to modify the Canadian custody order, and Susan appeals.

BACKGROUND

Susan and Steven were both living in British Columbia when their relationship resulted in the birth of Steffany on March 19, 1998. Susan and Steven were never married. Steven is a citizen of Canada, while Susan is a citizen of the United States.

On October 18, 2000, the Supreme Court of British Columbia, a Canadian trial court of general jurisdiction, issued an "Interim Order" granting sole interim custody of Steffany to Susan and allowing Susan to move with Steffany to Nebraska. The court also specified interim access rights for Steven and various elements of "interim joint guardianship." Susan and Steffany have lived in Lincoln since October 2000.

After returning from visitation with Steven during the spring of 2004, Steffany reported to her therapist various incidents which led the therapist to believe that Steffany had been sexually abused by Steven during the visit. The alleged abuse was reported to the Lincoln Police Department.

The Lincoln police contacted the police department in Delta, British Columbia, so that it could investigate the allegations of abuse. The therapist's report and taped interviews by the Lincoln police were forwarded to the Delta police. Steven voluntarily suspended Steffany's scheduled summer visitation. The Delta police conducted an investigation and, in September 2004, advised that they were not going to bring criminal charges against Steven.

Susan filed a "Petition for Registration of Foreign Judgment" with the district court for Lancaster County. Around this same time, Susan filed a motion with the Supreme Court of British Columbia, asking the Canadian court to decline to exercise jurisdiction over Steffany in favor of Nebraska. Susan also filed a

motion with the district court “to assume jurisdiction and suspend visitation.” The motion referred to the pending motion in Canada and also asserted that recent allegations of abuse warranted the court’s exercise of temporary emergency jurisdiction under § 43-1241. The parties apparently agreed at that time that unless the British Columbia court declined jurisdiction, the district court would not have jurisdiction over Steffany’s custody.

On November 19, 2004, the Supreme Court of British Columbia issued an order denying Susan’s motion for the court to decline jurisdiction. The court noted that there were relevant witnesses in both countries and that the alleged abuse took place in British Columbia. The court stated that it could not reach any conclusion about the veracity of the allegations of abuse based upon the evidence currently before it. Still, the court did modify the existing access order to provide that Steven and Steffany would not sleep in the same bedroom and that when Steven was with Steffany, another adult would always be present. The court also set forth specific limitations to Susan’s telephone access during Steffany’s visits with Steven and denied a motion by Steven to increase his access time. Susan filed an application before the British Columbia Court of Appeal to appeal the November 19 order.

Relying on the November 19, 2004, order, Steven filed an objection in the district court for Lancaster County to Susan’s motion to assume jurisdiction and suspend visitation. The hearing on Susan’s motion to assume jurisdiction and suspend visitation was continued by agreement of the parties. On December 17, Susan filed a motion to assume temporary emergency jurisdiction to prevent Steffany’s upcoming Christmas visitation with Steven. On December 23, the district court denied the motion, but visitation did not take place. On February 1, 2005, Steven filed a motion in the district court to enforce the Canadian custody and visitation orders.

The British Columbia Court of Appeal, on January 14, 2005, denied Susan’s motion for leave to appeal the November 19, 2004, order, explaining that the appeal was merely an attempt to overturn the discretionary decision of the trial judge as to whether British Columbia was the proper forum for future custody issues relating to Steffany. On February 22, 2005, the district court

for Lancaster County granted Steven's motion to enforce the Canadian visitation orders.

Visitation again took place in the summer of 2005, when Steffany was 7 years old. Although Steffany had undergone counseling and had a code word to let Susan know if she needed help, Susan apparently was unable to get any of her calls through to Steffany during the visit. Steffany was allegedly very upset after returning to Susan and eventually reported more incidents of sexual abuse by Steven during that visit. The Delta police were again contacted with regard to the new allegations and were sent copies of interviews with Steffany and other relevant persons in Nebraska. Again, the Delta police did not press charges against Steven.

On November 28, 2005, Susan filed in the district court for Lancaster County a "Complaint to Establish Paternity, Determine Custody, Set and Define Support and Modify an Interim Order Issued by the Supreme Court of British Columbia." On December 16 and 19, Susan filed a motion to "assume jurisdiction" and an amended motion of the same. Susan alleged that the district court should assume jurisdiction under the Hague Convention and should declare § 43-1230(a) and (b) unconstitutional to the extent that, read in conjunction with § 43-1240(1), the provisions abdicate authority to determine jurisdiction over a child to a court of a foreign country.

In October 2005, Steven filed an affidavit with the Supreme Court of British Columbia requesting additional time with Steffany during Steffany's Christmas vacation in 2005 and spring break in 2006. Susan again asked the court to vary the November 19, 2004, order so as to decline jurisdiction over Steffany in favor of Nebraska. Alternatively, Susan asked the court to cede jurisdiction to Nebraska to adjudicate the "complaint of protection" of Steffany and defer determination of jurisdiction over custody and access until a factual determination on the protection complaint had been made. Until a final determination of jurisdiction, Susan asked that Steven's visitation either be suspended or take place in Nebraska, supervised by a professional supervision agency. On December 14, 2005, the Canadian court denied Susan's application. The court granted Steven's application for additional visitation days and ordered that the supervision provisions contained in the November 19, 2004, order remain in full force and effect.

The district court for Lancaster County, on December 22, 2005, denied Susan's December 19 amended motion to "assume jurisdiction" to modify custody and visitation. Susan appeals from the December 22 order.

ASSIGNMENTS OF ERROR

Susan asserts that the district court erred in determining (1) that it did not have jurisdiction over the issues of paternity, custody, visitation, and support for Steffany; (2) that it did not have jurisdiction to suspend visitation between Steffany and Steven; (3) that the UCCJEA was not preempted by the Hague Convention; and (4) that § 43-1230(a) and (b) is not unconstitutional.

STANDARD OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law, which requires an appellate court to reach a conclusion independent from that of the trial court. *Watson v. Watson*, 272 Neb. 647, 724 N.W.2d 24 (2006).

ANALYSIS

Susan appeals the order of the district court finding that it did not have jurisdiction to modify the terms of the Canadian custody orders and accordingly could not "assume jurisdiction" pursuant to Susan's motion. The UCCJEA, § 43-1240, provides that except for temporary emergency jurisdiction under § 43-1241, a court of this state may not modify a child custody determination made by a court of another state unless this state would otherwise have jurisdiction under § 43-1238(a)(1) or (2) and the other state has lost exclusive continuing jurisdiction under § 43-1239; the child, the child's parents, and any person acting as a parent no longer reside in the other state; or the other state determines under § 43-1244 that this state would be a more convenient forum. Under § 43-1230, a court of this state shall treat a foreign country as if it were a state of the United States for the purpose of applying §§ 43-1226 to 43-1247, although this state need not apply the UCCJEA if the child custody law of a foreign country violates fundamental principles of human rights.

Steven continues to reside in Canada and maintains a relationship with Steffany. The Canadian court has declined Susan's

requests that it cede jurisdiction to Nebraska as the “more appropriate forum.” See § 43-1238(a)(2). There is no dispute that under the UCCJEA, the Canadian court maintains exclusive continuing jurisdiction over legal custody, physical custody, and visitation with respect to Steffany. See *Atchison v. Atchison*, 256 Mich. App. 531, 664 N.W.2d 249 (2003). Susan does not claim that Canadian custody law violates fundamental human rights, and, in fact, it appears that Susan has not sought in the Canadian courts a full hearing on the alleged abuse. The issue presented is whether the Hague Convention or the Nebraska Constitution prohibits the application of the UCCJEA jurisdictional provisions which give the Canadian court exclusive jurisdiction over custody determinations involving Steffany. We conclude that they do not.

PREEMPTION

We first address Susan’s argument that the UCCJEA provisions are preempted by the Hague Convention and its implementing law, the ICARA. We find no merit to Susan’s preemption argument because we simply do not find either the Hague Convention or the ICARA applicable to this case. Because the Hague Convention and the ICARA do not concern the controversy presently before us, the issue of preemption does not arise.

As explained in 42 U.S.C. § 11601(a)(4) of the ICARA, the Hague Convention establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights. Section 11603(b) provides that “[a]ny person seeking to initiate judicial proceedings under the [Hague] Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action . . .” Section 11603(a) grants state and federal district courts concurrent original jurisdiction to hear such actions. But no action concerning Steffany has been commenced under the Hague Convention.

[2-4] Because she is neither the plaintiff nor the defendant in an action under the Hague Convention, Susan’s preemption argument rests on the alleged “underlying [premise]” of the Hague Convention that custody disputes be decided in the child’s place of “‘habitual residence’” and its “‘foremost commitment” to

“safeguard children from grave risk of harm.” Brief for appellant at 14, 16. Susan is correct that “habitual residence” is a term often employed in the Hague Convention. The Hague Convention speaks of wrongful removal or retention in terms of the law of the state in which the child was habitually resident immediately before the removal or retention. The Hague Convention seeks to establish procedures to ensure a child’s prompt return to the state of his or her “habitual residence” where removed or retained therefrom. See Hague Convention, preamble. The Hague Convention is applicable to any child “habitually resident” in a contracting state immediately before any breach of custody or access rights. Hague Convention, art. 3*a*. But nowhere does the Hague Convention seek to establish a child’s “habitual residence” as a general jurisdictional mandate for custody disputes. To the contrary, as stated in 42 U.S.C. § 11601(b)(4), “The [Hague] Convention and this chapter empower courts in the United States to determine only rights under the [Hague] Convention and not the merits of any underlying child custody claims.”

[5,6] Nor do we find the Hague Convention’s commitment to “safeguard children from grave risk of harm” to have any applicability here. The safeguard to which Susan refers is found in article 13 of the Hague Convention, which states, “Notwithstanding the provisions [providing for return of the child], the judicial or administrative authority . . . is not bound to order the return of the child if . . . there is a grave risk that his or her return would expose the child to physical or psychological harm.” Essentially, grave risk of harm is an affirmative defense to the return of the child. See, *Cantor v. Cohen*, 442 F.3d 196 (4th Cir. 2006); *Baxter v. Baxter*, 423 F.3d 363 (3rd Cir. 2005). Again, Susan is not a respondent to any action for return of the child under the Hague Convention, and therefore, any grave risk defense is inapplicable. The Hague Convention makes no statement as to the relevancy of grave risk of harm in deciding jurisdiction or the appropriate forum for resolution of custody issues involving a child not wrongfully removed or retained.

Steffany simply does not fall within the purview of the Hague Convention or the ICARA. As such, we do not consider whether any portion of that law preempts the jurisdictional mandates of the UCCJEA. We affirm the district court’s conclusion that the

Hague Convention and the ICARA do not impede the court's adherence to the UCCJEA in this case.

CONSTITUTIONALITY

Susan also asserts that the UCCJEA should not have been followed by the district court because the UCCJEA's jurisdictional provisions are unconstitutional. Susan asserts that the UCCJEA effectively grants "veto power over the exercise of Nebraska jurisdiction" to a foreign country, limiting Nebraska's chancery jurisdiction over the protection of children in a manner that lacks uniformity and provides no mechanism for a parent to challenge the foreign court's decision. Brief for appellant at 20. This, Susan contends, violates article V, §§ 1, 9, and 19, of the Nebraska Constitution and the right of due process found in article I.

NEB. CONST. ART. V, §§ 1 AND 9

Neb. Const. art. V, § 1, states in relevant part:

The judicial power of the state shall be vested in a Supreme Court, an appellate court, district courts, county courts, in and for each county, with one or more judges for each county or with one judge for two or more counties, as the Legislature shall provide, and such other courts inferior to the Supreme Court as may be created by law.

Neb. Const. art. V, § 9, states in relevant part: "The district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the Legislature may provide"

[7] Susan points out that these two sections combine to grant chancery (equity) jurisdiction to district courts and that child custody is within the purview of that jurisdiction. See, e.g., *Drennen v. Drennen*, 229 Neb. 204, 426 N.W.2d 252 (1988); *Schleuter v. McCuiston*, 203 Neb. 101, 277 N.W.2d 667 (1979); *Wassung v. Wassung*, 136 Neb. 440, 286 N.W. 340 (1939). This court has said that the jurisdiction of the district courts conferred by the terms of the Nebraska Constitution, as thus conferred, is beyond the power of the Legislature to limit or control; while the Legislature may grant to the district courts such other jurisdiction as it may deem proper, it cannot limit or take away from such courts their broad and general jurisdiction which the constitution has conferred upon them. See, *K N Energy, Inc. v. City of Scottsbluff*, 233 Neb. 644, 447 N.W.2d 227 (1989); *Miller v. Janecek*, 210 Neb. 316, 314

N.W.2d 250 (1982); *John A. Creighton Home v. Waltman*, 140 Neb. 3, 299 N.W. 261 (1941); *State, ex rel. Wright, v. Barney*, 133 Neb. 676, 276 N.W. 676 (1937); *Lacey v. Zeigler*, 98 Neb. 380, 152 N.W. 792 (1915). Susan argues that by limiting the district court's jurisdiction to modify a child custody order, the UCCJEA has improperly encroached upon the inherent powers granted by the constitution.

The proposition that the Legislature cannot limit or take away the broad and general jurisdiction of the district courts, as conferred by the Nebraska Constitution, has most often been invoked when a legislative enactment has sought to give exclusive, original jurisdiction over a chancery or common-law class of cases to the county courts or to an administrative agency or agent. See, e.g., *Drennen v. Drennen, supra*; *Village of Springfield v. Hevelone*, 195 Neb. 37, 236 N.W.2d 811 (1975); *In re Trust Estate of Myers*, 151 Neb. 255, 37 N.W.2d 228 (1949); *Hoover v. Haller*, 146 Neb. 697, 21 N.W.2d 450 (1946); *Cox v. Johnston*, 139 Neb. 223, 296 N.W. 883 (1941); *Clark v. Lincoln Liberty Life Ins. Co.*, 139 Neb. 65, 296 N.W. 449 (1941); *State, ex rel. Sorensen, v. State Bank of Minatare*, 123 Neb. 109, 242 N.W. 278 (1932); *Lacey v. Zeigler, supra*. The proposition has also been decisive where the Legislature has sought to limit the district court's inherent contempt powers. See *State ex rel. Beck v. Frontier Airlines, Inc.*, 174 Neb. 172, 116 N.W.2d 281 (1962). The proposition has never been applied to find unconstitutional provisions such as those presented in this case.

[8,9] The term "jurisdiction," as used in Neb. Const. art. V, § 9, denotes the concept of legal power to interpret and administer the law in the premises. *State, ex rel. Wright v. Barney, supra*. We have previously explained that the constitutional grant of jurisdiction to the district court, while original, is not exclusive. *Village of Springfield v. Hevelone, supra*; *In re Estate of Steppuhn*, 221 Neb. 329, 377 N.W.2d 83 (1985). In *In re Estate of Steppuhn, supra*, we considered whether a statutory provision granting to county courts subject matter jurisdiction over probate matters involving chancery or common law was unconstitutional. We explained that both the district court and the county court could possess the same original jurisdiction, although they could not both exercise exclusive jurisdiction. We concluded: "In considering the difference

between exclusive and original, the apparent conflict between the jurisdiction of the county court and the district court vanishes.” *Id.* at 332, 377 N.W.2d at 85.

[10,11] Our common-law jurisprudence recognized the “fundamental” proposition that “where courts have concurrent jurisdiction, the first to assume jurisdiction retains it to the exclusion of the other.” *McFarland v. State*, 172 Neb. 251, 256, 109 N.W.2d 397, 401-02 (1961). See, also, *State, ex rel. Sorensen, v. Mitchell Irrigation District*, 129 Neb. 586, 262 N.W. 543 (1935); *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb. 463, 62 N.W. 899 (1895). Sections 43-1230 and 43-1240 do not deprive the district court of its broad and general original jurisdiction over child custody. Rather, they simply codify rules related to the exercise of that jurisdiction where there is concurrent jurisdiction with another court. We accordingly find no merit to Susan’s argument that these provisions violate §§ 1 and 9 of the Nebraska Constitution.

NEB. CONST. ART. V, § 19

Susan next argues that leaving our court’s power to modify contingent upon a foreign court’s decision whether to cede jurisdiction violates the mandate of Neb. Const. art. V, § 19. Section 19 provides that all courts of the same class or grade in this state be uniform. In *State v. Magney*, 52 Neb. 508, 72 N.W. 1006 (1897), we explained that the mandate of article V, § 19, is that the jurisdiction and powers conferred upon a justice, county, or district court of one county can be neither more nor less than given the court of the same class in any other county.

[12] We conclude that because the UCCJEA is uniformly applicable to all district courts of the same class, there is no violation of Neb. Const. art. V, § 19. Such uniformity is not changed by the fact that the UCCJEA (uniformly) disallows those courts from modifying another jurisdiction’s original custody order absent certain circumstances. This is so even where one of those circumstances is the exercise of the foreign court’s discretion. The fact that the exercise of discretion will not be strictly homogeneous does create a lack of uniformity in the constitutional sense. See *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998) (rejecting argument that discretion with sentencing judge violated Neb. Const. art. V, § 19). Regardless of the ability to ensure uniformity

among courts of foreign nations in their deliberative process to determine whether to cede jurisdiction, the courts of this state are uniform in their powers upon such deliberation. Susan's contention that the UCCJEA violates article V, § 19, of the Nebraska Constitution is likewise without merit.

NEB. CONST. ART. I, § 3

Finally, Susan asserts that her rights of due process and equal protection under Neb. Const. art. I, § 3, are violated by the UCCJEA because "there is no mechanism for a parent such as Susan . . . to be heard in order to challenge the refusal of the foreign court to give its blessing and approval to the district court's exercise of the jurisdiction." Brief for appellant at 22. Section 43-1230(c) provides that "[a] court of this state need not apply the act if the child custody law of a foreign country violates fundamental principles of human rights."

[13] To protect Susan's due process rights, due process need not take place in Nebraska. Susan makes no claim that the Canadian courts have failed to afford her due process. Certainly, there is not an innate due process violation due to the fact that a Canadian appellate court would be reviewing a lower court's decision from its own country. We find no violation of Susan's rights under Neb. Const. art. I in the district court's application of the UCCJEA in this case.

CONCLUSION

We affirm the district court's conclusion that pursuant to §§ 43-1239 and 43-1240, the Canadian courts have exclusive continuing jurisdiction over child custody determinations concerning Steffany and that it could not "assume jurisdiction" to modify the Canadian orders.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DAVID C. PHELPS, APPELLANT.
727 N.W.2d 224

Filed February 2, 2007. No. S-06-226.

1. **DNA Testing: Appeal and Error.** A motion for DNA testing 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. ____: _____. In an appeal from a proceeding under the DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 through 29-4125 (Cum. Supp. 2006), the trial court's findings of fact will be upheld unless such findings are clearly erroneous.
3. ____: _____. Decisions regarding appointment of counsel under the DNA Testing Act are reviewed for an abuse of discretion.

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

Jeanne A. Burke and James E. Reisinger, of Iowa/Nebraska Innocence Project, for appellant.

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

WRIGHT, CONNOLLY, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

David C. Phelps was convicted and sentenced to life imprisonment for the 1987 kidnapping of Jill Cutshall. In accordance with the DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 through 29-4125 (Cum. Supp. 2006), Phelps seeks DNA testing of certain items of Cutshall's clothing found by a hunter in a wooded area 3 months after her disappearance. Phelps claims the clothing may contain biological evidence with DNA from a male individual other than himself and would therefore be exculpatory and material to his case. He appeals the district court's denial of his motion for DNA testing and his request for court-appointed counsel.

SCOPE OF REVIEW

[1-3] A motion for DNA testing 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. Dean*, 270

Neb. 972, 708 N.W.2d 640 (2006). In an appeal from a proceeding under the DNA Testing Act, the trial court's findings of fact will be upheld unless such findings are clearly erroneous. *State v. Poe*, 271 Neb. 858, 717 N.W.2d 463 (2006). Decisions regarding appointment of counsel under the DNA Testing Act are reviewed for an abuse of discretion. *Id.*

FACTS

Cutshall disappeared on August 13, 1987; she has never been found. The morning of Cutshall's disappearance, her father and stepmother left for work around 6 o'clock. Cutshall was wearing a nightshirt at that time, but her stepmother noted that Cutshall had laid out a purple shirt and a pair of jeans.

Cutshall, who was 9 years old, was to walk 4½ blocks to her babysitter's apartment at 8 a.m. When the stepmother finished work at 3 p.m., she discovered that Cutshall had not arrived at the babysitter's apartment that day. An intensive search by various law enforcement agencies and other persons ensued.

In November 1987, a hunter discovered in a wildlife refuge what were later identified as Cutshall's blouse, jeans, underwear, shoes, and keys. Laboratory testing performed prior to trial by the Federal Bureau of Investigation (FBI) determined that there was no blood or semen on the clothing.

An officer present during a police interview on April 22, 1988, testified that during the interview, Phelps recalled six prior incidents of sexual contact with young girls dating back to 1980. When asked specifically about Cutshall, Phelps stated that he liked her blue eyes, the way she could control people, and how she helped others, but he claimed she was "too old" for him.

Lawrence Pennybacker, a former roommate of Phelps, testified that he and Phelps had watched a movie on television about a child who had been kidnapped and killed, and whose body was never recovered. During the movie, Phelps stated that he wondered what it would be like to kidnap, rape, and kill a child and be able to get away with it. Pennybacker told Phelps that a person had to be sick to think of things like that, and Phelps responded, "[W]hat was wrong with it[?]"

Phelps gave a videotaped interview to a television reporter on January 4, 1989. During this interview, Phelps admitted his

involvement in a sexual assault on Cutshall. After the interview, Phelps accompanied officers to the police station. There, he received and waived his *Miranda* rights. Phelps then largely confirmed the version of events he described during the videotaped interview. Later, he recanted his statements, telling one of the police officers that he had fabricated the entire story out of fear.

In March 1991, a jury convicted Phelps of kidnapping Cutshall, and he was sentenced to life imprisonment. The conviction was affirmed by this court in *State v. Phelps*, 241 Neb. 707, 490 N.W.2d 676 (1992).

On July 20, 2005, Phelps sought an order authorizing forensic DNA testing of certain items of evidence, including seven post-cards sent to various authorities about the kidnapping and clothing purported to have been worn by Cutshall when she was kidnapped. He alleged that current methods of DNA testing were not available at the time of his trial and that new methods of testing could show the presence of DNA from a person other than Phelps, which would be exculpatory evidence relevant to his claim of innocence. He alleged that he was indigent and requested the appointment of an attorney to represent him.

Phelps participated by telephone in a hearing held in the district court for Madison County. Evidence received at the hearing included the bill of exceptions from Phelps' trial; Phelps' affidavit; the affidavit of Steve Hecker, the lead investigator on Cutshall's kidnapping; the affidavit of Rita Olberding, the court reporter at Phelps' trial; the affidavit of Dr. Kerry Bernal, director of the human DNA identity laboratory at the University of Nebraska Medical Center; and the affidavit of Dr. James Wisecarver, director of the clinical laboratory at the University of Nebraska Medical Center.

Hecker described how Cutshall's clothing was recovered from the wildlife refuge and handled after recovery. He indicated that numerous persons touched the clothing, including police investigators, FBI personnel, Phelps' trial counsel, and the jury. Bernal stated that if an item of evidence had been handled by multiple persons, DNA testing would most likely yield mixed DNA profiles or the profile of the last person who contacted the item. Bernal also indicated that various conditions affect the amount and quality of DNA available for testing, including the environmental conditions

to which a piece of evidence was exposed before recovery, the passage of time, and storage conditions. Bernal stated that the identification of a person's DNA on an item indicates contact by that person at some point in time but that the absence of a person's DNA is inconclusive proof regarding whether that person touched the item. Wisecarver described currently used DNA testing systems that provide numerous advantages over earlier systems.

Phelps' affidavit alleged that DNA testing would allow the court to determine the following facts in support of his claim that he was wrongfully convicted:

1. The testing of postcards held by the Madison Police Department will establish that the saliva used to attach stamps to them did not come from me.
2. The testing of clothing alleged to belong to Jill Cutshall and used in evidence against me will establish either that the clothes did not belong to the victim or that my DNA is not present on them.
3. The testing of clothing alleged to belong to Jill Cutshall and used in evidence against me may also establish the presence of DNA belonging to a person other than myself.

The court determined that Phelps had satisfied the threshold requirements of § 29-4120(1) for obtaining DNA testing. It concluded, however, that the statute's further conditions for DNA testing had not been met because the handling of the clothing since its recovery made it unlikely that the original physical composition of the clothing had been safeguarded for purposes of DNA testing and because the evidence did not demonstrate that DNA testing would produce noncumulative, exculpatory evidence relevant to Phelps' claim that he was wrongfully convicted. The court denied Phelps' motion for DNA testing and appointment of counsel and dismissed the action.

ASSIGNMENTS OF ERROR

Phelps asserts that the court abused its discretion in denying his request for DNA testing and appointment of counsel under the DNA Testing Act. He further asserts that the court erred in determining that the biological evidence lacked compositional integrity for purposes of DNA testing and that DNA testing would not produce noncumulative, exculpatory evidence.

ANALYSIS

Phelps has voluntarily waived his request for DNA testing of any items except Cutshall's clothing. He has abandoned earlier arguments that DNA testing of biological material will establish either that his DNA is not present or that the recovered items did not belong to Cutshall. Phelps now claims that DNA testing of Cutshall's clothing might produce the DNA profile of a person who has an existing DNA profile in a convicted offender index and who, therefore, may have committed the crime.

DNA TESTING

A person in custody takes the first step toward obtaining possible relief under the DNA Testing Act by filing a motion requesting forensic DNA testing of biological material. See § 29-4120(1). Forensic DNA testing is available for any biological material that (1) is related to the investigation or prosecution that resulted in the judgment, (2) is in the actual or constructive possession of the State or others likely to safeguard the integrity of the biological material, and (3) either was not previously subjected to DNA testing or can be retested with more accurate current techniques. See *id.* After a motion seeking forensic DNA testing has been filed, the State is required to file an inventory of all evidence that was secured by the State or a political subdivision in connection with the case. See § 29-4120(4).

If the threshold requirements of § 29-4120(1) have been met, then a court is required to order testing only upon a further determination that

such testing was effectively not available at the time of trial, that the biological material has been retained under circumstances likely to safeguard the integrity of its original physical composition, and that such testing may produce noncumulative, exculpatory evidence relevant to the claim that the person was wrongfully convicted or sentenced.

§ 29-4120(5). See *State v. Buckman*, 267 Neb. 505, 675 N.W.2d 372 (2004).

In an appeal from a proceeding under the DNA Testing Act, the trial court's findings of fact will be upheld unless such findings are clearly erroneous. *State v. Poe*, 271 Neb. 858, 717 N.W.2d 463 (2006). The court found that FBI laboratory testing was performed on Cutshall's clothing before trial, which testing

determined that there was no blood or semen on the clothing. Thus, for purposes of DNA testing of biological material, the court made a factual finding that there was no biological material in the form of blood or semen—biological material that could be the subject of DNA testing.

On appeal, Phelps speculates that a DNA sample on Cutshall's clothing might be similar to a DNA profile of an individual whose DNA is contained in a convicted offender index. Phelps has produced no evidence that such a sample exists on the clothing, and he makes no claim that such a sample exists. He asserts that because DNA testing is now more precise, such a sample may be found. The existence of such a sample is an essential premise of Phelps' claim that he has been wrongfully convicted. However, the record does not support a finding that any such sample of DNA existed on the clothing belonging to Cutshall.

Based on the affidavits and the trial record admitted into evidence, the court determined it was unlikely that the original physical composition of Cutshall's clothing had been safeguarded for purposes of DNA testing. The court found that any DNA testing of the clothing indicating the absence of Phelps' DNA or the presence of someone else's DNA would be inconclusive and thus would not be exculpatory. The clothing was not discovered for nearly 3 months after Cutshall disappeared. It was recovered from a wildlife refuge, in a location where the clothing would have been exposed to weather elements and animals. The clothing was then handled by numerous persons during the investigation and at trial. Thus, it was not clearly erroneous for the court to determine that the clothing had not been safeguarded for purposes of DNA testing and that DNA testing would not produce noncumulative, exculpatory evidence.

The dispositive question is whether the court abused its discretion in denying the request for DNA testing of Cutshall's clothing. Having determined that the lower court did not err in finding that DNA testing would not produce noncumulative, exculpatory evidence, we conclude that the court did not abuse its discretion in refusing to order DNA testing.

APPOINTMENT OF COUNSEL

Phelps also assigns as error the court's denial of his request for appointment of counsel. Upon a showing by a person that

DNA testing may be relevant to the person's claim of wrongful conviction, the court will appoint counsel for an indigent person. See § 29-4122. Because Phelps did not show that DNA testing may be relevant to his claim of wrongful conviction, the court did not abuse its discretion in denying his request for appointment of counsel.

CONCLUSION

We conclude that Phelps' assignments of error are without merit, and we affirm the judgment of the district court.

AFFIRMED.

HEAVICAN, C.J., and GERRARD, J., not participating.

STATE OF NEBRASKA, APPELLEE, v.
ELMORE HUDSON, JR., APPELLANT.

727 N.W.2d 219

Filed February 2, 2007. No. S-06-432.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. ____: _____. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Jurisdiction: Final Orders: Appeal and Error.** 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.
4. **Postconviction: Pleadings: Final Orders: Appeal and Error.** An order ruling on a motion filed in a pending postconviction case seeking to amend the postconviction motion to assert additional claims is not a final judgment and is not appealable under Neb. Rev. Stat. § 29-3002 (Reissue 1995).
5. ____: ____: ____: _____. The resolution of a motion to amend a postconviction motion to assert additional claims does not affect a substantial right and is not a final order under Neb. Rev. Stat. § 25-1902 (Reissue 1995).

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

Brian S. Munnely 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.

NATURE OF CASE

Elmore Hudson, Jr., was convicted of first degree murder, attempted second degree murder, and two counts of use of a deadly weapon to commit a felony. Following this court's affirmation of his convictions on direct appeal, *State v. Hudson*, 268 Neb. 151, 680 N.W.2d 603 (2004) (*Hudson I*), Hudson filed a motion for postconviction relief. The district court for Douglas County denied Hudson's claims for postconviction relief without an evidentiary hearing. Hudson appealed to this court. We reversed, and remanded with directions to hold an evidentiary hearing on two claims of ineffective assistance of counsel which we specified in our opinion, *State v. Hudson*, 270 Neb. 752, 708 N.W.2d 602 (2005) (*Hudson II*).

On remand, Hudson sought leave to file an amended motion for postconviction relief. The proposed amended motion for postconviction relief included further allegations with regard to the two claims of ineffective assistance of counsel identified in *Hudson II*. In addition, Hudson sought leave to assert allegations which would raise additional claims. The district court granted leave to amend the allegations in the postconviction motion with respect to the two claims but overruled the motion with respect to the assertion of additional claims. Hudson appeals the district court's order denying leave to amend his motion for postconviction relief. We dismiss the appeal for lack of jurisdiction.

STATEMENT OF FACTS

Hudson was convicted of first degree murder, attempted second degree murder, and two counts of use of a deadly weapon to commit a felony. He was sentenced to life imprisonment for the first degree murder conviction, to 30 years' imprisonment for the attempted second degree murder conviction, and to 20 years' imprisonment for each of the two weapons convictions. Hudson's trial counsel represented him on direct appeal. We affirmed Hudson's convictions. *Hudson I*.

Following our decision in *Hudson I*, Hudson filed a pro se motion for postconviction relief in district court, which motion

was denied without an evidentiary hearing. Hudson appealed to this court, and counsel was appointed to represent him on appeal. We determined that Hudson's pleading could be fairly read to raise two postconviction claims of ineffective assistance of counsel. In the first claim, Hudson alleged that counsel was ineffective in failing to object to the manner in which the district court awarded credit for time served and in failing to preserve the alleged error and raise it on appeal. In the second claim, Hudson alleged that counsel was ineffective in failing to file the appropriate motion in the district court with respect to an alleged improper communication with the jury and in therefore failing to preserve the issue for appeal. We concluded that neither claim was procedurally barred because Hudson was represented by the same counsel at trial and on direct appeal. We further concluded that the files and records did not affirmatively show that Hudson was entitled to no postconviction relief on either claim and that the two claims should not have been denied without an evidentiary hearing. We therefore reversed the denial of Hudson's motion for postconviction relief without an evidentiary hearing and remanded the cause to the district court with directions to hold an evidentiary hearing on the two claims of ineffective assistance of counsel. *Hudson II*.

On remand, on February 16, 2006, Hudson filed a motion for leave to file an amended motion for postconviction relief. The amended motion included further allegations regarding the two claims of ineffective assistance of counsel noted in *Hudson II*. The amended petition also sought to add allegations which, if permitted, would raise additional claims. The proposed additional claims included allegations that trial counsel provided ineffective assistance in failing to present an alibi defense, failing to object to certain hearsay testimony, failing to request a preliminary hearing after the original charges were amended to first degree murder, failing to file a motion to recuse the trial judge on grounds of bias and prejudice, failing to challenge expert testimony presented by the State, and failing to raise all federal constitutional issues on direct appeal in order to preserve such issues for federal habeas corpus relief. Hudson also alleged that the prosecutor allowed false testimony to go uncorrected.

Before the court ruled on Hudson's motion for leave to amend, the State filed a partial motion to dismiss for failure to state a

claim. The State argued that Hudson was procedurally barred from amending the motion for postconviction relief to add claims not previously included and outside the mandate of this court. The State's motion was not directed at the two claims of ineffective assistance of counsel noted and remanded in *Hudson II*; instead, the State sought the dismissal of the additional claims which Hudson sought leave to assert.

A hearing was held on March 22, 2006. In an order filed July 11, the district court sustained in part and overruled in part Hudson's motion for leave to file an amended motion for postconviction relief. The district court permitted the amendments with respect to the two claims noted in *Hudson II*. However, the court overruled the motion with respect to Hudson's effort to amend the motion for postconviction relief to add additional claims. The July 11 order also states that the State's motion to dismiss the additional claims was granted. Hudson appeals the order filed July 11.

ASSIGNMENT OF ERROR

Hudson asserts that the district court erred in overruling his motion to amend his motion for postconviction relief to the extent he was denied leave to add additional claims.

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. *State v. Dunlap*, 271 Neb. 314, 710 N.W.2d 873 (2006).

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. *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005). 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. *State v. Vela*, 272 Neb. 287, 721 N.W.2d 631 (2006). The State argues that the July 11, 2006, order in this case is an order denying leave to amend and is not a final judgment or final, appealable order. We agree.

Because the district court's July 11, 2006, order from which this appeal is taken purported to rule on both Hudson's motion to amend his motion for postconviction relief as well as the State's

motion to dismiss Hudson's proposed additional claims, we must, as an initial matter, clarify the legal significance of the July 11 order. In this case, leave to amend to add additional claims was denied in the July 11 order, and therefore, the State's motion to dismiss such additional claims was not addressed to existing claims and was not warranted. Therefore, the portion of the court's July 11 order granting the State's motion to dismiss is a nullity. In view of the foregoing, we analyze this appeal as one from an order denying leave to file additional claims in a pending postconviction case, and, as explained below, we find jurisdiction is lacking.

[4] This postconviction case is brought under the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1995), and we note that under § 29-3002, an appeal may be taken from an order which sustains or overrules a motion for postconviction relief. Specifically, § 29-3002 addresses appeals in postconviction actions and provides in part, "An order sustaining or overruling a motion filed under sections 29-3001 to 29-3004 shall be deemed to be a final judgment, and an appeal may be taken from the district court as provided for in appeals in civil cases." We have held in postconviction cases that an appeal may be taken from an order granting an evidentiary hearing on some issues and denying a hearing on others. See, *State v. Harris*, 267 Neb. 771, 677 N.W.2d 147 (2004); *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998). An order denying an evidentiary hearing on a postconviction claim is effectively an order overruling a motion for postconviction relief as to that claim, and the order is therefore a "final judgment" as to such claim under § 29-3002. But an order overruling a motion for leave to amend to assert additional claims is not a ruling on the merits of the proposed claim and is not in substance an order overruling a motion for postconviction relief as to such claims; instead, it is an order precluding the assertion of additional claims rather than an order denying the claims themselves. We therefore conclude that an order ruling on a motion filed in a pending postconviction case seeking to amend the postconviction motion to assert additional claims is not a final judgment and is not appealable under § 29-3002.

[5] We further note that in cases outside the postconviction context, we have stated that an order overruling a motion for leave to amend a petition to assert a new cause of action is not ordinarily

a final, appealable order. *Bailey v. Lund-Ross Constructors Co.*, 265 Neb. 539, 657 N.W.2d 916 (2003); *Knoell Constr. Co., Inc. v. Hanson*, 208 Neb. 373, 303 N.W.2d 314 (1981). We apply the reasoning in these cases and conclude in the present case that although a postconviction action is a special proceeding, see *Harris, supra*, and *Silvers, supra*, the resolution of a motion to amend the postconviction motion to assert additional claims does not affect a substantial right and is not a final order under Neb. Rev. Stat. § 25-1902 (Reissue 1995).

The July 11, 2006, order that Hudson seeks to appeal was an order partially overruling Hudson's motion for leave to amend his motion for postconviction relief for the purpose of asserting additional claims. We conclude that the July 11 order in this case is not a "final judgment" under § 29-3002 and not a final, appealable order and that therefore, this court lacks jurisdiction to consider Hudson's appeal.

CONCLUSION

We conclude that the July 11, 2006, order denying leave to amend the postconviction motion from which Hudson seeks to appeal is not a "final judgment" under § 29-3002 and is not a final, appealable order. We, therefore, dismiss this appeal for lack of jurisdiction.

APPEAL DISMISSED.

IN RE INTEREST OF BRANDON M.,
A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, v.
BRANDON M., APPELLANT.

727 N.W.2d 230

Filed February 2, 2007. No. S-06-508.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.
2. **Juvenile Courts.** A juvenile court proceeding is not a prosecution for crime, but a special proceeding that serves as an ameliorative alternative to a criminal prosecution.
3. **Juvenile Courts: Restitution.** Because juvenile proceedings are not criminal proceedings, the requirements of Neb. Rev. Stat. §§ 29-2280 and 29-2281 (Reissue

1995) are inapplicable to an order of restitution entered pursuant to Neb. Rev. Stat. § 43-286(1)(a) (Reissue 2004).

4. ____: _____. Although strict rules of evidence do not apply at dispositional hearings in juvenile cases, the record must nevertheless support the court's action in imposing restitution.

Appeal from the Separate Juvenile Court of Douglas County: CHRISTOPHER KELLY, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Thomas C. Riley, Douglas County Public Defender, and Amy Stanosheck for appellants.

No appearance for appellee.

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

STEPHAN, J.

In this delinquency proceeding brought under the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 2004), Brandon M. appeals from that portion of a dispositional order entered by the separate juvenile court of Douglas County which required him to pay \$3,000 in restitution to the victim of the burglary he committed. We conclude that while restitution was appropriate, the record does not support the amount which Brandon was required to pay. Accordingly, we reverse in part, and remand for further proceedings.

FACTS

On December 28, 2005, a petition alleging that Brandon committed felony burglary was filed in juvenile court. Based on Brandon's plea admitting the offense, he was adjudicated a child described by § 43-247(2) on March 3, 2006.

At the dispositional hearing, the court received two exhibits: an abbreviated predisposition investigation report completed by a probation officer and a dispositional placement evaluation and recommendation completed by the Department of Health and Human Services, Office of Juvenile Services. The predisposition investigation report included a form filled out by the victim of the burglary and a letter written by the victim and her family. The victim was an 82-year-old neighbor who had hired Brandon to do

odd jobs. The victim wrote on the form that she had been reimbursed \$3,600 from her bank for a stolen check. In the accompanying letter, the victim stated that items taken from her were the check, \$360 in cash, a purse, her wedding and engagement rings, a wristwatch, a crown-shaped gemstone pin given to her as an engagement present in 1946, a blue butterfly-shaped pin, a string of Yamasaki pearls, and her piggy bank. The victim's letter stated the pearls were purchased in 1987 for \$290, but gave no value for the other items. The victim's daughter stated in the letter that she spent \$75 changing the locks on her mother's home after the burglary and that she purchased replacement wedding and engagement rings for her mother. No value for these replacement items was stated.

During the dispositional hearing, Brandon asked for an evidentiary hearing if the court decided to order restitution. The court did not directly address his request. Instead, the court asked Brandon where the victim's rings and jewelry were, and Brandon responded: "I didn't take any of that. I got caught at the scene, and the bag was still in the back that I was going to take, so they got all of that back, but the co-defendant that was with me took the checks and the rings."

After this exchange, the court noted: "The bank may have made this victim whole on the \$3,600 cash or whatever that was taken, but she's missing probably anywhere from five to \$10,000 in other items" In imposing restitution, the court stated:

You are to pay restitution in the amount of \$3,000. I plucked that, in a sense, out of the air, and I know that that gives us a good issue on appeal, if you want to appeal that portion, but I think that is a low ball — an extreme low ball figure, but I also don't know that you're capable of paying more than that. You will pay at a rate of \$150 per month until further order of the Court.

In addition to ordering restitution, the juvenile court imposed numerous terms and conditions upon Brandon, including that he reside in the home of his mother on intensive supervision probation, that he attend school, that he abstain from the use of illegal drugs or alcohol, that he not be in the company of anyone using drugs or alcohol, that he submit to random urinalysis testing, that he participate in and complete individual and family therapy, that

he complete 30 hours of community service, that he write a letter of apology to the victim, that he pay court costs, that he tour the Omaha Correctional Center and write a 500-word essay on his impressions, and that he have no contact with the victim.

Brandon timely filed this appeal contesting only the term and condition of restitution. The State waived its right to file a brief. We moved the case to our docket on our own motion based upon our statutory authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

Brandon assigns that the juvenile court erred in (1) denying his request for an evidentiary hearing to determine the actual damages sustained by the victim supported by evidence in the record and (2) ordering him to pay \$3,000 in restitution without considering his earning ability, employment status, financial resources, and family or other legal obligations.

STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. *In re Interest of Rebecka P.*, 266 Neb. 869, 669 N.W.2d 658 (2003); *In re Interest of Joshua R. et al.*, 265 Neb. 374, 657 N.W.2d 209 (2003).

ANALYSIS

As noted above, this appeal focuses solely upon that portion of the dispositional order dealing with restitution. 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. *State ex rel. Lemon v. Gale*, 272 Neb. 295, 721 N.W.2d 347 (2006); *Cole v. Isherwood*, 271 Neb. 684, 716 N.W.2d 36 (2006). Although his assignments of error broadly attack the juvenile court's order imposing restitution, in his brief, Brandon argues only that the juvenile court erred because the restitution order violated Neb. Rev. Stat. §§ 29-2280 and 29-2281 (Reissue 1995) and case law interpreting these statutes. See, *State v. Holecek*, 260 Neb. 976, 621 N.W.2d 100 (2000); *State v. Wells*, 257 Neb. 332, 598 N.W.2d 30 (1999); *State v. McLain*, 238 Neb. 225, 469

N.W.2d 539 (1991); *State v. Yost*, 235 Neb. 325, 455 N.W.2d 162 (1990); *State v. McGinnis*, 2 Neb. App. 77, 507 N.W.2d 46 (1993). We therefore initially address this argument.

The authority cited by Brandon clearly requires a sentencing court imposing restitution after a conviction to base the amount of the restitution on the actual damages sustained by the victim based on sworn evidence contained in the record. See *id.* The authority further requires a sentencing court imposing restitution after a conviction to consider the defendant's earning ability, employment status, financial resources, and family or other legal obligations. *Holecek, supra*; *Wells, supra*; *Yost, supra*. We agree with Brandon that these requirements are not met on the record before us.

[2] However, the order of restitution in this case was made at the dispositional phase of a juvenile proceeding. We have long recognized that a juvenile court proceeding is not a prosecution for crime, but a special proceeding that serves as an ameliorative alternative to a criminal prosecution. *In re Interest of Leo L.*, 258 Neb. 877, 606 N.W.2d 783 (2000); *In re Interest of Brandy M. et al.*, 250 Neb. 510, 550 N.W.2d 17 (1996). The purpose of our statutes relating to the handling of youthful offenders is the education, treatment, and rehabilitation of the child, rather than retributive punishment. *In re Interest of Brandy M. et al., supra*; *In re Interest of A.M.H.*, 233 Neb. 610, 447 N.W.2d 40 (1989). The emphasis on training and rehabilitation, rather than punishment, is underscored by the declaration that juvenile proceedings are civil, rather than criminal, in nature. *Id.*

[3] Because juvenile proceedings are not criminal proceedings, the order of restitution entered at the dispositional hearing was not imposed by a sentencing court after a conviction. As such, the requirements of §§ 29-2280 and 29-2281 are inapplicable, and we find Brandon's arguments to be without merit.

On the unique facts of this case, however, we do not limit our analysis to an examination of the error argued by Brandon. Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error. *Krumwiede v. Krumwiede*, 258 Neb. 785, 606 N.W.2d 778 (2000); *Hajenga v. Hajenga*, 257 Neb. 841, 601 N.W.2d 528 (1999). Plain error is error plainly evident from

the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004); *In re Interest of D.W.*, 249 Neb. 133, 542 N.W.2d 407 (1996).

[4] The Nebraska Juvenile Code authorizes a court to order “restitution of any property stolen or damaged” upon a juvenile as a term and condition of continued disposition if it is “in the interest of the juvenile’s reformation or rehabilitation.” § 43-286(1)(a). Generally, restitution encompasses the “[r]eturn or restoration of some specific thing to its rightful owner” or “[c]ompensation for loss.” Black’s Law Dictionary 1339 (8th ed. 2004). Based upon our review of the record, we conclude that requiring restitution was in the interest of Brandon’s reformation and rehabilitation. However, the amount of the restitution order is problematic. The juvenile court judge candidly admitted that his valuation of the missing items at \$5,000 to \$10,000 was “plucked . . . out of the air.” Although strict rules of evidence do not apply at dispositional hearings in juvenile cases, see *In re Interest of Rebecka P.*, 266 Neb. 869, 669 N.W.2d 658 (2003), and § 43-283, the record must nevertheless support the court’s action in imposing restitution. On the record before us, there is nothing to support the amount of restitution which Brandon was required to pay to the victim. We therefore conclude that the court erred in fixing the amount of restitution at \$3,000.

CONCLUSION

We affirm all portions of the dispositional order except the provision dealing with restitution. Because the record is insufficient to support the amount of restitution ordered by the separate juvenile court, we reverse that portion of the dispositional order and remand the cause for further proceedings.

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

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE
OF THE NEBRASKA SUPREME COURT, RELATOR, v.
LAVON STENNIS WILLIAMS, RESPONDENT.
727 N.W.2d 235

Filed February 2, 2007. No. S-06-629.

Original action. Judgment of disbarment.

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, Lavon Stennis Williams. As indicated below, the court accepts respondent's surrender of her license and enters an order of disbarment.

FACTS

Respondent was admitted to the practice of law in the State of Nebraska on September 25, 1991. At all times relevant hereto, respondent was engaged in the private practice of law in Nebraska.

On June 8, 2006, an application for the temporary suspension of respondent from the practice of law was filed by the chairperson of the Committee on Inquiry of the Second Disciplinary District of the Nebraska State Bar Association. A supplement to the application was filed by the chairperson of the Committee on Inquiry on June 12. Collectively, the application and supplemental application (the application) stated generally that a grievance had been filed against respondent and was under investigation by the Counsel for Discipline. The application stated that according to the grievance, respondent had misappropriated client funds in the total amount of approximately \$93,000. The application further stated that "respondent has engaged in and continues to engage in conduct that, if allowed to continue until final disposition of disciplinary proceedings, will cause serious damage to the public and to the members of the Nebraska State Bar Association."

On June 14, 2006, this court entered an order directing respondent to show cause why her license should not be temporarily suspended.

A copy of the show cause order was served on respondent, and respondent filed two separate documents in response to the show cause order. On June 28, this court determined that respondent had failed to show cause why her license should not be temporarily suspended and ordered respondent's license to practice law in the State of Nebraska temporarily suspended until further order of the court.

On September 26, 2006, formal charges were filed by the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, against respondent. The formal charges set forth one count that included charges that respondent had violated the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102(A)(1) (violating disciplinary rule), (3) (engaging in illegal conduct involving moral turpitude), (4) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), (5) (engaging in conduct that is prejudicial to administration of justice), and (6) (engaging in conduct that adversely reflects on respondent's fitness to practice law), and Canon 9, DR 9-102(A) and (B) (failing to preserve identity of funds and property belonging to client), as well as her oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 1997).

The formal charges generally alleged that in the fall of 2001, Robert H. Nelson hired respondent to assist him with certain estate planning matters, including the drafting of his will. Respondent prepared Robert's will. In the executed will, Robert named his daughter, Robin Nelson, as his sole beneficiary. Robert also nominated respondent to serve as personal representative of his estate, without bond, and he authorized respondent to employ herself as the attorney for the administration of the estate for a fee not to exceed \$3,500. Robert died on February 7, 2002.

The formal charges alleged that respondent received a total of \$233,584.23 for the benefit of Robert and his estate. On August 30, 2002, respondent opened an estate account, into which she deposited \$93,539.59. As of December 2004, the balance remaining in the estate account was less than \$100. Respondent was the only person authorized to make withdrawals from the account.

The formal charges further alleged that despite repeated requests from Robin for an accounting of the estate and a distribution of her inheritance, respondent failed to provide the accounting

or make any distributions to Robin. In October and November 2005, respondent made certain representations to Robin regarding sending distributions from the estate to Robin, but Robin did not receive any funds from the estate.

According to the formal charges, on November 28, 2005, Robin filed a grievance against respondent with relator. Notice of the grievance was sent by relator to respondent in a letter directing respondent to file an appropriate written response. On December 7, respondent spoke with relator and stated that all of the money from the estate had been given to Robin. Respondent stated that by December 14, she would provide to relator the bank statements showing where the money was maintained and how it was paid to Robin. Respondent did not provide to relator the bank statements. In a letter dated January 5, 2006, respondent offered to pay Robin an unspecified amount of money if Robin would withdraw her grievance.

The formal charges further alleged that on May 15, 2006, the county court for Douglas County appointed a special administrator to investigate respondent's handling of Robert's estate. On June 6, relator received from the special administrator photocopies of documents indicating that from the period of August 30, 2002, to April 23, 2004, respondent had withdrawn a total of \$93,590 from the estate account, and of those withdrawn funds, over \$50,000 had been withdrawn by checks made payable to respondent.

On November 1, 2006, respondent filed her answer to the formal charges. In her answer, respondent disputed certain of the allegations in the formal charges and raised issues of fact. On November 20, this court appointed a referee to conduct an evidentiary hearing on the formal charges.

On December 22, 2006, respondent filed with this court a voluntary surrender of license, voluntarily surrendering her license to practice law in the State of Nebraska. In her voluntary surrender of license, respondent stated that she knowingly did not challenge or contest the truth of the allegations in the formal charges. In addition to surrendering her license, respondent voluntarily consented to the entry of an order of disbarment and waived her 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 her license to practice law and knowingly does not contest the truth of the allegations made against her in the formal charges. Further, respondent has waived all proceedings against her 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 she knowingly does not challenge or contest the truth of the allegations in the formal charges filed against her and that such allegations, if true, constitute a violation of DR 1-102(A)(1), (3), (4), (5), and (6), and DR 9-102(A) and (B), as well as her oath of office as an attorney, § 7-104. The court accepts respondent's surrender of her license to practice law, finds that respondent should be disbarred, and hereby orders her disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith 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. 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.

HEAVICAN, C.J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE
OF THE NEBRASKA SUPREME COURT, RELATOR,
v. JOHN G. TAYLOR, RESPONDENT.
727 N.W.2d 229

Filed February 2, 2007. No. S-06-1330.

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, John G. Taylor. 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 28, 1995. At all times relevant hereto, respondent was engaged in the private practice of law in Nebraska.

On November 27, 2006, an application for the temporary suspension of respondent from the practice of law was filed by the chairperson of the Committee on Inquiry of the First Disciplinary District. The application stated, in effect, that respondent was overdrawn on his attorney trust account in the amount of \$4,340.55 and that respondent had in the past misappropriated client funds for his personal use. The application further stated, in effect, that respondent "is engaging in conduct that, if allowed to continue until final disposition of disciplinary proceedings, will cause serious damage to the public and to the legal profession."

On January 10, 2007, respondent filed with this court a voluntary surrender of license, voluntarily surrendering his license to practice law in the State of Nebraska. In his voluntary surrender of license, respondent knowingly does not challenge or contest the truth of the allegations in the application for temporary suspension to the effect that he was overdrawn on his attorney trust account and that he had misappropriated client funds. 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. Respondent's voluntary surrender was accompanied by his bar card and an indication that he had notified his clients of his voluntary surrender.

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 challenge or contest the truth of the allegations made against him in the application for temporary suspension. 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 challenge or contest the truth of the allegations in the application for temporary suspension to the effect that he was overdrawn on his attorney trust account and that he had misappropriated client funds. 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 all terms of Neb. Ct. R. of Discipline 16 (rev. 2004), including rule 16(A)(4), which requires respondent to notify in writing all members and nonresident attorneys involved in pending legal or other matters being handled by respondent of

his altered status, and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1997) and Neb. Ct. R. of Discipline 10(P) (rev. 2005) and 23 (rev. 2001) within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF DISBARMENT.

IN RE TRUST OF MONROE D. ROSENBERG, DECEASED.
MARILYN J. TIPP, APPELLANT AND CROSS-APPELLEE, V.
WILLIAM L. REINBRECHT, SUCCESSOR TRUSTEE AND PERSONAL
REPRESENTATIVE, APPELLEE AND CROSS-APPELLEE, AND
MAYNARD ROSENBERG, APPELLEE AND CROSS-APPELLANT.
727 N.W.2d 430

Filed February 9, 2007. No. S-05-757.

1. **Trusts: Equity: Appeal and Error.** Appeals involving the administration of a trust are equity matters and are reviewable in an appellate court de novo on the record.
2. **Decedents' Estates: Appeal and Error.** In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court.
3. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. ____: _____. In instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record.
5. ____: _____. An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.
6. **Attorney Fees: Appeal and Error.** On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.
7. ____: _____. When an attorney fee is authorized, the amount of the fee is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.
8. **Trusts.** Whether a trust has been created is a question of fact. The interpretation of the words of such a trust is a question of law.
9. **Wills: Joint Tenancy.** Property owned in joint tenancy passes by reason of the nature of the title to the surviving joint tenant upon the death of the other and does not pass by virtue of the provisions of the will of the first joint tenant to die.

10. **Appeal and Error.** In the absence of plain error, an appellate court considers only claimed errors which are both assigned and discussed.
11. **Decedents' Estates.** The owner retains sole ownership of an account having a payable-on-death designation, and only the owner may withdraw the proceeds or change the named beneficiary during the owner's lifetime.
12. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
13. **Trial: Expert Witnesses: Appeal and Error.** The admission of expert testimony is ordinarily within the trial court's discretion, and its ruling will be upheld absent an abuse of discretion.
14. **Decedents' Estates: Attorney Fees: Costs.** Attorney fees and expenses will ordinarily be allowed a trustee where they were incurred for the benefit of the estate.
15. **Trusts: Attorney Fees: Costs.** In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.
16. ____: ____: _____. Where a trustee's defense of his or her acts is substantially successful, the trustee is ordinarily entitled to recover the reasonable costs necessarily incurred in preparing his or her final account and in defending it against objections.

Appeal from the County Court for Douglas County: LAWRENCE BARRETT, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Jerry W. Katskee and Melvin R. Katskee, of Katskee, Henatsch & Suing, for appellant.

Howard N. Epstein and Steven J. Riekes, of Marks, Clare & Richards, L.L.C., for appellee Maynard Rosenberg.

William L. Reinbrecht, of Car & Reinbrecht, P.C., L.L.O., pro se.

HEAVICAN, C.J., WRIGHT, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

In 1984, Monroe D. Rosenberg executed a last will and testament and a trust agreement. He died on December 15, 2001, survived by his wife, Helen Brown Rosenberg, and his three adult children from a previous marriage: Marilyn Tipp, Maynard Rosenberg, and Howard Rosenberg. This case involves a dispute

among the three children regarding Tipp's handling of various assets in her capacity as successor trustee. The principal issue is whether, upon Monroe's death, certain property passed to Tipp in her individual capacity, as she contends, or in her capacity as trustee, as claimed by Maynard and Howard. In trust administration proceedings initiated by Maynard, the county court for Douglas County removed Tipp as trustee, appointed a successor trustee, and determined that certain life insurance proceeds, accounts payable on death to Tipp, and assets held jointly by Monroe and Tipp became trust assets upon Monroe's death. Tipp perfected this appeal, and Maynard has cross-appealed. We reverse the determination as to the ownership of the disputed property, but affirm in all other respects.

I. BACKGROUND

1. EXECUTION OF WILL AND TRUST AGREEMENT

In the trust agreement dated July 25, 1984, Monroe named himself as both grantor and trustee, and he executed the agreement in both capacities. The trust agreement named Tipp as successor trustee, but she did not sign the document. The trust agreement included the following provisions, which are pertinent to the issues presented in this appeal.

ARTICLE I

TRUST ESTATE

1. Sources of Property. Promptly after the execution of this agreement, the Grantor intends to designate the Trustee as the beneficiary of certain policies of insurance upon the life of the Grantor. The Grantor at any time also may name the Trustee as the beneficiary of additional policies of insurance upon the life of the Grantor or upon the lives of others, may have various death benefits made payable to the Trustee, and may transfer property to the trust during the Grantor's lifetime and by the Grantor's will. The Trustee at any time also may receive property of any kind from persons other than the Grantor.

2. Meaning of "Trust Estate". The life insurance proceeds and any other property which the Trustee at any time may receive or acquire for the purposes of the trusts created by this agreement shall constitute and for convenient reference

collectively are referred to in this agreement as the “trust estate”

. . . .

ARTICLE III
LIFE INSURANCE POLICIES

. . . .

3. Collection of Proceeds. Upon the death of the insured, the Trustee shall use its best efforts to collect the proceeds of any policy of life insurance of which the Trustee is the beneficiary and of which the Trustee has knowledge

. . . .

ARTICLE VI
DIVISION UPON GRANTOR’S DEATH

1. Establishment of Family Trust. Subject to the provisions of Article V, upon Grantor’s death, the Trustee shall transfer the trust estate as then constituted (including but not limited to any insurance proceeds, death benefits, or property receivable by the Trustee by reason of the Grantor’s death and any property receivable by the Trustee pursuant to the will of the Grantor) into a separate trust, to be known as the “Family Trust”

The trust agreement also provided that the assets of the family trust were to be divided equally among the children living at the time of Monroe’s death and the issue of any deceased child. The stated objective of the family trust was to ensure that “the Grantor’s issue will enjoy the benefits of and ultimately receive a substantial portion of the Grantor’s estate.”

In his will executed on August 3, 1984, Monroe described himself as a widower with three children from a former marriage and stated that he had intentionally made no provision in the will “for any children of mine nor for HELEN BROWN of Las Vegas, Nevada, who I am presently contemplating marrying.” The will provided that Monroe could prepare a separate written statement or list for the purpose of disposing of various items of tangible personal property and that if he did so, the listed items were devised to the listed devisees who survived him by more than 60 days. The will further provided: “I devise all the residue of my estate, wherever situated, whether real or personal, tangible or intangible, together with all insurance policies relating thereto,

to the trustee under that certain trust agreement dated July 25, 1984 wherein I am referred to as Grantor.” The will named Tipp as personal representative of Monroe’s estate. On March 7, 1985, Monroe executed a handwritten statement in which he devised “all tangible items of personal property including, without limitation, all household goods, furniture and personal effects” to Tipp.

2. PROPERTY HELD PRIOR TO DEATH

After executing the will and trust agreement, Monroe married Helen. In anticipation of their marriage, they executed an agreement that provided each would retain their separate assets. They resided in one-half of a duplex in Omaha which Monroe owned as a tenant-in-common with Louie and Betty Fedman, who resided in the other half of the structure. There was a written agreement whereby the property was not to be sold until after Monroe and the Fedmans were deceased. At the time of his death, Monroe’s original undivided one-half interest in the property was held by the trust. Both Louie Fedman and Helen survived Monroe and continued living in their respective portions of the duplex after his death. Helen moved from the residence at the end of January 2002, and Louie Fedman continued to reside in his portion of the duplex.

During Monroe’s lifetime, he had certain property titled in the name of the Monroe D. Rosenberg Trust. This included his interest in the duplex and cash and security accounts at several brokerage firms. Other property was held in joint accounts. This included a checking account at U.S. Bank, held in the names of Monroe, Helen, and Tipp, and Omaha Public Power District bonds and U.S. Treasury notes, held in the names of Monroe and Tipp. Additional accounts at First Federal Lincoln Bank and Nebraska State Bank were held in Monroe’s name, with Tipp designated as the payable-on-death (POD) beneficiary, and accounts at Pentagon Federal Credit Union were held in Monroe’s name, with Tipp designated as the beneficiary. Monroe also had a life insurance policy issued by MetLife in which Tipp was named as beneficiary.

Several days prior to his death, Monroe asked Howard to bring him his checkbook because he wanted to write a \$10,000 check to Helen. Howard obtained the checkbook and wrote the check

payable to Helen, as Monroe had directed. Monroe then signed the check. The check was drawn on the First Federal Lincoln Bank account, on which Tipp was designated the POD beneficiary.

3. ACTIONS TAKEN BY TIPP AS TRUSTEE

After Monroe's death, Tipp attempted to marshal Monroe's nonprobate assets. With the assistance of financial consultants, Tipp segregated the assets held in the name of the trust from those held jointly or POD to her. She transferred the assets held in various accounts in the name of the trust to a single brokerage account opened in her name as trustee for the Monroe D. Rosenberg Trust. She then directed the trust assets to be divided equally into three separate accounts, each individually titled in the names of Tipp, Maynard, and Howard. Maynard and Howard were notified of the existence of these accounts. Tipp transferred the remaining assets, which she deemed not to be trust property, to an account in her name at another brokerage company.

After Helen vacated the portion of the duplex where she and Monroe had resided, Tipp found a tenant to reside in the space for 1 year rent free in exchange for cleaning, repairing, and performing other services.

In April 2002, Tipp transferred \$10,000 from the trust account to her personal account. She did so because the check in that amount which Monroe had written to Helen shortly before his death was drawn on an account which was payable to Tipp upon Monroe's death. Tipp reasoned that Monroe was heavily medicated at the time he wrote the check, that he had not indicated which account he wished to use to make the gift to Helen, and that she "reimbursed" herself from the trust account so that she and her brothers would share the expense equally from their inheritance, as she thought Monroe would have intended.

4. PROCEEDINGS IN COUNTY COURT

In April 2002, Maynard initiated trust administration proceedings in county court pursuant to Neb. Rev. Stat. § 30-2806 (Reissue 1995) (repealed by 2003 Neb. Laws, L.B. 130, § 143, operative Jan. 1, 2005). Maynard sought to have Tipp removed as the successor trustee and sought a determination of the proper administration and distribution of trust assets. After conducting evidentiary hearings on November 22 and December 30, the

county court removed Tipp as successor trustee and replaced her with William L. Reinbrecht in an order entered on December 31. Tipp did not immediately appeal this order.

On March 13, 2003, Reinbrecht filed an inventory of assets that Monroe owned at this death. On April 7, he filed a “Petition for Instruction and Application for Review of Fees,” in which he requested “guidance” from the court regarding several issues, including whether the various assets Tipp acquired at Monroe’s death should be treated as trust assets and returned to the trust. Also on April 7, Reinbrecht filed an application for approval of his own fees and costs in the amount of \$11,355.12. Finally, Reinbrecht filed a report in which he made numerous recommendations to the court. Those recommendations addressed many of the issues raised by Reinbrecht in his April 7 “petition for instruction.”

Tipp filed a resistance to Reinbrecht’s report, in which she took exception to most of his recommendations. Maynard and Howard also filed an “application for instruction” in which they posed several questions to the court and advanced various arguments. In particular, Maynard and Howard asked whether Tipp should be required to pay the legal fees they incurred in bringing the trust administration proceedings. Tipp filed a resistance, generally arguing against Maynard and Howard’s position.

The county court held a hearing on April 28, 2003. No witnesses testified, and only one exhibit was offered and received into evidence. The parties presented brief arguments, and the court announced its findings after having “reviewed all the filings.” The court’s findings were reduced to a written order, prepared by Reinbrecht, entered on May 1. The order provided, among other things, that Tipp should not be surcharged as trustee for her management of the duplex, that Tipp should repay the trust estate the \$10,000 she paid herself from trust funds, that Tipp should return the MetLife insurance proceeds, bank accounts, bonds, and treasury notes to the trust, and that the trust estate should pay the attorney fees Tipp incurred while she was trustee. The court ordered that the trust pay Reinbrecht’s fees but denied the application of Maynard and Howard for payment of their attorney fees by the trust. Tipp subsequently appealed.

In her appeal, Tipp assigned that the county court erred in removing her as trustee in its order of December 31, 2002. We

held that Tipp's failure to timely appeal that order precluded our consideration of that issue. *In re Trust of Rosenberg*, 269 Neb. 310, 693 N.W.2d 500 (2005) (*Rosenberg I*). Tipp also assigned error with respect to the order entered on May 1, 2003, following the hearing held on April 28. We concluded that the county court failed to hold a formal evidentiary hearing prior to entry of the May 1 order, and we therefore held the order was not supported by competent evidence. We vacated, and remanded to the county court with directions to hold an evidentiary hearing. *Id.*

On remand, the county court held an evidentiary hearing, at which the parties stipulated that all testimony and exhibits received during the hearings held on November 22 and December 30, 2002, could be received with respect to the remaining unresolved issues. Tipp attempted to present expert testimony from Thomas M. Moore regarding her handling of the trust assets. The court sustained Maynard's objection but permitted Moore's testimony in the form of an offer of proof. Reinbrecht testified generally as to how he had handled the assets of the trust while he was trustee. In a separate written order, the court excluded Moore's testimony. An exhibit itemizing the attorney fees claimed by Maynard and Howard was offered and received.

In an order entered on May 24, 2005, the county court resolved the issues in the same manner as in its prior order of May 1, 2003. On the same day, the court entered a separate order denying Tipp's motion to remove Reinbrecht as successor trustee. Tipp perfected this appeal from both orders. We moved the appeal 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

Tipp assigns, restated and renumbered, that the county court erred in (1) finding that the proceeds which Tipp received and retained as the beneficiary of the MetLife insurance policy were assets of the trust and ordering her to reimburse the trust estate in that amount; (2) finding that the bonds, treasury notes, and accounts held jointly by Tipp and Monroe at the time of Monroe's death and retained by Tipp were assets of the trust and ordering Tipp to reimburse the trust estate; (3) finding that the accounts

owned by Monroe and payable or transferable to Tipp on his death and retained by Tipp were assets of the trust and ordering Tipp to reimburse the trust estate for such property; (4) ordering Tipp to reimburse the trust estate for the \$10,000 transfer she made as “reimbursement” for the gift to Helen; (5) failing to remove Reinbrecht as successor trustee; (6) approving Reinbrecht’s fees; and (7) excluding the proffered expert testimony of Moore.

On cross-appeal, Maynard assigns, restated and renumbered, that the county court erred in (1) ordering that the attorney fees Tipp incurred while she was acting as trustee were payable from the trust, (2) denying his application for attorney fees to be paid from the trust, and (3) not surcharging Tipp for alleged mismanagement of the trust.

III. STANDARD OF REVIEW

[1] Appeals involving the administration of a trust are equity matters and are reviewable in an appellate court de novo on the record. *In re R.B. Plummer Memorial Loan Fund Trust*, 266 Neb. 1, 661 N.W.2d 307 (2003).

[2-5] In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. *In re Trust Created by Inman*, 269 Neb. 376, 693 N.W.2d 514 (2005); *In re Trust of Rosenberg*, 269 Neb. 310, 693 N.W.2d 500 (2005). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.* In instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record. *Stover v. County of Lancaster*, 271 Neb. 107, 710 N.W.2d 84 (2006). An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Schwartz v. Nebraska Liq. Cont. Comm.*, 271 Neb. 346, 711 N.W.2d 556 (2006).

[6,7] On appeal, a trial court’s decision awarding or denying attorney fees will be upheld absent an abuse of discretion. *Rapp v. Rapp*, 252 Neb. 341, 562 N.W.2d 359 (1997). When an attorney

fee is authorized, the amount of the fee is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion. *Id.*

IV. ANALYSIS

1. TIPP'S APPEAL

(a) Disputed Property

(i) *Life Insurance Proceeds*

Tipp contends that the county court erred in ordering her to return to the trust estate all of the proceeds received by her from the \$25,000 life insurance policy on the life of Monroe held with MetLife. The policy itself is not in the record. Attached to Tipp's annual accounting, filed with the court on December 30, 2002, and received in evidence, is a report prepared by a certified fraud examiner who analyzed the assets held by Monroe at the time of his death. The report states that Tipp was designated as the beneficiary of a MetLife insurance policy, that benefits were paid to her in the amount of \$23,060.49 on January 22, 2002, and that these funds were subsequently deposited by Tipp in one of her accounts. In a report filed April 7, 2003, Reinbrecht states that Tipp "was paid \$25,000.00 as the beneficiary of a life insurance policy from MetLife on the life of Monroe D. Rosenberg."

[8] Generally, life insurance benefits are a type of nonprobate transfer on death which is nontestamentary. See, Neb. Rev. Stat. § 30-2715 (Reissue 1995); *In re Estate of Reynolds*, 131 Neb. 557, 268 N.W. 480 (1936). The issue here is whether a trust was created with respect to the life insurance proceeds. Under the Nebraska Uniform Trust Code (NUTC), "[a] trust may be created by: (1) transfer of property to another person as trustee during the settlor's lifetime or by will or *other disposition taking effect upon the settlor's death.*" (Emphasis supplied.) Neb. Rev. Stat. § 30-3827 (Cum. Supp. 2006). With regard to life insurance, we have generally recognized that a trust may be created in the death benefits. For instance, the insured may create a life insurance trust, where the trustee is named in the policy to hold the death benefits in trust for the benefit of others. See, *In re Estate of Reynolds*, *supra*; 46A C.J.S. *Insurance* § 1423 (1993). See, also, 4 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* 3d

§ 58:8 (1996). Likewise, a policy beneficiary may expressly agree to hold the death benefits as trustee for the benefit of others. See *Estate of Devries v. Hawkins*, 70 Neb. 656, 97 N.W. 792 (1903). Whether a trust has been created is a question of fact. The interpretation of the words of such a trust is a question of law. *In re Estate of West*, 252 Neb. 166, 560 N.W.2d 810 (1997).

The trust agreement provides:

Promptly after the execution of this agreement, the Grantor intends to designate the Trustee as the beneficiary of certain policies of insurance upon the life of the Grantor. The Grantor at any time also may name the Trustee as the beneficiary of additional policies of insurance upon the life of the Grantor or upon the lives of others, may have various death benefits made payable to the Trustee, and may transfer property to the trust during the Grantor's lifetime and by the Grantor's will.

The trust agreement does not specifically refer to the MetLife policy, and the record does not reflect whether the policy was even in existence when the trust agreement was executed. There is no evidence that Monroe ever designated the trust or anyone acting in the representative capacity as trustee as the beneficiary of the policy. The record includes an inventory of Monroe's estate filed by Reinbrecht indicating that there was no insurance payable to the estate.

The trust agreement reflects Monroe's objective to ensure that his "issue will enjoy the benefits of and ultimately receive a substantial portion of the Grantor's estate." The agreement provides that upon Monroe's death, trust assets were to be distributed equally to his children and their issue. However, it is apparent from the record that during his lifetime, Monroe placed some but not all of his assets in the trust. He clearly could have designated "the Trustee" as the beneficiary of the MetLife policy, but there is no evidence that he did so. Tipp's obligation upon Monroe's death was to "transfer the trust estate as then constituted" to a separate "Family Trust" to be administered in accordance with the terms of the trust agreement. The "trust estate" is defined in the agreement as "[t]he life insurance proceeds and any other property which the Trustee at any time may receive or acquire *for the purposes of the trusts created by this agreement . . .*" (Emphasis

supplied.) We find nothing in the record reflecting a declaration by Monroe that Tipp was to hold the life insurance benefits as trustee. See § 30-3827(2). There is no competent evidence upon which to conclude that the life insurance benefits paid to Tipp were a part of the “trust estate” as defined in the trust agreement, and the county court therefore erred in ordering Tipp to pay the proceeds to Monroe’s estate.

(ii) Jointly Held Property

Reinbrecht’s report states that Monroe had owned certain property jointly with Tipp, including Omaha Public Power District bonds and certain U.S. Treasury notes. The court ordered that Tipp pay the proceeds of these instruments to the estate. The actual bonds and notes are not in the record, but the parties apparently do not dispute that these assets were jointly held as indicated in Reinbrecht’s report.

[9] Neb. Rev. Stat. § 30-2723(a) (Reissue 1995) provides in pertinent part that “on death of a party sums on deposit in a multiple-party account belong to the surviving party or parties.” As to jointly held property not subject to this provision, the common-law rule is that property owned in joint tenancy passes by reason of the nature of the title to the surviving joint tenant upon the death of the other and does not pass by virtue of the provisions of the will of the first joint tenant to die. *Norwest Bank Neb. v. Katzberg*, 266 Neb. 19, 661 N.W.2d 701 (2003); *Heinold v. Siecke*, 257 Neb. 413, 598 N.W.2d 58 (1999).

Based on these principles, the bonds and notes passed to Tipp immediately upon Monroe’s death and did not become a part of his residuary estate. The contested question is whether Tipp took title in her individual capacity, or as trustee. Unless Tipp acquired the assets “for the purposes of the trusts” created by Monroe, they are not a part of the “trust estate” as defined in the trust agreement. Here, there is no evidence that Tipp acquired the bonds and notes in question for the purposes of the trust, i.e., in her capacity as trustee. Indeed, Howard testified that Monroe had, in several conversations, expressed his belief that Tipp should receive “additional monies outside of . . . an equal split” in part because of “her good works as a daughter” and to compensate her for serving as trustee. There is no competent evidence upon which to conclude

that the assets held jointly in the names of Monroe and Tipp were intended by Monroe to be a part of the trust estate upon his death, and the county court therefore erred in ordering Tipp to pay the proceeds of these bonds and notes to the trust estate.

Reinbrecht's report further identifies a joint account at U.S. Bank in the names of Monroe, Helen, and Tipp. The court ordered Tipp to pay the proceeds of this account to Helen, as Monroe's surviving spouse. In her brief, Tipp concedes that "Helen Rosenberg should receive the entire amount held in that account pursuant to the Successor Trustee's conclusions at page 15 of his Report. In fact, Helen Rosenberg took the proceeds and paid some remaining bills of the marriage." Brief for appellant at 28. Based on this concession, we conclude that the county court did not err in requiring Tipp to pay the proceeds of this account to Helen, as she represents that she has already done.

(iii) Payable-on-Death Accounts

Reinbrecht's report identifies accounts at First Federal Lincoln Bank and Nebraska State Bank which were payable to Tipp upon Monroe's death. The record includes the customer agreement for the First Federal Lincoln Bank account dated October 2, 2000, identifying Monroe as the "Payable on Death Party" and Tipp as the "Payable on Death Designee." There are no account records for the Nebraska State Bank account, but the parties do not dispute Reinbrecht's characterization of both accounts as bearing a POD designation. The county court ordered Tipp to pay the proceeds of these accounts to the estate.

Under Nebraska law of nonprobate transfers, an "account" is defined as "a contract of deposit between a depositor and a financial institution" and includes checking accounts and certificates of deposit. Neb. Rev. Stat. § 30-2716(1) (Reissue 1995). Such accounts may have a POD designation. Neb. Rev. Stat. § 30-2718(a) (Reissue 1995). When an account bears a POD designation, "[o]n death of the sole party . . . sums on deposit belong to the surviving beneficiary . . ." § 30-2723(b)(2). "A right of survivorship arising from . . . a POD designation . . . may not be altered by will." Neb. Rev. Stat. § 30-2724(b) (Reissue 1995).

While the trust agreement provided that Monroe, as grantor, "may have various death benefits made payable to the Trustee,"

it did not require that he do so. He was free to make Tipp the POD designee in her individual capacity. The customer agreement for the First Federal Lincoln Bank account identifies Tipp by name with no reference to her representative capacity as successor trustee. There is no evidence that the POD designation on the Nebraska State Bank account identified Tipp as the POD designee in her representative capacity as trustee. We conclude that there is no competent evidence upon which to find that the assets held in the two POD accounts were intended by Monroe to be a part of the trust estate upon his death, and the county court therefore erred in ordering Tipp to pay the proceeds of these accounts to the estate.

(iv) *Beneficiary Accounts*

In her brief, Tipp argues that the county court erred in requiring her to pay over to the trust the amounts she received upon Monroe's death as beneficiary of accounts at Pentagon Federal Credit Union. However, she did not specifically assign error with respect to this argument. Maynard contends that this precludes our consideration of this issue under the principle that in the absence of plain error, an appellate court considers only claimed errors which are both assigned and discussed. *In re Petition of SID No. 1*, 270 Neb. 856, 708 N.W.2d 809 (2006); *State v. Carter*, 255 Neb. 591, 586 N.W.2d 818 (1998). We disagree.

Initially, we note that the record is ambiguous as to the exact status of the accounts held at Pentagon Federal Credit Union. Some evidence suggests that the accounts were jointly held by Monroe and Tipp, while other evidence suggests that the accounts were POD accounts to Tipp. In any event, the status of these accounts does not preclude our resolution of this issue. Tipp's other assignments of error fairly raise issues of whether the county court erred in ordering that jointly held property and POD accounts be included in the trust estate. On the facts of this case, we consider the issue with respect to the accounts at Pentagon Federal Credit Union to be encompassed in those assignments of error. We therefore conclude, for the same reasons we articulated for the jointly held property and the POD accounts, that the county court erred in ordering Tipp to pay the proceeds of the accounts held at Pentagon Federal Credit Union to the trust estate.

(v) *Tangible Personal Property*

[10] Tipp also argues in her brief that the county court erred in requiring her to return to the trust the tangible personal property which she contends was bequeathed to her by a separate written statement as contemplated in Monroe's will. However, she did not specifically assign error with respect to this argument. Maynard contends that this precludes our consideration of this issue under the principle that in the absence of plain error, an appellate court considers only claimed errors which are both assigned and discussed. *In re Petition of SID No. 1, supra*; *State v. Carter, supra*. We agree. None of Tipp's assignments of error raise any issue with respect to tangible personal property, and we therefore do not address her argument on that subject.

(b) Reimbursement of Monroe's Gift to Helen

[11] Monroe's \$10,000 check payable to Helen, written days before his death, was drawn on the First Federal Lincoln Bank account which was POD to Tipp. Under Nebraska law, "[a] beneficiary in an account having a POD designation has no right to sums on deposit during the lifetime of any party." Neb. Rev. Stat. § 30-2722(c) (Reissue 1995). The owner retains sole ownership, and only the owner may withdraw the proceeds or change the named beneficiary during the owner's lifetime. *Crosby v. Luehrs*, 266 Neb. 827, 669 N.W.2d 635 (2003). Thus, Monroe's act of making a gift from a POD account created no right of reimbursement in Tipp, the POD beneficiary, after Monroe's death. The county court did not err in ordering Tipp to repay the \$10,000 reimbursement she made to herself from the assets of the trust.

(c) Failure to Remove Reinbrecht as Successor Trustee

Tipp contends that the county court erred in not removing Reinbrecht and replacing him with a successor trustee "who is disinterested in the outcome and neutral as to the interests of the various beneficiaries." Brief for appellant at 40. Under the NUTC, "[i]f a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests." Neb. Rev. Stat. § 30-3868 (Cum. Supp. 2006). As we noted in *Rosenberg I*, while this case began before the NUTC

became operative, we can apply this law unless the application “would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties.” Neb. Rev. Stat. § 30-38,110(a)(3) (Cum. Supp. 2006). Tipp relies on pre-NUTC case law generally holding that trustees should be impartial between all beneficiaries. See, *Burnham v. Bennison*, 126 Neb. 312, 253 N.W. 88 (1934); *Northern Trust Co. v. Heuer*, 202 Ill. App. 3d 1066, 560 N.E.2d 961, 148 Ill. Dec. 364 (1990); *Matter of Duke*, 305 N.J. Super. 408, 702 A.2d 1008 (1995). In essence, Tipp’s argument is equivalent to the law codified in the NUTC, specifically at § 30-3868.

Furthermore, under the Nebraska Uniform Prudent Investor Act, “[i]f a trust has two or more beneficiaries, the trustee shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries.” Neb. Rev. Stat. § 8-2207 (Reissue 1997). While § 8-2207 has been repealed, it was repealed by the same legislative bill that enacted § 30-3868. See 2003 Neb. Laws, L.B. 130, §§ 68 and 143, operative Jan. 1, 2005. At all times relevant to this case, the trustee had a statutory duty of impartiality, either under the Nebraska Uniform Prudent Investor Act or the NUTC. Therefore, application of the NUTC will not substantially prejudice the rights of Tipp and should apply.

Tipp does not point to any evidence indicating that Reinbrecht has violated his duty of impartiality with respect to the three trust beneficiaries, and we find none in our review of the record. The record indicates Reinbrecht has diligently attempted to manage the assets of the trust. There is no indication, nor does Tipp argue, that Reinbrecht has or will divide the trust assets in any other way than equally between Tipp, Maynard, and Howard. Tipp’s disagreement with Reinbrecht arises from his efforts to marshal assets into the trust that Tipp believes belong to her personally. While we agree with most of Tipp’s arguments in this regard, as noted above, this does not lead to a conclusion that Reinbrecht violated his duty of impartiality in arguing to the contrary. Reinbrecht owes no duty of impartiality to Tipp in her individual capacity, only as a cobeneficiary of the trust. We conclude that there is competent evidence to support the decision of the county court to deny Tipp’s motion to remove Reinbrecht as trustee.

(d) Approval of Reinbrecht's Fees

Tipp assigns that the county court erred in approving the payment for services rendered by Reinbrecht as trustee and personal representative from the estate. We review this equity question pertaining to trust administration de novo on the record. See *In re R.B. Plummer Memorial Loan Fund Trust*, 266 Neb. 1, 661 N.W.2d 307 (2003). Based upon such review, we find no error in the approval of Reinbrecht's fees.

(e) Exclusion of Moore's Testimony

[12,13] Tipp argues that the county court erred in excluding the testimony of Moore, her designated expert witness, at the May 2005 hearing. In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *Roth v. Wiese*, 271 Neb. 750, 716 N.W.2d 419 (2006). The admission of expert testimony is ordinarily within the trial court's discretion, and its ruling will be upheld absent an abuse of discretion. *Ford v. Estate of Clinton*, 265 Neb. 285, 656 N.W.2d 606 (2003).

Tipp had designated Moore an expert witness based on his background as a long-time trust administrator and head of a commercial trust department. Tipp stated that Moore was prepared to testify how he, as a commercial trust officer, would have handled Monroe's nonprobate assets had they come into his possession. Maynard objected to Moore's testimony, claiming that his testimony would not address factual issues that would assist the trier of fact and that he was not qualified as an expert due to his absence from trust administration. The court sustained the objection but allowed Moore to testify as an offer of proof. In a written order, the court excluded Moore's testimony, finding:

Moore's testimony will not be helpful to the trier of fact because it consists only of an opinion which is nothing more than an expression of how the Court should decide this case, he did not review Nebraska law, and has not kept up to date and knowledgeable about the law of this case since 1994, and his testimony cannot be allowed because it is expert testimony concerning a question of law, and will concern the application of law in determining how the disputed

assets should be distributed to the heirs and beneficiaries of [Monroe]. That testimony intrudes into the province of the Court and is improper.

We conclude that the county court did not abuse its discretion in excluding Moore's testimony.

2. MAYNARD'S CROSS-APPEAL

(a) Approval of Tipp's Attorney Fees

On cross-appeal, Maynard argues that the county court erred in ordering Tipp's attorney fees to be paid from the trust. On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion. *Rapp v. Rapp*, 252 Neb. 341, 562 N.W.2d 359 (1997). When an attorney fee is authorized, the amount of the fee is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion. *Id.*

[14-16] Attorney fees and expenses will ordinarily be allowed a trustee where they were incurred for the benefit of the estate. *Rapp v. Rapp*, *supra*; *Linn v. Linn*, 146 Neb. 666, 21 N.W.2d 283 (1946). "In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy." Neb. Rev. Stat. § 30-3893 (Cum. Supp. 2006). Where a trustee's defense of his or her acts is substantially successful, the trustee is ordinarily entitled to recover the reasonable costs necessarily incurred in preparing his or her final account and in defending it against objections. See *Rapp v. Rapp*, *supra*.

In this case, Maynard contends that the attorney fees and expenses Tipp incurred as a result of Maynard's legal action serve as a detriment to the estate, not as a benefit. He argues that due to her failures as trustee, the county court removed Tipp as trustee and required her to return to the trust the life insurance proceeds, bank accounts, bonds, treasury notes, and personal property.

In its oral pronouncement removing Tipp as trustee, the court stated:

The real problem in this case was the Trustee was put in the really bad position of trying to decipher which assets were hers individually and those which belonged to the Trust. Even if she did everything properly, it still has that same appearance that there's always something to have been done wrong. And I think that the one part that caught my attention the most was when she was asked directly by one of her siblings about certain assets that were hers from some of those p.o. death accounts; her response was that it was none of his business what was left to her.

Well, that is exactly what engenders the kind of problems we've had here today. It's not the open and fair treatment that a beneficiary would expect from a trustee and certainly leaves everyone the impression that something is being hidden. I don't know if anything ever was. I just don't know. And that's probably the real problem we have with all the beneficiaries here. I'm not saying she did anything wrong; quite the opposite. I'm saying that she just didn't make a full disclosure, so everybody would see that she did nothing wrong.

My real problem is that after our November 22nd hearing, we have a problem with what the Trustee then did, which was nothing. The interim accounting was not produced and filed; the bond was not filed until December 13th, which was almost a month after that. I find that to be something that I can't excuse.

Although in deciding to remove Tipp as trustee it appears that the county court was motivated by Tipp's lack of urgency, it did not find an intentional breach of her fiduciary duties. The record discloses that Tipp did marshal those assets which she believed to be trust property and caused partial distributions to be made to the trust beneficiaries. We conclude that the court did not abuse its discretion in ordering that Tipp's attorney fees incurred while acting as successor trustee be paid from the trust.

(b) Maynard's Attorney Fees

Next, Maynard argues that the county court erred in not ordering that his attorney fees be paid from trust funds. Again, we

review for abuse of discretion. See *Rapp v. Rapp*, 252 Neb. 341, 562 N.W.2d 359 (1997). We find none.

(c) Surcharge

Finally, Maynard argues that the county court erred in failing to surcharge Tipp for her mismanagement of the trust's real estate. In essence, Maynard argues that because Tipp failed to rent the duplex for fair market value, the trust lost a minimum of \$9,000 in income, and that Tipp should therefore be surcharged.

It is clear from the record that the portion of the duplex owned by the trust and formerly occupied by Monroe and Helen required significant repairs and cleaning before it could be rented. There is conflicting evidence regarding the cost of such services if contracted, the amount of time it would have taken to prepare the property for rental, and the amount of rental income which could have been realized during Tipp's tenure as trustee. After reviewing Tipp's performance in this regard in considerable detail, Reinbrecht determined that she fulfilled her duties as trustee and recommended that she not be surcharged. The county court accepted this recommendation. Based upon our de novo review of the record, we conclude that this was not error.

V. CONCLUSION

For the reasons discussed above, we conclude that certain assets received by Tipp following Monroe's death were not included in the trust estate and that the county court erred in ordering her to pay them over to the estate. These assets include the death benefits paid under the MetLife policy, the jointly held Omaha Public Power District bonds, the jointly held U.S. Treasury notes, the POD accounts at First Federal Lincoln Bank and Nebraska State Bank, and the proceeds of the accounts at Pentagon Federal Credit Union. We reverse the judgment of the county court with respect to those assets, but affirm in all other respects. We remand the cause to that court for further proceedings with respect to the administration of the trust.

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

CONNOLLY, J., participating on briefs.

JOHN DOE, AS FATHER AND NEXT FRIEND OF JANE DOE,
 A MINOR CHILD, APPELLANT, V. OMAHA PUBLIC SCHOOL
 DISTRICT, A POLITICAL SUBDIVISION, APPELLEE.

727 N.W.2d 447

Filed February 16, 2007. No. S-05-794.

1. **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.
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. **Pleadings: Appeal and Error.** An appellate court reviews de novo a lower court's dismissal of a complaint for failure to state a claim.
4. ____: _____. 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.
5. **Summary Judgment: Motions to Dismiss: Notice.** When receiving evidence which converts a motion to dismiss into a motion for summary judgment, it is important for the trial court to give the parties notice of the changed status of the motion and a reasonable opportunity to present all material made pertinent to such a motion by the rules governing summary judgment.
6. **Political Subdivisions Tort Claims Act: Immunity: Negligence.** The Political Subdivisions Tort Claims Act eliminates, in part, the traditional immunity of political subdivisions for the negligent acts of their employees.
7. **Political Subdivisions Tort Claims Act: Negligence.** A negligence action brought under the Political Subdivisions Tort Claims Act has the same elements as a negligence action against a private individual, i.e., duty, breach of duty, causation, and damages.
8. **Negligence: Words and Phrases.** A duty is defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.
9. **Negligence.** Whether a duty exists at all is a question of law. Defining the scope of an existing duty is likewise a question of law.
10. **Political Subdivisions Tort Claims Act.** The exceptions set forth in Neb. Rev. Stat. § 13-910 (Cum. Supp. 2002) are affirmative sovereign immunity defenses to claims brought pursuant to the Political Subdivisions Tort Claims Act.
11. **Political Subdivisions: Immunity: Liability.** If a political subdivision proves that a plaintiff's claim comes within an exception pursuant to Neb. Rev. Stat. § 13-910 (Cum. Supp. 2002), then the claim fails based on sovereign immunity, and the political subdivision is not liable.
12. **Rules of the Supreme Court: Motions to Dismiss: Pleadings.** A complaint is subject to dismissal under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003) when its allegations indicate the existence of an affirmative defense that will bar

the award of any remedy; but for this to occur, the applicability of the defense has to be clearly indicated and must appear on the face of the pleading to be used as the basis for the motion to dismiss.

13. **Political Subdivisions Tort Claims Act.** The discretionary function exception of the Political Subdivisions Tort Claims Act extends only to basic policy decisions made in governmental activity, and not to ministerial activities implementing such policy decisions. The exception does not extend to the exercise of discretionary acts at an operational level.
14. _____. It is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception of the Political Subdivisions Tort Claims Act applies in a given case.
15. _____. A court engages in a two-step analysis to determine if the discretionary function exception of the Political Subdivisions Tort Claims Act applies. First, the court must consider whether the action is a matter of choice for the acting employee. If the court concludes that the challenged conduct involves an element of judgment, it must then determine whether that judgment is of the kind that the discretionary function exception was designed to shield.
16. _____. When the facts are undisputed, the determination of whether the discretionary function exception of the Political Subdivisions Tort Claims Act applies is a question of law.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Reversed and remanded for further proceedings.

Maren Lynn Chaloupka, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, and K.C. Engdahl, of Ballew, Schneider, Covalt, Gaines & Engdahl, for appellant.

Kirk S. Blecha and Lindsay K. Lundholm, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, L.L.P., for appellee.

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

STEPHAN, J.

John Doe, as father and next friend of Jane Doe, brought this action against the Omaha Public School District (OPS) under the Political Subdivisions Tort Claims Act (PSTCA), Neb. Rev. Stat. §§ 13-901 to 13-926 (Reissue 1997 & Cum. Supp. 2002). OPS moved to dismiss, claiming immunity under § 13-910. The district court granted the motion and dismissed the complaint with prejudice. Doe perfected this timely appeal. We conclude the district court erred in dismissing the action and therefore reverse, and remand for further proceedings.

I. BACKGROUND

Doe alleged in his complaint that on February 26, 2004, a student identified as J.D. sexually assaulted his daughter Jane during school hours at the OPS high school they both attended. Doe alleged on information and belief that OPS “had actual knowledge that J.D. had a history of physical and/or sexual misconduct toward other students” before the purported assault but “took no steps to restrict or restrain” J.D.’s activities in order to protect other students. Doe alleged that OPS was negligent in, among other things, (1) failing to provide adequate protection to Jane from the foreseeable acts of J.D., (2) failing to follow State Department of Education rules on student safety, (3) failing to supervise school employees, (4) failing to investigate prior complaints about J.D., (5) failing to take appropriate actions with regard to J.D., and (6) maintaining unsafe premises which enhanced the threat of and enabled criminal activity without detection on school grounds and during school hours. Doe claimed that these acts or omissions by OPS caused Jane physical injury and emotional distress, for which he sought damages on her behalf.

OPS moved to dismiss under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003), claiming that Doe’s complaint failed to state a claim upon which relief could be granted. In its motion, OPS asserted that as a political subdivision of the State of Nebraska, it retained immunity from suit under § 13-910 based on the fact that Doe’s claims arose out of (1) an assault; (2) OPS’ exercise of due care in the execution of officially adopted resolutions, regulations, and rules; and (3) OPS’ exercise of discretionary functions. OPS also asserted in its motion that Doe’s complaint failed to allege facts sufficient to show the negligence elements of duty, breach, and causation.

At a hearing on the motion to dismiss, both parties offered evidence which was received without objection. In a written order, the district court determined that OPS was immune from the negligence claims alleged in Doe’s complaint based on the exceptions found in the PSTCA, and it therefore granted the motion to dismiss with prejudice. Doe perfected this timely appeal, and we granted his petition to bypass the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(2) (Reissue 1995).

II. ASSIGNMENT OF ERROR

Doe assigns that the district court erred in concluding that his complaint failed to state a claim upon which relief could be granted.

III. STANDARD OF REVIEW

[1-4] We begin by addressing a procedural issue affecting the nature and scope of our review. 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. *Ferer v. Erickson, Sederstrom*, 272 Neb. 113, 718 N.W.2d 501 (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. *Johnson v. Johnson*, 272 Neb. 263, 720 N.W.2d 20 (2006); *Spear T Ranch v. Knaub*, 269 Neb. 177, 691 N.W.2d 116 (2005). An appellate court reviews de novo a lower court's dismissal of a complaint for failure to state a claim. *Myers v. Nebraska Invest. Council*, 272 Neb. 669, 724 N.W.2d 776 (2006); *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.*

However, rule 12(b) provides that when matters outside of the pleadings are presented by the parties and accepted by the trial court with respect to a motion to dismiss under rule 12(b)(6), the motion "shall be treated" as a motion for summary judgment as provided in Neb. Rev. Stat. §§ 25-1330 to 25-1336 (Reissue 1995 & Cum. Supp. 2006) and the parties shall be given reasonable opportunity to present all material made pertinent to such a motion by statute. See, *Crouse v. Pioneer Irr. Dist.*, 272 Neb. 276, 719 N.W.2d 722 (2006); *Wise v. Omaha Public Schools*, 271 Neb. 635, 714 N.W.2d 19 (2006). Our review of an order granting a motion for summary judgment is not restricted to the allegations of the complaint, but instead requires that we determine whether 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. See, *Ferer v. Erickson, Sederstrom, supra*; *Wise v. Omaha Public Schools, supra*.

[5] As a threshold matter, we must determine whether we are reviewing a ruling on a motion to dismiss or a ruling on a motion for summary judgment. Because Nebraska's current notice pleading rules are modeled after the Federal Rules of Civil Procedure, we look to federal decisions for guidance. See *Kellogg v. Nebraska Dept. of Corr. Servs.*, 269 Neb. 40, 690 N.W.2d 574 (2005). Federal courts have recognized that when receiving evidence which converts a motion to dismiss into a motion for summary judgment, it is important for the trial court to "give the parties notice of the changed status of the motion and a 'reasonable opportunity to present all material made pertinent to such a motion'" by the rules governing summary judgment. 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1366 at 188 (3d ed. 2004). See, e.g., *Country Club Estates, L.L.C. v. Town of Loma Linda*, 213 F.3d 1001 (8th Cir. 2000). We agree with and adopt this principle.

In this case, the trial court did not indicate that its receipt of evidence converted the motion to one for summary judgment, and neither party contends that a conversion occurred. We have recently held that 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. *In re Adoption of Kenten H.*, 272 Neb. 846, 725 N.W.2d 548 (2007); *Ferer v. Erickson, Sederstrom*, 272 Neb. 113, 718 N.W.2d 501 (2006). The exhibit offered by OPS and received by the district court without objection purports to include copies of public records, including the "Omaha Public Schools Nondiscrimination Policy" and the "Omaha Public Schools, 2003-2004 Student Code of Conduct." The exhibits offered by Doe and received without objection consist of copies of motions purportedly filed by OPS in an action brought by Doe in the U.S. District Court for the District of Nebraska and copies of discovery requests which Doe served on OPS in this action. Although the district court did not specifically take judicial notice of these exhibits in receiving them, we assume without deciding that it could have done so.

In any event, the evidence offered by OPS did not directly address the factual allegations of Doe's complaint and therefore did not establish the absence of a genuine issue of material fact. On the record before us, OPS would be entitled to prevail only if the district court correctly concluded that the complaint failed to state a claim upon which relief could be granted. Accordingly, we apply the standard of review applicable to orders granting motions to dismiss, as set forth above. See, *Myers v. Nebraska Invest. Council*, 272 Neb. 669, 724 N.W.2d 776 (2006); *Johnston v. Nebraska Dept. of Corr. Servs.*, 270 Neb. 987, 709 N.W.2d 321 (2006).

IV. ANALYSIS

1. DOE'S PRIMA FACIE CASE

The district court did not specifically address the question of whether Doe's complaint alleged a prima facie case. As an alternative ground for affirmance, OPS argues that it did not. We deem it necessary to address this potentially dispositive issue.

[6] The PSTCA eliminates, in part, the traditional immunity of political subdivisions for the negligent acts of their employees. *Talbot v. Douglas County*, 249 Neb. 620, 544 N.W.2d 839 (1996). Except as otherwise provided, in all suits brought under the PSTCA, "the political subdivision shall be liable in the same manner and to the same extent as a private individual under like circumstances." § 13-908. Public school districts are political subdivisions for purposes of the PSTCA. See § 13-903(1).

[7-9] As noted above, Doe's complaint asserts a personal injury claim based upon allegations of negligence imputed to OPS, a political subdivision. A negligence action brought under the PSTCA has the same elements as a negligence action against a private individual, i.e., duty, breach of duty, causation, and damages. *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch.*, 262 Neb. 66, 628 N.W.2d 697 (2001); *Brandon v. County of Richardson*, 252 Neb. 839, 566 N.W.2d 776 (1997). A duty is defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another. *Munstermann v. Alegent Health*, 271 Neb. 834, 716 N.W.2d 73 (2006). Whether a duty exists at all is a question of law. *Stahlecker v. Ford Motor Co.*, 266 Neb. 601, 667 N.W.2d 244 (2003); *Cerny v. Cedar Bluffs*

Jr./Sr. Pub. Sch., *supra*. Defining the scope of an existing duty is likewise a question of law. *Stahlecker v. Ford Motor Co.*, *supra*.

OPS “does not dispute that a general duty of care exists to furnish security for the student body,” but argues that it would have a duty to protect specific students from harm by another student only if the other student’s conduct was “sufficiently foreseeable.” Brief for appellee at 26. We agree. See *Sharkey v. Board of Regents*, 260 Neb. 166, 182, 615 N.W.2d 889, 902 (2000) (holding that public university “owes a landowner-invitee duty to its students to take reasonable steps to protect against foreseeable acts of violence on its campus and the harm that naturally flows therefrom”).

Neb. Ct. R. of Pldg. in Civ. Actions 8(a)(2) (rev. 2003) requires a party asserting a claim to plead “a short and plain statement of the claim showing that the pleader is entitled to relief.” Doe alleged that prior to the date of the alleged assault on his daughter, OPS “had actual knowledge that J.D. had a history of physical and/or sexual misconduct toward other students” but “took no steps to restrict or restrain” him. OPS argues that this allegation is insufficient to raise an issue of foreseeability. We disagree. The allegation places OPS on notice that Doe is claiming that it had prior knowledge of specific behaviors on the part of J.D. which made his alleged subsequent violent conduct reasonably foreseeable. Greater factual specificity is the object of discovery. Whether the alleged assault in this case was foreseeable is a matter of proof. See *Doe v. Gunny’s Ltd. Partnership*, 256 Neb. 653, 593 N.W.2d 284 (1999). Construing the allegations of the complaint in a light most favorable to Doe, as we are required to do at this stage of the proceeding, we conclude that it is sufficient under our notice pleading rules to state a claim for relief under the PSTCA.

2. OPS’ AFFIRMATIVE DEFENSES

[10,11] A political subdivision retains its sovereign immunity with respect to certain listed exceptions found in the PSTCA. See § 13-910. The exceptions set forth in § 13-910 are affirmative sovereign immunity defenses to claims brought pursuant to the PSTCA. *Harris v. Omaha Housing Auth.*, 269 Neb. 981, 698 N.W.2d 58 (2005). If a political subdivision proves that a plaintiff’s claim comes within an exception pursuant to § 13-910, then

the claim fails based on sovereign immunity, and the political subdivision is not liable. *Id.*

[12] In its motion to dismiss, OPS alleged that it is entitled to immunity based upon three of the exceptions in § 13-910. We have not previously addressed the manner in which affirmative defenses are to be considered with respect to a rule 12(b)(6) motion. We agree with the prevailing view among federal courts that

[a] complaint also is subject to dismissal under Rule 12(b)(6) when its allegations indicate the existence of an affirmative defense that will bar the award of any remedy; but for this to occur, the applicability of the defense has to be clearly indicated and must appear on the face of the pleading to be used as the basis for the motion.

5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 at 708-10 (3d ed. 2004). In other words, a motion to dismiss a complaint may be granted where “the plaintiff’s own allegations show that a defense exists that legally defeats the claim for relief.” *Id.* at 713.

Within this analytical framework, we address each of the three affirmative defenses upon which OPS bases its claim of immunity.

(a) § 13-910(7) Intentional Tort Exception

OPS argues that because the complaint specifically alleges a claim arising from an assault, it retains sovereign immunity under § 13-910(7). Section 13-910(7) states that the PSTCA shall not apply to “[a]ny claim arising out of assault, battery, false arrest, false imprisonment, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.” Doe responds that because the assailant was not alleged to be an agent or employee of OPS, the intentional tort exception in § 13-910(7) does not apply. To resolve the issue, we must determine the breadth of the phrase “[a]ny claim arising out of assault” as it is used in § 13-910(7).

The exception would clearly preserve immunity in the circumstance where a political subdivision was alleged to be vicariously liable to the victim of an assault committed by an employee of the political subdivision acting in the scope of employment. In *Johnson v. State*, 270 Neb. 316, 700 N.W.2d 620 (2005), we

held that the identical provision in the State Tort Claims Act preserved sovereign immunity as to a claim that the State negligently hired and supervised a correctional officer who allegedly committed an assault while on duty. Adopting the reasoning of a concurring opinion in *Sheridan v. United States*, 487 U.S. 392, 108 S. Ct. 2449, 101 L. Ed. 2d 352 (1988), which construed an identical provision in the Federal Tort Claims Act, we reasoned that when a tort claim arising from an assault is based on “the mere fact of government employment” or “on the employment relationship between the intentional tort-feasor and the government,” the intentional tort exception preserves sovereign immunity. *Johnson v. State*, 270 Neb. at 323, 700 N.W.2d at 625, citing *Sheridan v. United States*, *supra* (Kennedy, J., concurring in judgment).

In this case, there is no allegation that the assailant was an agent or employee of the political subdivision. We have not previously considered whether the intentional tort exception in the PSTCA preserves immunity in this circumstance. We again look to *Sheridan* for guidance.

In *Sheridan*, a serviceman who worked at a naval hospital remained in the building after finishing his shift. He became intoxicated and then left the building with a loaded rifle in his possession. Other hospital employees were aware that he was intoxicated and armed, but did not try to prevent him from leaving the building and did not report the incident. Later that evening, the off-duty serviceman fired the rifle at a vehicle, injuring one of the occupants. The injured person brought an action against the government under the Federal Tort Claims Act, alleging negligence on the part of hospital employees who permitted the off-duty serviceman to leave the hospital with a loaded weapon in violation of certain regulations. In reversing a judgment that the claim was barred by the intentional tort exception of the Federal Tort Claims Act, which uses language identical to that of § 13-910(7), the U.S. Supreme Court distinguished between a liability claim arising entirely from an assault and a claim based upon negligently allowing an assault to occur. The Court determined that the case fell in the latter category, in that the governmental liability was not based upon the off-duty serviceman’s intentional acts, but, rather, upon the negligence of other government employees

who did not prevent the armed individual from leaving the naval hospital or report his violation of regulations to the appropriate authorities. The Court concluded:

If nothing more was involved here than the conduct of [the off-duty serviceman] at the time he shot at petitioners, there would be no basis for imposing liability on the Government. The tortious conduct of an off-duty serviceman, not acting within the scope of his office or employment, does not itself give rise to Government liability whether that conduct is intentional or merely negligent.

As alleged in this case, however, the negligence of other Government employees who allowed a foreseeable assault and battery to occur may furnish a basis for Government liability that is entirely independent of [the off-duty serviceman's] employment status. By voluntarily adopting regulations that prohibit the possession of firearms on the naval base and that require all personnel to report the presence of any such firearm, and by further voluntarily undertaking to provide care to a person who was visibly drunk and visibly armed, the Government assumed responsibility to "perform [its] 'good Samaritan' task in a careful manner."

Sheridan v. United States, 487 U.S. 392, 401, 108 S. Ct. 2449, 101 L. Ed. 2d 352 (1988), citing and quoting *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955).

We find this reasoning persuasive and applicable to this case. Doe's claim is not based upon the assault itself, and he could not prevail merely by proving that it occurred. Rather, he alleges that *before* the alleged assault, OPS breached an independent legal duty, unrelated to any possible employment relationship between the assailant and OPS, to take reasonable steps to prevent foreseeable violence from occurring on its premises. See *Sharkey v. Board of Regents*, 260 Neb. 166, 615 N.W.2d 889 (2000). See, also, *Johnson v. State*, 270 Neb. 316, 700 N.W.2d 620 (2005). The claim therefore does not arise from an assault, but, rather, from an alleged negligent failure to protect a student from a foreseeable act of violence. Accordingly, the complaint does not clearly indicate the applicability of a defense under § 13-910(7) which would legally bar the relief sought.

(b) § 13-910(2) Discretionary Function Exception

In its motion to dismiss, OPS alleged that it was immune from suit on the alternative ground that Doe's claim arose from the exercise of "discretionary functions and duties." Section § 13-910(2) states that the PSTCA shall not apply to "[a]ny claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of the political subdivision or an employee of the political subdivision, whether or not the discretion is abused." Although it is unclear whether the district court relied upon this provision in determining that OPS had immunity, we must examine the issue of whether discretionary function immunity is necessarily apparent on the face of the complaint so as to require dismissal.

[13,14] The purpose of the discretionary function exception is to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 609 N.W.2d 338 (2000). See, also, *Jasa v. Douglas County*, 244 Neb. 944, 510 N.W.2d 281 (1994). The discretionary function exception extends only to basic policy decisions made in governmental activity, and not to ministerial activities implementing such policy decisions. *Norman v. Ogallala Pub. Sch. Dist.*, *supra*; *Parker v. Lancaster Cty. Sch. Dist. No. 001*, 256 Neb. 406, 591 N.W.2d 532 (1999). The exception does not extend to the exercise of discretionary acts at an operational level. See, *Norman v. Ogallala Pub. Sch. Dist.*, *supra*; *Talbot v. Douglas County*, 249 Neb. 620, 544 N.W.2d 839 (1996); *Jasa v. Douglas County*, *supra*; *Hamilton v. City of Omaha*, 243 Neb. 253, 498 N.W.2d 555 (1993). "'[I]t is the nature of the conduct, rather than the status of the actor that governs whether the discretionary function exception applies in a given case.'" *Security Inv. Co. v. State*, 231 Neb. 536, 544, 437 N.W.2d 439, 445 (1989). Examples of discretionary functions include the initiation of programs and activities, establishment of plans and schedules, and judgmental decisions within a broad regulatory framework lacking specific standards. *Norman v. Ogallala Pub. Sch. Dist.*, *supra*. The exception, properly construed, therefore protects only governmental actions and decisions based on considerations of

public policy. *Parker v. Lancaster County Sch. Dist. No. 001, supra*. The political subdivision remains liable for negligence of its employees at the operational level, where there is no room for policy judgment. *Norman v. Ogallala Pub. Sch. Dist., supra*. Doe argues that the exception could not apply because his claims are directed at conduct at the operational level of OPS, not at the policy level.

[15] A court engages in a two-step analysis to determine if the discretionary function exception applies. First, the court must consider whether the action is a matter of choice for the acting employee. *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 678 N.W.2d 82 (2004); *Parker v. Lancaster Cty. Sch. Dist. No. 001, supra*. If the court concludes that the challenged conduct involves an element of judgment, it must then determine whether that judgment is of the kind that the discretionary function exception was designed to shield. *Aguallo v. City of Scottsbluff, supra*; *Parker v. Lancaster Cty. Sch. Dist. No. 001, supra*.

[16] When the facts are undisputed, the determination of whether the discretionary function exception applies is a question of law. *Parker v. Lancaster County Sch. Dist. No. 001, supra*; *Jasa v. Douglas County, supra*. By the same token, however, it is often difficult to undertake such an analysis without a complete factual record. For example, in *Lawry v. County of Sarpy*, 254 Neb. 193, 575 N.W.2d 605 (1998), we were unable to determine from the allegations of a petition whether the alleged negligence of a county in carrying out flood warnings involved discretionary policy-level decisionmaking or operational-level conduct. We concluded that “[a]n adequate record would have to be developed to separate what decisions qualify as *policy* from those that may have been only *operational* or *ministerial*.” (Emphasis in original.) *Id.* at 200, 575 N.W.2d at 610. The difficulty in determining whether the discretionary function exception applies at the pleading stage is even more pronounced under our current notice pleading rules which require only “a short and plain statement of the claim showing that the pleader is entitled to relief.” Rule 8(a)(2). In *Rohde v. Knoepfel*, 13 Neb. App. 383, 693 N.W.2d 564 (2005), the Court of Appeals determined that the granting of a rule 12(b)(6) motion was error because it could not be determined from the face of the complaint whether or not the discretionary function exception was applicable.

OPS argues that the discretionary function exception is triggered by Doe's allegation in his complaint that "pursuant to school policy allowing for students to be transferred rather than expelled after a finding of sexual misconduct," OPS permitted J.D. to attend the school where the alleged assault occurred. Without evidence concerning the policy and what actually transpired, we are unable to engage in the analysis outlined in *Aguallo v. City of Scottsbluff*, *supra*, to determine whether or not the discretionary function exception applies. Because it cannot be determined from Doe's complaint whether or not the discretionary function exception bars his claim, the affirmative defense cannot serve as a basis for dismissal under rule 12(b)(6).

(c) § 13-910(1) Due Care Exception

The third basis for immunity asserted by OPS in its motion to dismiss is § 13-910(1), which provides that the PSTCA shall not apply to "[a]ny claim based upon an act or omission of an employee of a political subdivision, exercising due care, in the execution of a statute, ordinance, or officially adopted resolution, rule, or regulation . . ." Doe argues that this defense cannot bar his claim because he alleged that OPS failed to exercise due care. In the absence of a factual record, we cannot determine whether or not this affirmative defense has merit. Thus, it cannot serve as the basis for dismissal under rule 12(b)(6).

V. CONCLUSION

For the reasons discussed, we conclude that this is not "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." *Johnson v. Johnson*, 272 Neb. 263, 265, 720 N.W.2d 20, 23 (2006). Accord *Spear T Ranch v. Knaub*, 269 Neb. 177, 691 N.W.2d 116 (2005). A factual record is necessary to resolve the issues raised by the complaint and the assertion of affirmative defenses by OPS. Accordingly, the district court erred in granting the motion to dismiss. We reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.

COUNTY OF SARPY, NEBRASKA, APPELLANT, v.
 CITY OF GRETNA, NEBRASKA, APPELLEE.
 727 N.W.2d 690

Filed February 23, 2007. No. S-05-748.

1. **Annexation: Ordinances: Equity.** An action to determine the validity of an annexation ordinance and enjoin its enforcement sounds in equity.
2. **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.
3. **Appeal and Error.** Errors argued but not assigned will not be considered on appeal.
4. **Municipal Corporations: Annexation: Boundaries.** A municipal corporation has no power to extend or change its boundaries otherwise than as provided by constitutional enactment or as it is empowered by the Legislature by statute to do.
5. **Municipal Corporations: Annexation: Statutes.** The power delegated to municipal corporations to annex territory must be exercised in strict accord with the statute conferring it.
6. **Municipal Corporations: Annexation: Words and Phrases.** The terms "contiguous" and "adjacent" are used synonymously and interchangeably, and if the territory sought to be annexed is not contiguous to the municipality, the proceedings are without legal effect.
7. **Annexation: Boundaries: Words and Phrases.** Contiguity means that the two connecting boundaries should be substantially adjacent.
8. **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.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Reversed and remanded with directions.

Tamra L.W. Madsen and Michael A. Smith, Deputy Sarpy County Attorneys, for appellant.

John K. Green and J. Patrick Green for appellee.

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

STEPHAN, J.

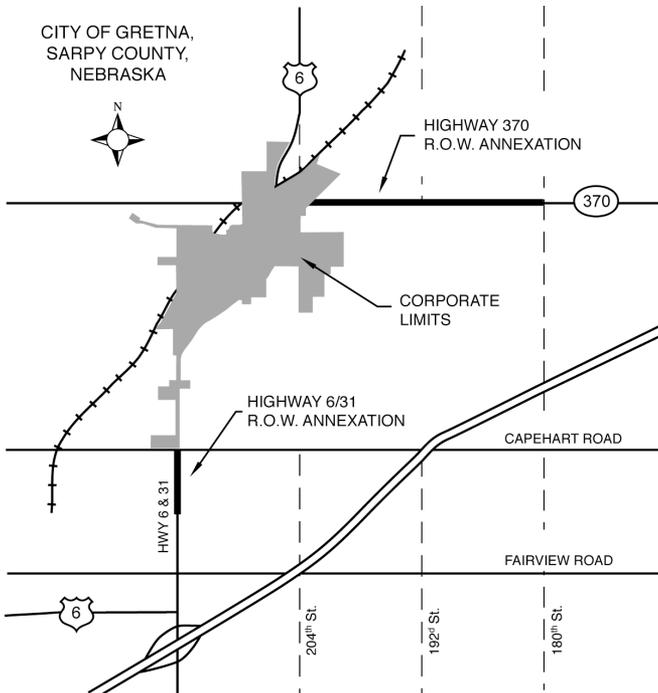
This challenge by Sarpy County, Nebraska, to annexation ordinances enacted by the City of Gretna, located within Sarpy County, is before us for the second time. In *County of Sarpy v. City of Gretna*, 267 Neb. 943, 678 N.W.2d 740 (2004), we

concluded that the county had standing to challenge the annexations. We reversed the judgment of dismissal and remanded the cause for further proceedings. Following remand, the district court for Sarpy County conducted a bench trial and found that the annexation ordinances were valid. Sarpy County perfected this timely appeal. Based upon our de novo review of all issues in this equity action, we conclude that the annexation ordinances are invalid because the lands they seek to annex are not contiguous or adjacent to the corporate limits of Gretna, as required by Neb. Rev. Stat. § 17-405.01 (Reissue 1997).

BACKGROUND

Gretna is a city of the second class located entirely within Sarpy County. On July 3, 2001, the Gretna City Council adopted ordinances Nos. 740 and 741, by which it sought to annex certain lands. Ordinance No. 740 would annex “Nebraska State Highway 6/31 from its intersection with Capehart Road to a point ½ mile from North of Fairview Road in Sarpy County, Nebraska” Ordinance No. 741 would annex “Nebraska State Highway 370 from its intersection with 204th Street east to the midline of the intersection of 180th Street in Sarpy County, Nebraska” The “Highway 6/31 R.O.W. [(right-of-way)] Annexation,” which is the subject of ordinance No. 740, and the “Highway 370 R.O.W. Annexation,” which is the subject of ordinance No. 741, are depicted in the illustration on page 94.

Sarpy County claimed that the annexations were illegal, null, and void because the lands in question were neither “urban or suburban in character” nor “contiguous or adjacent” to the corporate limits of Gretna, as required by § 17-405.01. Sarpy County further alleged that by enacting the ordinances, Gretna sought to unlawfully extend its extraterritorial zoning jurisdiction and usurp the zoning and planning jurisdiction of the county. Sarpy County alleged that it was adequately serving and maintaining the “strips of Highway 6/31 and Highway 370” which Gretna sought to annex. It prayed for an order declaring the annexation ordinances unlawful and void and enjoining their enforcement and for an accounting of various fees collected from the areas of expanded extraterritorial zoning jurisdiction resulting from the annexation ordinances.



A planning consultant for the City of Gretna testified that the property adjacent to the portions of highway which Gretna sought to annex was suburban in character. Asked to opine on the “appropriateness of the Gretna annexations for land use planning and future development,” the consultant testified that what he characterized as the “highway annexations” at issue were proper as a “short-term solution” for controlling areas in which Gretna anticipated future growth.

In its judgment of dismissal, the district court found that the annexed areas were “portions of State highways and right-of-ways” and that the areas adjacent to such roadways “were urban and suburban in nature.” The court concluded that Gretna “had a valid City interest in the annexation to govern future land use within its zoning jurisdiction.” The court found generally in favor of Gretna and against Sarpy County.

ASSIGNMENT OF ERROR

Sarpy County's sole assignment of error is that the district court erred in entering a judgment in favor of Gretna because the statutory requirements of adjacency and contiguity of lands to be annexed to a city of the second class were not met.

STANDARD OF REVIEW

[1,2] An action to determine the validity of an annexation ordinance and enjoin its enforcement sounds in equity. *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007); *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). On appeal from an equity action, we decide factual questions de novo on the record and, as to questions of both fact and law, are obligated to reach a conclusion independent of the trial court's determination. *City of Elkhorn v. City of Omaha, supra*; *Cornhusker Pub. Power Dist. v. City of Schuyler, supra*.

ANALYSIS

[3] The single issue presented in this appeal is whether the two parcels of land which Gretna sought to annex were contiguous or adjacent to its existing corporate limits. Sarpy County also argues in its brief that the annexed tracts were not urban or suburban in character and that Gretna annexed the tracts for revenue purposes only. However, Sarpy County did not assign either of these issues as error. Errors argued but not assigned will not be considered on appeal. *Japp v. Papio-Missouri River NRD*, 271 Neb. 968, 716 N.W.2d 707 (2006).

[4,5] A municipal corporation such as Gretna has no power to extend or change its boundaries otherwise than as provided by constitutional enactment or as it is empowered by the Legislature by statute to do. See, *Cornhusker Pub. Power Dist. v. City of Schuyler, supra*; *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995), *disapproved on other grounds*, *Adam v. City of Hastings*, 267 Neb. 641, 676 N.W.2d 710 (2004). The power delegated to municipal corporations to annex territory must be exercised in strict accord with the statute conferring it. *Cornhusker Pub. Power Dist. v. Schuyler, supra*; *SID No. 57 v.*

City of Elkhorn, supra; Johnson v. City of Hastings, 241 Neb. 291, 488 N.W.2d 20 (1992). Nebraska cities of the second class are authorized to annex, by ordinance, “any contiguous or adjacent lands, lots, tracts, streets, or highways as are urban or suburban in character, and in such direction as may be deemed proper.” § 17-405.01(1). The district court did not specifically find that the tracts in question were contiguous or adjacent to Gretna’s corporate limits, but its general finding in favor of Gretna necessarily implies a determination that this statutory requirement was met.

[6-8] The “contiguous or adjacent” requirement in statutes governing the annexation powers of cities determines how substantial the link between the city and the annexed area must be. See *City of Elkhorn v. City of Omaha, supra*. The terms are used synonymously and interchangeably, and if the territory sought to be annexed is not contiguous to the municipality, the proceedings are without legal effect. *Cornhusker Pub. Power Dist. v. City of Schuyler, supra; SID No. 57 v. City of Elkhorn, supra*. See, also, *Swedlund v. City of Hastings, supra; Johnson v. City of Hastings, supra; Village of Niobrara v. Tichy*, 158 Neb. 517, 63 N.W.2d 867 (1954). Contiguity means that the two connecting boundaries should be substantially adjacent. *Cornhusker Pub. Power Dist. v. City of Schuyler, supra; Swedlund v. City of Hastings, supra; Johnson v. City of Hastings, supra*. See, also, *Village of Niobrara v. Tichy, supra*. 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. *City of Elkhorn v. City of Omaha, supra; Cornhusker Pub. Power Dist. v. City of Schuyler, supra; Swedlund v. City of Hastings, supra; Johnson v. City of Hastings, supra*. See, also, *Village of Niobrara v. Tichy, supra; Jones v. City of Chadron*, 156 Neb. 150, 55 N.W.2d 495 (1952).

The lands which Gretna seeks to annex in this case consist of two sections of public highway and adjacent right-of-way extending perpendicularly from the south and east corporate limits of the city. We addressed an attempted annexation of highway in *Johnson v. City of Hastings, supra*. In that case, the city attempted to annex a community college campus which was located approximately three-quarters of a mile east of its corporate limits. To reach the campus, it also annexed a 120-foot-wide strip of a U.S.

highway and right-of-way. Noting the “saucepan” shape of the annexed tract, we held:

[I]n this case, the City of Hastings is reaching out like a finger, along Highway 6, a 120-foot-wide strip, to the college campus. . . .

We hold that as to territorial extent, the idea of a city is one of unity, not of plurality; of compactness or contiguity, not separation or segregation. . . . The requirement of contiguity has not been achieved in this case, since the boundary of the area sought to be annexed is not substantially adjacent to the boundary of the city.

(Citation omitted.) *Id.* at 297, 488 N.W.2d at 24. In reaching this conclusion, we relied in part upon the following principle stated by a noted commentator:

As applied to annexation of streets or roads projecting beyond the limits of a municipality, “contiguous” has been construed to mean contiguous in the sense of adjacent and parallel to the existing municipal limits. . . . Accordingly, the annexation of a portion of a highway extending beyond the border of a municipality, connected only by the width of the highway as it adjoined the municipal boundary, has been held an invalid “strip” or “corridor” annexation.

2 Eugene McQuillin, *The Law of Municipal Corporations* § 7.34 at 657-58 (3d ed. 2006).

We again addressed an issue of “strip” or “corridor” annexation in *Cornhusker Pub. Power Dist. v. City of Schuyler*, 269 Neb. 972, 699 N.W.2d 352 (2005). There, a city attempted to annex a large tract of land which was separated from the city by a county industrial area which could not be annexed. In order to reach the target tract, the city also attempted to annex a connecting strip of land approximately 30 feet in width around a portion of the perimeter of the county industrial area. Applying the reasoning of *Johnson v. City of Hastings*, 241 Neb. 291, 488 N.W.2d 20 (1992), we held that the boundary of the land sought to be annexed was not substantially adjacent to the city’s existing corporate limits.

Gretna attempts to distinguish these cases by arguing that it did not seek to annex portions of the two highways as a means to reach and annex larger tracts. The record suggests that this may

have occurred in the past along a portion of U.S. Highways 6 and 31 lying north of Capehart Road, but the validity of those annexations is not before us in this case. Using the “saucepan” analogy from *Johnson*, Gretna argues that “it is not the annexation of the handle as such which is unlawful. Only when the pan is at the far end of the handle is there an unlawful annexation.” Brief for appellee at 13. We find no merit in this argument. The invalidity of a strip annexation is not based upon the existence of a larger tract at the distal end of the strip, but, rather, upon the lack of substantial adjacency where the proximal end meets the corporate limits of the city. Here, as in *Johnson*, the connecting point consists merely of the width of the highway right-of-way where it meets the municipal boundary. While the shape of a tract does not determine whether it can be lawfully annexed, the lack of substantial adjacency to an existing corporate boundary precludes annexation under § 17-405.01.

It is apparent from the record that Gretna attempted these annexations for the purpose of controlling future growth by enlarging its zoning jurisdiction, which by law extends 1 mile beyond its corporate limits. See Neb. Rev. Stat. § 17-1001 (Cum. Supp. 2006). While a city may have legitimate reasons for using its annexation power to achieve planning and land use control objectives, it must nevertheless exercise that power in strict compliance with the statute by which it is conferred. See, *Cornhusker Pub. Power Dist. v. Schuyler*, *supra*; *SID No. 57 v. City of Elkhorn*, 248 Neb. 486, 536 N.W.2d 56 (1995), *disapproved on other grounds*; *Adam v. City of Hastings*, 267 Neb. 641, 676 N.W.2d 710 (2004); *Johnson v. City of Hastings*, *supra*. We conclude that the annexations at issue here are invalid because they do not meet the contiguity or adjacency requirement of § 17-405.01.

CONCLUSION

For the reasons discussed, ordinances Nos. 740 and 741, passed and approved by the City of Gretna on July 3, 2001, are invalid and void. We reverse the judgment of the district court and remand the cause with directions to enter judgment consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, v.
GARY S. MUSE, APPELLANT.
727 N.W.2d 689

Filed February 23, 2007. No. S-05-947.

Petition for further review from the Nebraska Court of Appeals, IRWIN, MOORE, and CASSEL, Judges, on appeal thereto from the District Court for Douglas County, PATRICIA A. LAMBERTY, Judge. Judgment of Court of Appeals affirmed.

Stefanie A. Martinez and James Walter Crampton 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.

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. Muse*, 15 Neb. App. 13, 721 N.W.2d 661 (2006), is correct.

We are not persuaded by the concerns raised by the opinion dissenting from the judgment of the Court of Appeals. That dissent cites *State v. Baker*, No. A-00-177, 2001 WL 221557 (Neb. App. Feb. 6, 2001) (not designated for permanent publication), for the proposition that “the relevant information should not be considered properly filed for purposes of speedy trial calculations until it was file stamped.” *Muse*, 15 Neb. App. at 31, 721 N.W.2d at 675 (Irwin, J., dissenting). The dissent thus concludes that the lack of a file stamp on the second amended information indicates the information was never properly filed and the district court lacked jurisdiction.

In *Baker*, although the information was file stamped, the defendant contended the information had actually been filed before the date reflected on the stamp. In its opinion, the Court of Appeals simply concluded there was insufficient evidence in the record to suggest that the information was filed on an earlier date. As such,

the Court of Appeals determined the file-stamped date controlled. This court granted further review, but later dismissed the petition as having been improvidently granted. *State v. Baker*, 262 Neb. xxvi (No. S-00-177, Sept. 12, 2001).

While we encourage the practice of using file stamps, we do not read *Baker* as requiring that an information be file stamped in order to be filed. As such, we affirm the decision of the Court of Appeals.

AFFIRMED.

BILLY R. TYLER, PETITIONER, v. ROBERT P. HOUSTON,
DIRECTOR, NEBRASKA DEPARTMENT OF
CORRECTIONAL SERVICES, RESPONDENT.
728 N.W.2d 549

Filed February 23, 2007. No. S-07-101.

1. **Habeas Corpus.** Habeas corpus is a special civil proceeding providing a summary remedy to persons illegally detained.
2. _____. A writ of habeas corpus is a remedy which is constitutionally available in a proceeding to challenge and test the legality of a person's detention, imprisonment, or custodial deprivation of liberty.
3. _____. A writ of habeas corpus is available only when the release of the petitioner from the deprivation of liberty being attacked will follow as a result of a decision in the petitioner's favor.
4. **Habeas Corpus: Proof.** Habeas corpus requires the showing of legal cause, that is, that a person is detained illegally and is entitled to the benefits of the writ.
5. **Criminal Law: Sentences.** At common law, a convicted person erroneously at liberty was required, when the error was discovered, to serve the full sentence imposed.
6. **Sentences: Bail Bond: Time.** The doctrine of credit for time erroneously at liberty is not applicable to a release on bail pursuant to Neb. Rev. Stat. § 29-2823 (Reissue 1995).
7. **Habeas Corpus: Prisoners: Appeal and Error.** Neb. Rev. Stat. § 29-2823 (Reissue 1995) is intended to balance the interests of the State and the prisoner in a habeas action by allowing the prisoner to ask for immediate release, yet permitting the State to effectively seek appellate review of a trial court's decision to grant the writ.
8. **Bail Bond.** Admission to bail is regarded as a release from custody.

Original action. Writ of habeas corpus denied.

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

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

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

GERRARD, J.

The issue in this original action for writ of habeas corpus is whether the time that Billy R. Tyler was free on bond, pursuant to an order of the district court granting a writ of habeas corpus, should be credited against the sentence that Tyler was required to complete after the district court's order was reversed on appeal.

BACKGROUND

The petitioner, Tyler, is an inmate committed to the custody of the Nebraska Department of Correctional Services (the Department). Robert P. Houston, the director of the Department, is the respondent in this action in his official capacity.

Tyler was convicted in the Douglas County District Court of three counts of delivery of a controlled substance. Tyler was sentenced to 7 to 10 years' imprisonment on each count, with the sentences to be served concurrently, and Tyler was to receive credit for 80 days' time served. The sentences were imposed on February 9, 1996.

During the course of his imprisonment, Tyler forfeited all of his "good time" credit. However, Tyler challenged the forfeiture, and on July 1, 2003, the Johnson County District Court entered an order granting Tyler's pro se petition for writ of habeas corpus, on the basis that Tyler's good time had been improperly forfeited because the authority to approve the forfeiture of good time had been improperly delegated. The Department appealed, but on July 11, 2003, Tyler was released on bond pursuant to an order of the Johnson County District Court.

On November 21, 2003, this court decided *Martin v. Nebraska Dept. of Corr. Servs.*,¹ an appeal brought from a similar challenge raised by another inmate, in which we rejected the Johnson

¹ *Martin v. Nebraska Dept. of Corr. Servs.*, 267 Neb. 33, 671 N.W.2d 613 (2003).

County District Court's reasoning. In Tyler's case,² we summarily reversed the judgment and remanded the cause to the district court for further consideration in light of *Martin*. Our mandate issued on March 26, 2004, and was spread on the record of the Johnson County District Court on March 29, 2004. Tyler was ordered to surrender himself to the Department.

On April 19, 2004, the Johnson County District Court entered a failure to appear on the record, declared Tyler's bond to be forfeited, and issued a warrant for Tyler's arrest. On November 7, Tyler was arrested, and on November 8, he was reincarcerated by the Department.

Tyler has raised a number of pro se challenges to his continued confinement.³ In particular, Tyler filed a pro se declaratory judgment action in the Lancaster County District Court requesting that he be granted credit against his remaining sentence for the 485 days he was out on bond. The Lancaster County District Court initially denied Tyler leave to proceed in forma pauperis on the ground that the action was frivolous, but the Nebraska Court of Appeals concluded the action was not frivolous and reversed the district court's determination.⁴ The district court denied Tyler the relief sought, and an appeal from that order is pending on this court's docket.

Tyler also filed a pro se petition for habeas corpus relief in the Lancaster County District Court that was denied as premature, and the Court of Appeals affirmed that determination.⁵ In its opinion, the Court of Appeals distinguished between the time Tyler was lawfully free on bond and the time he was at large after he was ordered to surrender. The court reasoned that Tyler was not entitled to credit against his sentence for the 202 days during which he was in violation of his bond. The court concluded that

² *State ex rel. Tyler v. Britten*, 267 Neb. xxii (No. S-03-762, Feb. 19, 2004).

³ See *State ex rel. Tyler v. Houston*, 15 Neb. App. 374, 727 N.W.2d 703 (2007) (collecting cases).

⁴ See *Tyler v. Nebraska Dept. of Corr. Servs.*, 13 Neb. App. 795, 701 N.W.2d 847 (2005).

⁵ See *State ex rel. Tyler v. Houston*, *supra* note 3.

[a]t the time of Tyler's release on bond, his projected release date was November 18, 2005. Because Tyler is not entitled to any credit as time served for the 202 days that he was out of custody and in violation of his appearance bond, his projected release date would have become at least sometime in June 2006.

Tyler filed his petition seeking habeas corpus relief on September 8, 2005. . . . As such, when Tyler filed for habeas corpus relief and when the court ruled on his petition, the district court correctly held that Tyler was not entitled to habeas corpus relief on the basis of credit as time served.⁶

Because it was not necessary in that appeal, the Court of Appeals expressly declined to address whether Tyler was entitled to credit for any other period of time he was out on bond.⁷

Tyler also filed a pro se motion in the Douglas County District Court, generally asking the court to release him from confinement. The Douglas County District Court denied the motion, and the Court of Appeals sustained the State's motion for summary affirmance.⁸ Because the case presented the same issue as the appeal from the Lancaster County District Court that was already on this court's docket, we sustained Tyler's petition for further review,⁹ and appointed counsel to represent Tyler for purposes of that appeal.

Through his newly appointed counsel, on January 19, 2007, Tyler filed an application with this court for leave to commence an original action for writ of habeas corpus. Ordinarily, in the interest of proper state practice and procedure, we initially require a party to file a petition for a writ of habeas corpus in the trial court.¹⁰ However, Tyler alleged that because of the appeals pending from the prior pro se motions, the district court in neither Douglas nor Lancaster County had jurisdiction to consider Tyler's claim for

⁶ *Id.* at 379, 727 N.W.2d at 707.

⁷ See *id.*

⁸ See *State v. Tyler*, 15 Neb. App. ____ (No. A-06-698, Nov. 8, 2006).

⁹ *State v. Tyler*, 272 Neb. xxxv (No. S-06-698, Dec. 13, 2006).

¹⁰ See, *Smeal Fire Apparatus Co. v. Kreikemeier*, 271 Neb. 616, 715 N.W.2d 134 (2006); *State v. Goham*, 191 Neb. 639, 216 N.W.2d 869 (1974).

immediate release.¹¹ We granted Tyler's application, subject to the parties' filing a stipulation of facts with this court within 10 days. The parties filed such a stipulation on January 26, 2007, and we expedited briefing and oral argument.

ANALYSIS

[1-4] Habeas corpus is a special civil proceeding providing a summary remedy to persons illegally detained.¹² A writ of habeas corpus is a remedy which is constitutionally available in a proceeding to challenge and test the legality of a person's detention, imprisonment, or custodial deprivation of liberty.¹³ A writ is available only when the release of the petitioner from the deprivation of liberty being attacked will follow as a result of a decision in the petitioner's favor.¹⁴ Habeas corpus requires the showing of legal cause, that is, that a person is detained illegally and is entitled to the benefits of the writ.¹⁵

Neb. Rev. Stat. § 29-2823 (Reissue 1995) provides:

The proceedings upon any writ of habeas corpus shall be recorded by the clerk and judges respectively, and may be reviewed as provided by law for appeal in civil cases. If the state shall appeal from a final order of a district court made upon the return of a writ of habeas corpus discharging a defendant in a criminal case, the defendant shall not be discharged from custody pending final decision upon appeal; *Provided*, said defendant may be admitted to bail pending disposition of said appeal as is otherwise provided by law.

(Emphasis in original.)

It was pursuant to § 29-2823 that Tyler was released on bond pending the appeal of his Johnson County District Court action. Tyler makes no claim, in this case, that he should be given credit for good time, or for the period of time between April 19 and November 7, 2004, when he was in violation of his bond. Tyler's

¹¹ See, generally, Neb. Ct. R. of Prac. 15A(2) (rev. 2002).

¹² *Smeal Fire Apparatus Co.*, *supra* note 10.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

sole claim in this case is that between July 11, 2003, and April 19, 2004, he was in the legal custody of the Department, and that such period should be credited against the maximum terms of his sentences. The parties agree that if that time is credited against Tyler's sentences, he would have served his maximum term of 10 years on June 18, 2006. In other words, if Tyler's sentence should have been credited for the time that he was free on bond between July 11, 2003, and April 19, 2004, his continued detention would be unlawful and he would be entitled to the benefit of the writ.

The traditional common-law rule, in Nebraska and elsewhere, was that a prisoner released before his or her sentence was complete would be required to serve the full sentence, regardless of the circumstances of release, or how long the prisoner had been free.¹⁶ "Where the penalty is imprisonment, the sentence of the law is to be satisfied only by the actual suffering of the imprisonment imposed, unless remitted by death or by some legal authority."¹⁷ Mere lapse of time without imprisonment or other restraint contemplated by the law did not constitute service of sentence.¹⁸

[5] Thus, at common law, a convicted person erroneously at liberty was required, when the error was discovered, to serve the full sentence imposed.¹⁹

In the absence of some other statutory provision, the judgment of a court imposing a jail sentence can only be satisfied

¹⁶ See, *U.S. v. Martinez*, 837 F.2d 861 (9th Cir. 1988); *In re Roach*, 150 Wash. 2d 29, 74 P.3d 134 (2003). See, e.g., *State v. Rider*, 201 La. 733, 10 So. 2d 601 (1942); *State ex rel. Siehl v. Jorgenson*, 176 Minn. 572, 224 N.W. 156 (1929); *Hopkins v. North*, 151 Md. 553, 135 A. 367 (1926); *The State of Florida v. Horne*, 52 Fla. 125, 42 So. 388 (1906); *The State, ex rel., v. McClellan*, 87 Tenn. 52, 9 S.W. 233 (1888); *Ex parte Alexander*, 5 Okla. Crim. 196, 113 P. 993 (1911).

¹⁷ *In re Collins*, 8 Cal. App. 367, 370, 97 P. 188, 190 (1908).

¹⁸ *Anderson v. Corall*, 263 U.S. 193, 44 S. Ct. 43, 68 L. Ed. 247 (1923). Accord, *Caballery v. United States Parole Commission*, 673 F.2d 43 (2d Cir. 1982); *Reese v. Looney*, 252 F.2d 683 (10th Cir. 1958). See, also, *In re Collins*, *supra* note 17.

¹⁹ *State v. Chapman*, 977 S.W.2d 122 (Tenn. Crim. App. 1997).

by a compliance with its terms. Neither the honest mistake nor the willful disregard of duty on the part of the officers whose duty it is to enforce the judgment can release the convicted party from its consequences.²⁰

For example, in *The State, ex rel., v. McClellan*,²¹ a prisoner was granted habeas relief by a Tennessee trial court and the warden, representing the state, appealed. The order of the trial court was reversed, and the prisoner was recaptured and returned to prison. The prisoner claimed that because he was “legally released” during the habeas appeal, that time “should be counted as a part of the period of his term.”²² The Supreme Court of Tennessee applied the common-law rule and held that “[t]he reversal determined the illegality of the discharge, and the time elapsing until re-imprisonment cannot be counted as time in prison. The imprisonment contemplated by the [sentencing] statute is confinement in fact, and not in legal or other fiction.”²³ Or, as explained by the Supreme Court of Wisconsin, at common law, “no delay of commitment secured by legal strategy, however brilliant, intricate, or attenuated, will be considered a substitute for personal presence in the jail, and there is no ‘fiction of law’ by force of which one can be at the same time in jail and at liberty.”²⁴

This court expressed its endorsement of the common-law rule in *Riggs v. Sutton*.²⁵

“The judgment is the penalty of the law, as declared by the court, while the direction with respect to the time of carrying it into effect is in the nature of an award of execution. Where the penalty is imprisonment, the sentence of the law is to be satisfied only by the actual suffering of the imprisonment imposed, unless remitted by death or by some legal authority. Therefore, the expiration of time without

²⁰ *Ex parte Bugg*, 163 Mo. App. 44, 48, 145 S.W. 831, 832 (1912).

²¹ *McClellan*, *supra* note 16.

²² *Id.* at 55, 9 S.W. at 234.

²³ *Id.* Accord *Chapman*, *supra* note 19.

²⁴ *State ex rel. Kassner v. Momsen*, 153 Wis. 203, 208, 140 N.W. 1117, 1119 (1913).

²⁵ *Riggs v. Sutton*, 113 Neb. 556, 203 N.W. 999 (1925).

imprisonment is in no sense an execution of the sentence. Accordingly where the judgment and sentence is imprisonment for a certain term, and from any cause the time elapses without the imprisonment being endured, it will still be a valid, subsisting, unexecuted judgment. *And where a convict is permitted to absent himself from prison the time when he is absent is no part of the sentence. And therefore where a convicted defendant is at liberty and has not served his sentence, if there is no statute to the contrary, he may be arrested as for an escape, and ordered into custody on the unexecuted judgment, and the result is the same if he escapes to another jurisdiction and is brought back, though by illegal means.*"²⁶

This court has applied the common-law rule in a variety of situations, such as escape,²⁷ parole violation,²⁸ and the release of an ill prisoner to obtain medical care.²⁹

However, some federal and state courts have moved away from the traditional rule in situations where a prisoner is inadvertently released, and addressed whether principles of equity or due process require that the sentence of a mistakenly released prisoner be credited with time spent out of custody.³⁰ Generally, there are two bases for granting relief to a mistakenly released prisoner—one rooted in equity and the other in constitutional due process. Courts granting equitable relief grant day-for-day credit against a sentence for time spent at liberty where the government mistakenly releases a prisoner due to negligence. Courts granting relief

²⁶ *Id.* at 560, 203 N.W. at 1000 (emphasis supplied). Accord, *Iron Bear v. Jones*, 149 Neb. 651, 32 N.W.2d 125 (1948); *Ulrich v. O'Grady*, 136 Neb. 684, 287 N.W. 81 (1939); *Philbrook v. Dunn*, 121 Neb. 421, 237 N.W. 391 (1931); *Brott v. Fenton*, 120 Neb. 792, 235 N.W. 449 (1931); *Volker v. McDonald*, 120 Neb. 508, 233 N.W. 890 (1931); *Mercer v. Fenton*, 120 Neb. 191, 231 N.W. 807 (1930). See, also, *Goodman v. O'Grady*, 135 Neb. 612, 283 N.W. 213 (1939).

²⁷ See *Goodman*, *supra* note 26.

²⁸ See, *Ulrich*, *supra* note 26; *Mercer*, *supra* note 26.

²⁹ See *Philbrook*, *supra* note 26.

³⁰ See *In re Roach*, *supra* note 16 (collecting cases).

under due process analyze whether reincarceration after an erroneous release violates the prisoner's due process rights.³¹

The record here does not present a due process issue. Under the due process "waiver of jurisdiction" doctrine, the inquiry is whether the state has waived its jurisdiction to recommit for *any* length of time by delaying execution of the sentence and allowing the prisoner to reenter society.³² But it is implicit in § 29-2823, and well established in our jurisprudence, that a prisoner released by a trial court's writ of habeas corpus may be directed to return to custody if the writ is reversed on appeal.³³ Nor does Tyler argue, in this proceeding, that it was a violation of due process to release and then reincarcerate him.

Rather, the issue here is whether Tyler's sentence should be credited under the equitable doctrine of "credit for time erroneously at liberty," also known as the "installment theory."³⁴ In the seminal and oft-cited case of *White v. Pearlman*,³⁵ a prisoner was told, a little over a year into his 5-year sentence, that he was to be released. The prisoner told the warden that there was a mistake, but the prisoner was released nonetheless. The prisoner "re-established his home," but more than 2 years later was told that he was wanted, so he surrendered himself and was committed to prison to serve the remainder of his sentence.³⁶ The prisoner waited until his sentence would have expired, if it had been running during the time he was out, and applied for habeas relief. The 10th Circuit affirmed a district court order granting relief, explaining that

[a] prisoner has some rights. A sentence of five years means a continuous sentence, unless interrupted by escape,

³¹ See *id.* See, generally, *Sanchez v. Warden, New Hampshire State Prison*, 329 F. Supp. 2d 200 (D.N.H. 2004); *Bailey v. Ciccone*, 420 F. Supp. 344 (W.D. Mo. 1976); *Chapman, supra* note 19; *Com. v. Blair*, 699 A.2d 738 (Pa. Super. 1997).

³² See *Chapman, supra* note 19.

³³ See, *Hulbert v. Fenton*, 115 Neb. 818, 215 N.W. 104 (1927); *State v. Shrader*, 73 Neb. 618, 103 N.W. 276 (1905).

³⁴ See *Schwichtenberg v. ADOC*, 190 Ariz. 574, 951 P.2d 449 (1997).

³⁵ *White v. Pearlman*, 42 F.2d 788 (10th Cir. 1930).

³⁶ See *id.* at 789.

violation of parole, or some fault of the prisoner, and he cannot be required to serve it in installments. Certainly a prisoner should have his chance to re-establish himself and live down his past. Yet, under the strict rule contended for by the warden, a prisoner sentenced to five years might be released in a year; picked up a year later to serve three months, and so on ad libitum, with the result that he is left without even a hope of beating his way back. It is our conclusion that where a prisoner is discharged from a penal institution, without any contributing fault on his part, and without violation of conditions of parole, that his sentence continues to run while he is at liberty.³⁷

As it has developed, the doctrine holds that a prisoner is entitled to credit against his or her sentence for time spent erroneously at liberty due to the State's negligence.³⁸ To be eligible for credit, the prisoner must show that there was simple or mere negligence on the part of the government and that the delay in execution of sentence was through no fault of his or her own.³⁹ In addition, because the doctrine awards equitable relief, some courts have considered factors such as whether the prisoner absconded legal obligations while at liberty and whether the prisoner had no further criminal convictions.⁴⁰

But *White*, and cases relying upon it, was decided on circumstances in which a prisoner was inadvertently released due to the negligence of a jailor. Thus, given a situation nearly identical to that of the instant case, in *Hunter v. McDonald*,⁴¹ the 10th Circuit concluded that its decision in *White* did not apply. In *Hunter*, a prisoner was sentenced to a 15-year term of imprisonment, but after approximately 4 years, a federal district court granted the prisoner habeas relief and ordered that he be discharged. The

³⁷ *Id.*

³⁸ See, *In re Roach*, *supra* note 16; *Pugh v. State*, 563 So. 2d 601 (Miss. 1990).

³⁹ *Martinez*, *supra* note 16; *Schwichtenberg*, *supra* note 34.

⁴⁰ See, *In re Roach*, *supra* note 16; *Brown v. Brittain*, 773 P.2d 570 (Colo. 1989). But cf. *Schwichtenberg*, *supra* note 34.

⁴¹ *Hunter v. McDonald*, 159 F.2d 861 (10th Cir. 1947).

order of discharge required the prisoner to give a bond, conditioned that the prisoner abide by the 10th Circuit's decision on an appeal from the order granting relief. The 10th Circuit reversed the judgment,⁴² and the prisoner returned to custody, but filed a later action claiming he was entitled to credit for the time he was out of custody by virtue of the order of discharge. The 10th Circuit rejected the prisoner's reliance on *White*, explaining that [t]here, the discharge was due to the mistake of the Warden, an agent of the administrative branch of the Government. Here, petitioner was out of prison by reason of the original order of discharge and the order staying the mandate of this court which orders were induced by applications prosecuted by petitioner. These orders can, in no sense, operate as an estoppel against the United States or its administrative agents. The Warden was compelled to obey the original order of discharge pending review by the appellate courts.

A prisoner is not entitled to credit for the time he is at liberty under an erroneous discharge on a writ of habeas corpus. Imprisonment contemplated by a sentence imposed by a Federal court is confinement in fact and not merely in fiction.⁴³

Similarly, in *Hayward v. U.S. Parole Com'n*,⁴⁴ the Eighth Circuit also addressed a situation in which a federal prisoner had been released on his own recognizance after the U.S. District Court granted his petition for habeas relief but the Eighth Circuit had reversed the order.⁴⁵ The prisoner filed another petition for habeas relief, arguing that the time he spent free pending appeal of his first habeas petition should have been credited against his sentence.⁴⁶ The Eighth Circuit concluded that the time the prisoner spent at liberty was "akin to that of a prisoner who is

⁴² See *Hudspeth v. McDonald*, 120 F.2d 962 (10th Cir. 1941).

⁴³ *Hunter*, *supra* note 41, 159 F.2d at 862-63 (emphasis supplied). See, also, *Anderson v. State*, 710 So. 2d 491 (Ala. Crim. App. 1997).

⁴⁴ *Hayward v. U.S. Parole Com'n*, 740 F.2d 610 (8th Cir. 1984).

⁴⁵ See *Hayward v. U. S. Parole Commission*, 502 F. Supp. 1007 (D. Minn. 1980), *reversed* 659 F.2d 857 (8th Cir. 1981).

⁴⁶ See *Hayward*, *supra* note 44.

released pending direct appeal of his conviction” and affirmed the denial of relief.⁴⁷

We are persuaded by the logic of these cases, and likewise conclude that the purpose of the doctrine of credit for time erroneously at liberty is not served by its application where a prisoner is not inadvertently released. “[S]tatements in the cases to the effect that a prisoner has a right to serve a continuous sentence have been made in a context in which a prisoner inadvertently has been released, with the state attempting, sometimes years later, to reincarcerate him.”⁴⁸ The limited function of the doctrine of credit for time erroneously at liberty is clear: Its sole purpose was to prevent the government from abusing its coercive power to imprison a person by artificially extending the duration of his or her sentence through releases and reincarcerations.⁴⁹ The government is not permitted to play cat and mouse with the prisoner, delaying indefinitely the expiation of his or her debt to society and reintegration into the free community.⁵⁰ But unlike the “false release” cases, our case presents no allegations of governmental or prosecutorial harassment, misconduct, or oversight.

[6] The doctrine of credit for time erroneously at liberty is simply not applicable to the circumstances of this case. The fact that the Johnson County District Court’s order granting habeas relief was reversed on appeal does not make Tyler’s release “erroneous” within the meaning of the doctrine, as it was not the result of negligence or some other unauthorized act.⁵¹ We express no

⁴⁷ *Id.* at 611. See, also, *Matthews v. Meese*, 827 F.2d 313 (8th Cir. 1987); *Mtr. of Licitra v Coughlin*, 61 N.Y.2d 450, 463 N.E.2d 1, 474 N.Y.S.2d 685 (1984); *Chapman*, *supra* note 19.

⁴⁸ *In re Garmon*, 572 F.2d 1373, 1376 (9th Cir. 1978). See, also, *U.S. v. Miller*, 49 F. Supp. 2d 489 (E.D. Va. 1999).

⁴⁹ *Free v. Miles*, 333 F.3d 550 (5th Cir. 2003). See *Dunne v. Keohane*, 14 F.3d 335 (7th Cir. 1994).

⁵⁰ *Dunne*, *supra* note 49. See *People v. Levandoski*, 237 Mich. App. 612, 603 N.W.2d 831 (1999).

⁵¹ See *Mtr. of Licitra v Coughlin*, 93 A.D.2d 349, 463 N.Y.S.2d 289 (1983), *affirmed supra* note 47, 61 N.Y.2d 450, 463 N.E.2d 1, 474 N.Y.S.2d 685 (1984). See, also, *Hunter*, *supra* note 41; *Merchant v. State*, 374 N.W.2d 245 (Iowa 1985); *Chapman*, *supra* note 19.

opinion on whether we would adopt the doctrine under other circumstances. We simply conclude that even if the doctrine is available under Nebraska law, it would not be applicable to a release on bail pursuant to § 29-2823.

We recognize that under Nebraska law, there is a policy against serving sentences in increments or installments. We explained in *State v. Texel*⁵² that

widely varying the method of serving periods of incarceration increases the likelihood of uneven application of the law to various individuals in our society. Not only is a prisoner entitled to pay his debt to society in one stretch, not in bits and pieces,^[53] but society also has the right to expect that once a defendant has been incarcerated, the time will not be served in bits and pieces.

[7] But the principle of *Texel*, and the impact of Tyler's argument that piecemeal sentences are unlawful, is diluted by the intent of § 29-2823, and our cases holding that a prisoner mistakenly released by a trial court's writ of habeas corpus may be directed to return to custody if the writ is reversed on appeal.⁵⁴ Section 29-2823 is intended to balance the interests of the State and the prisoner in a habeas action by allowing the prisoner to ask for immediate release, yet permitting the State to effectively seek appellate review of a trial court's decision to grant the writ. The implication of demanding bail from a prisoner to be released pending appeal of a habeas decision is that the prisoner may be asked to return. In other words, the statute and our jurisprudence contemplate that the possibility of interrupted incarceration is outweighed by the prisoner's right to relief and the State's interest in seeking appellate review of that relief.

Tyler appears to argue that the policy against piecemeal sentences is served by requiring that a sentence run, uninterrupted, even when a successful habeas petitioner is released on bond. But

⁵² *State v. Texel*, 230 Neb. 810, 814, 433 N.W.2d 541, 544 (1989).

⁵³ See *Segal v. Wainwright*, 304 So. 2d 446 (Fla. 1974).

⁵⁴ See, *Hulbert*, *supra* note 33; *Shrader*, *supra* note 33.

*Texel*⁵⁵ and *White*⁵⁶ make clear that the problem with piecemeal sentences is not the *technical* interruption of a sentence, but the *actual* interruption in the prisoner's incarceration, and the effect on the prisoner and society if a prisoner is released from incarceration then forced to return.⁵⁷ In an ideal world, that problem would be avoided entirely, but § 29-2823 establishes that it is a tolerable risk when other interests are considered. Tyler's contention that he has a right not to serve his sentence in installments is hardly persuasive, "for it was his action, vigorously contested by the government, that resulted in his release on bail."⁵⁸ When he posted bond, Tyler surely understood that if the State prevailed on appeal, he would be returned to custody. A return to interrupted incarceration was a possibility that Tyler accepted by posting bond.

Tyler also argues that the Johnson County District Court had no authority to "suspend" his sentence during the State's appeal from the court's order granting habeas relief. But Tyler assumes that the sentence would have continued to run unless the court acted affirmatively to interrupt it. In fact, as the common-law principles set forth above demonstrate, the running of a sentence is interrupted by operation of law due to the fact of release from imprisonment. In the absence of a specific statutory provision, an affirmative act of the court is required to award credit for time spent at liberty, pursuant to the equitable and due process principles also articulated above. And, as we have already explained, we do not find those principles to be applicable here.

In fact, Tyler's reading of Nebraska law would place district courts applying § 29-2823 in a difficult position. If a prisoner's sentence continued to run while the prisoner was released on bond, the district court would face one of two options: (1) release the prisoner, and potentially moot the State's right to appellate review by allowing the prisoner's sentence to be completed during the

⁵⁵ *Texel*, *supra* note 52.

⁵⁶ *White*, *supra* note 35.

⁵⁷ See, *Free*, *supra* note 49; *Dunne*, *supra* note 49.

⁵⁸ See *United States v. O'Brien*, 273 F.2d 495, 498 (3d Cir. 1959).

appellate process, or (2) refuse bail, and continue to incarcerate a prisoner who has a colorable claim to immediate release. And *neither* choice would eliminate the possibility of an interrupted sentence, should the order granting the writ be reversed before the prisoner's sentence would have been complete. It would be inconsistent with the purpose of § 29-2823 to conclude that a prisoner who is released on bail under the statute should nonetheless be credited for the time that the prisoner spends at liberty.

[8] Tyler also argues that he was not discharged from "custody" because § 29-2823 provides that if the State appeals from an order granting habeas relief, "the defendant shall not be discharged from custody pending final decision upon appeal." But Tyler takes this language out of context. Section 29-2823 states that the prisoner shall not be discharged from custody, but provides that the prisoner *may* be admitted to bail. Tyler argues that admitting a prisoner to bail need not release the prisoner from "custody" for these purposes and calls our attention to other provisions under which he argues that "custody" does not mean incarceration, such as work release and furlough.⁵⁹ But under such temporary leaves, a convicted prisoner is subject to the custody and control of the penal complex.⁶⁰ And in any event, admission to bail is regarded as a release from custody.⁶¹

CONCLUSION

We conclude, based on long-established Nebraska law, that while Tyler was lawfully free on bond, he was not serving his sentence, and that the time he spent free should not be credited against his maximum sentence for purposes of determining his release date. The equitable doctrine of credit for time erroneously at liberty is not applicable to these circumstances. Tyler's petition for writ of habeas corpus is denied.

WRIT OF HABEAS CORPUS DENIED.

⁵⁹ See Neb. Rev. Stat. § 83-184 (Reissue 1999).

⁶⁰ *State v. Coffman*, 213 Neb. 560, 330 N.W.2d 727 (1983).

⁶¹ See Neb. Rev. Stat. § 29-908 (Reissue 1995) (establishing penalty for failure to appear after prisoner "released from custody under bail"). See, also, *U.S. v. Arpan*, 915 F.2d 1180 (8th Cir. 1990); *Anglin v. Johnston*, 504 F.2d 1165 (7th Cir. 1974).

TODD A. ROBBINS, APPELLANT, v. BEVERLY NETH,
DIRECTOR OF NEBRASKA DEPARTMENT OF
MOTOR VEHICLES, APPELLEE.
728 N.W.2d 109

Filed March 2, 2007. No. S-04-835.

1. **Administrative Law: Final Orders: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
4. **Administrative Law: Legislature.** The Legislature has 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.
5. **Administrative Law.** Agency regulations properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law.
6. _____. Regulations bind the agency that promulgated them just as they bind individual citizens, even if the adoption of the regulations was discretionary.
7. **Administrative Law: Waiver.** Regulations governing procedure are just as binding upon both the agency which enacts them and the public, and the agency does not, as a general rule, have the discretion to waive, suspend, or disregard, in a particular case, a validly adopted rule so long as such rule remains in force.
8. **Administrative Law.** To be valid, an action of an agency must conform to its rules which are in effect at the time the action is taken.
9. **Administrative Law: Statutes.** In order to be valid, a rule or regulation must be consistent with the statute under which the rule or regulation is promulgated.

Petition for further review from the Nebraska Court of Appeals, INBODY, Chief Judge, and SIEVERS and CARLSON, Judges, on appeal thereto from the District Court for Box Butte County, BRIAN SILVERMAN, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

David E. Veath for appellant.

Jon Bruning, Attorney General, Milissa Johnson-Wiles, and Laura L. Neesen for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Beverly Neth, director of the Nebraska Department of Motor Vehicles (the Department), administratively revoked Todd A. Robbins' driver's license for 90 days. The Box Butte County District Court affirmed the order. Robbins appealed to the Nebraska Court of Appeals. Robbins asserted that the revocation was not valid because the administrative license revocation (ALR) hearing was not held in the county where his arrest had occurred, as required by the Department's rules and regulations then in effect. The Court of Appeals rejected Robbins' claim. The Court of Appeals noted that the Legislature had recently repealed the statutory requirement that the ALR hearing be held in the county of arrest and therefore reasoned that such legislative action superseded the Department's regulation which continued to require that the ALR hearing be conducted in the county of the arrest. The Court of Appeals affirmed the district court's affirmance of the revocation order. *Robbins v. Neth*, 15 Neb. App. 67, 722 N.W.2d 76 (2006). Robbins petitioned for further review. We granted Robbins' petition. We conclude that the Department's regulation was not inconsistent with the relevant amended statute and that the regulation requiring the hearing be conducted in the county of arrest remained in effect at the time of Robbins' ALR hearing. Because the ALR hearing was not conducted in the county of arrest, it was not validly conducted. Accordingly, we reverse the decision of the Court of Appeals and remand the cause to the Court of Appeals with directions.

STATEMENT OF FACTS

In its opinion, the Court of Appeals described the facts of this case as follows:

On October 26, 2003, Box Butte County Deputy Sheriff Mark Lindburg conducted a traffic stop of a vehicle driven by Robbins. Deputy Lindburg detected the odor of alcohol, and Robbins admitted to having consumed alcohol. Robbins exhibited impairment on a number of field sobriety tests. Deputy Lindburg then arrested Robbins for driving under

the influence of alcohol and transported him to a hospital. Robbins submitted to a chemical test, which test indicated he had an alcohol concentration of .112 grams of alcohol per 100 milliliters of blood.

Deputy Lindburg completed the “Notice/Sworn Report/Temporary License” form and forwarded it to the Department, which received the report on November 12, 2003. On November 26, Robbins filed a petition for an administrative hearing. The ALR hearing was held on December 15. The hearing officer, located in Lincoln, Nebraska (Lancaster County), conducted the hearing via telephone. Robbins appeared via telephone from a district court jury room in the courthouse in Alliance, Nebraska (Box Butte County), and Box Butte County Deputy Sheriff Lindburg appeared via telephone from the sheriff’s department in Alliance. At the start of the hearing, Robbins’ attorney objected to venue and also objected that the hearing was not being conducted by videoconference even though it was technically feasible for the hearing to be conducted in such a manner.

Following the ALR hearing, the hearing officer recommended revocation of Robbins’ operating privileges, and Neth . . . adopted the recommendation. The Department entered an order revoking Robbins’ driver’s license for 90 days effective December 13, 2003. Robbins filed an appeal to the Box Butte County District Court, and on January 16, 2004, the Department stayed the revocation of Robbins’ driver’s license. On July 12, the district court affirmed the Department’s order of revocation.

Robbins v. Neth, 15 Neb. App. at 69, 722 N.W.2d at 80.

Robbins appealed to the Court of Appeals. Relying on the Department’s rules and regulations, Robbins asserted that the district court erred in affirming the revocation because, contrary to the rules and regulations, the ALR hearing was not held in the county in which the arrest had occurred and because the ALR hearing had not been conducted by videoconference when conducting the hearing in such a manner was technically feasible. In its opinion, the Court of Appeals noted that at the time of Robbins’ ALR hearing on December 15, 2003, the Department’s regulations provided that the hearing be held in the county in

which the arrest had occurred, despite the fact that the statute that had previously required that the hearing be conducted in the county of arrest had been amended to remove such requirement operative October 1, 2003. The Court of Appeals reasoned that the Legislature's amendment of the statute removing the requirement that the hearing be conducted in the county of arrest eclipsed the Department's rule which continued to require that the hearing be conducted in the county of arrest. The Court of Appeals therefore concluded that the failure to hold the hearing in the county in which the arrest had occurred did not make the revocation invalid on the ground of improper venue. The Court of Appeals further concluded that statutory language regarding videoconferencing was permissive and that Robbins had not shown a particularized need for a videoconference hearing. The Court of Appeals therefore rejected Robbins' assignments of error and affirmed the district court's affirmance of the Department's revocation of Robbins' driver's license.

One judge of the three-judge Court of Appeals panel dissented on the basis that "Robbins' hearing was invalid because it was not held in accordance with the Department's rules and regulations for the reason that the hearing officer was located in a county other than where the arrest occurred." *Robbins v. Neth*, 15 Neb. App. 67, 75, 722 N.W.2d 76, 84 (2006) (Inbody, Chief Judge, dissenting). The dissent noted that the statute in effect at the time of Robbins' ALR hearing did not require that the hearing be held in the county where the arrest had occurred and that the statute did not prohibit a requirement that the hearing be held in the county of arrest. The dissent reasoned that the requirement that the Department continued to impose on itself through its regulation was not prohibited or inconsistent with the relevant amended statute and that, therefore, the regulation remained in effect.

Robbins petitioned for further review. We granted Robbins' petition.

ASSIGNMENT OF ERROR

Robbins asserts that the Court of Appeals erred as a matter of law in affirming the district court's affirmance of the revocation of his license and, specifically, erred in concluding that the repeal of the statutory requirement superseded the Department's regulation.

The Court of Appeals' decision on the purported failure to conduct the ALR hearing by videoconference is not assigned as error. We comment on videoconferencing only incidentally as relevant to our consideration of Robbins' assigned error.

STANDARDS OF REVIEW

[1,2] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Kenley v. Neth*, 271 Neb. 402, 712 N.W.2d 251 (2006). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[3] Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Id.*

ANALYSIS

Robbins argues on further review that the Court of Appeals erred as a matter of law in affirming the district court's affirmance of the revocation of his license and, specifically, in concluding that the repeal of the statutory provision which had required that the ALR hearing be conducted in the county of arrest superseded the Department's regulation which continued to impose such requirement. We conclude that the Department's regulation requiring that a hearing be held in the county where the arrest had occurred is not inconsistent with the relevant statutes as amended. Therefore, at the time of Robbins' ALR hearing, the Department was required to hold the hearing in Box Butte County, where Robbins had been arrested. Because the Department failed to do so, we conclude that the district court erred in affirming the revocation of Robbins' license and that the Court of Appeals erred in affirming the district court's order.

[4] It is well established that the Legislature has 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. *Schumacher v. Johanns*, 272 Neb.

346, 722 N.W.2d 37 (2006). Within the Motor Vehicle Operator's License Act, Neb. Rev. Stat. §§ 60-462 to 60-4,188 (Reissue 1998, Cum. Supp. 2002 & Supp. 2003), the Legislature, at § 60-498.01, required the director of the Department of Motor Vehicles to revoke the operator's license of any person who has been convicted of certain offenses. Under § 60-498.01, a person whose license has been revoked is entitled to a hearing before the director. In § 60-498.01(7), the Legislature authorized the director to "adopt and promulgate rules and regulations to govern the conduct of the hearing and insure that the hearing will proceed in an orderly manner." Prior to being transferred to § 60-498.01 operative October 1, 2003, the same authority existed under Neb. Rev. Stat. § 60-6,205(7) (Cum. Supp. 2002).

Pursuant to statutory authority, the Department adopted 247 Neb. Admin. Code, ch. 1, § 022.01 (2001), which provided that revocation "[h]earings shall be held either by telephone, in person, or by video conference if technically feasible at the discretion of the Director, in the county in which the arrest occurred. The parties may agree to another venue." The language of the rule reflected the language of § 60-6,205(6)(a) (Cum. Supp. 2002), which until October 1, 2003, required that a revocation hearing "shall be conducted in the county in which the arrest occurred or in any other county agreed to by the parties." The Legislature transferred § 60-6,205 to § 60-498.01 operative October 1, 2003, and amended subsection (6)(a) by removing the requirement that the ALR hearing be conducted in the county of arrest and in its place provided that "[t]he hearing and any prehearing conference may be conducted in person or by telephone, television, or other electronic means at the discretion of the director, and all parties may participate by such means at the discretion of the director."

Thus, at the time that Robbins' ALR hearing was held on December 15, 2003, the new § 60-498.01(6)(a) was in effect, and such statute did not require that the hearing be conducted in the county in which the arrest had occurred. However, the Department had not amended its rules and regulations in response to the statutory change, and 247 Neb. Admin. Code, ch. 1, § 022.01, which required that the hearing be held in the county in which the arrest had occurred, was still in effect on December 15, 2003.

[5-8] Agency regulations properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law. *State v. Grosshans*, 270 Neb. 660, 707 N.W.2d 405 (2005). Regulations bind the agency that promulgated them just as they bind individual citizens, even if the adoption of the regulations was discretionary. *Schmidt v. State*, 255 Neb. 551, 586 N.W.2d 148 (1998). Regulations governing procedure are just as binding upon both the agency which enacts them and the public, and the agency does not, as a general rule, have the discretion to waive, suspend, or disregard, in a particular case, a validly adopted rule so long as such rule remains in force. *Id.* To be valid, an action of an agency must conform to its rules which are in effect at the time the action is taken. *Id.* Therefore, to the extent 247 Neb. Admin. Code, ch. 1, § 022.01, was a valid regulation at the time of Robbins' ALR hearing on December 15, 2003, the Department was required to conform to the regulation in order for any action taken at the hearing to be valid.

[9] We have stated that in order to be valid, a rule or regulation must be consistent with the statute under which the rule or regulation is promulgated. *City of Omaha v. Kum & Go*, 263 Neb. 724, 642 N.W.2d 154 (2002). The Department's requirement in 247 Neb. Admin. Code, ch. 1, § 022.01, that the hearing be held in the county where the arrest had occurred, was clearly valid prior to October 1, 2003, because the language of the regulation followed the language of § 60-6,205(6)(a). The question before us, however, is whether 247 Neb. Admin. Code, ch. 1, § 022.01, continued to be valid after the Legislature moved § 60-6,205 to § 60-498.01 and removed the requirement that the hearing be held in the county in which the arrest had occurred, and instead was silent on venue and required merely that the hearing "may be conducted in person or by telephone, television, or other electronic means at the discretion of the director, and all parties may participate by such means at the discretion of the director."

Having considered the language of § 60-498.01 and 247 Neb. Admin. Code, ch. 1, § 022.01, we determine that after the statutory amendment, the Department's regulation was still consistent with statutory authority and that therefore, the regulation was valid and the Department was required to conform to the regulation. In 2003, the Legislature removed the statutory requirement

that the hearing be held in the county in which the arrest had occurred. Thus, the amended statute, § 60-498.01, was silent on venue and, we further observe, did not prohibit the Department from requiring that the hearing be held in such county. The Legislature merely provided for the means by which a hearing could be conducted and by which parties could participate.

Because the Legislature did not mandate a location for the hearing and did not prohibit the hearing from being held in the county where the arrest occurred, the Department, pursuant to its rulemaking authority under § 60-498.01(7), was still authorized to require by its rules and regulations that the hearing be held in the county where the arrest had occurred. Such rules and regulations were not inconsistent with the relevant amended statute.

Although we agree with the Court of Appeals that legislative intent manifested by statute controls over an agency rule to the contrary, we do not read the legislative amendment in this case as a mandate prohibiting the Department from requiring hearings to be held in the county of arrest. The Court of Appeals incorrectly concluded that such legislative “mandate” prohibited the continued validity of the Department’s regulation which required that the hearing be conducted in the county of arrest.

Although the statutory amendment operative October 1, 2003, allowed the Department to remove the requirement from its rules and regulations, the Department had not done so at the time of Robbins’ ALR hearing on December 15, 2003. The Department was required to conform to its own rules and regulations in effect at the time of Robbins’ hearing, see *Schmidt v. State*, 255 Neb. 551, 586 N.W.2d 148 (1998), and the Department was therefore required under 247 Neb. Admin. Code, ch. 1, § 022.01, to hold the hearing in Box Butte County, where Robbins’ arrest had occurred. We have held that for statutory purposes, an ALR hearing is held at the location of the hearing officer. *Gracey v. Zwonechek*, 263 Neb. 796, 643 N.W.2d 381 (2002). Likewise, for purposes of 247 Neb. Admin. Code, ch. 1, § 022.01, the hearing is held at the location of the hearing officer. The record in the present case indicates that the hearing officer was located in Lancaster County rather than Box Butte County. Because the Department did not conform to its own regulation in effect at the time of the hearing, the revocation made at the hearing was not

valid. The affirmances of the revocation order by the lower courts were in error.

CONCLUSION

We determine that the Department's regulation requiring that the hearing be held in the county where the arrest had occurred was not inconsistent with the relevant statute and that the Department was therefore required to follow its own regulation. We conclude that the Court of Appeals erred in determining that the Department did not err when it failed to hold Robbins' hearing in the county where the arrest had occurred and that the Court of Appeals therefore erred in affirming the district court's affirmance of the Department's revocation of Robbins' driver's license. We reverse the decision of the Court of Appeals, and remand the cause to the Court of Appeals with directions to remand the cause to the district court with directions to remand the matter to the Department with directions to vacate the order of revocation.

REVERSED AND REMANDED WITH DIRECTIONS.

LESLIE N. JOHNSON AND AMY A. JOHNSON, HUSBAND AND WIFE,
APPELLANTS, v. KNOX COUNTY PARTNERSHIP, A NEBRASKA
GENERAL PARTNERSHIP, AND KNOX COUNTY FEEDERS, INC.,
A NEBRASKA CORPORATION, APPELLEES.

728 N.W.2d 101

Filed March 2, 2007. No. S-05-853.

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. **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.
4. **Actions: Pleadings.** To determine the nature of an action, a court must examine and construe a complaint's essential and factual allegations by which the plaintiff requests relief, rather than the legal terminology utilized in the complaint or the form of a pleading.
 5. **Nuisances: Real Estate: Words and Phrases.** A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of his or her land.
 6. **Actions: Equity: Nuisances.** With respect to an action in equity, a legitimate business enterprise is not a nuisance per se, but it may become a nuisance in fact by reason of the conditions implicit in and unavoidably resulting from its operation or because of the manner of its operation.
 7. **Nuisances: Zoning.** A legal and proper activity may be a nuisance in fact simply because of its location.
 8. **Actions: Equity: Nuisances.** With respect to a nuisance in the context of an action in equity, the invasion of or interference with another's private use and enjoyment of land need only be substantial.
 9. **Nuisances.** Where one's business operation as conducted materially and injuriously affects the comfort and enjoyment and property rights of those in the vicinity, it becomes a nuisance and may be enjoined.
 10. _____. To justify the abatement of a claimed nuisance, the annoyance must be such as to cause actual physical discomfort to one of ordinary sensibilities.
 11. **Nuisances: Presumptions.** There is a presumption, in the absence of evidence to the contrary, that a plaintiff in an action for abatement of a nuisance has ordinary sensibilities.
 12. **Nuisances.** Even in an industrial or rural area, one cannot conduct a business enterprise in such manner as to materially prejudice a neighbor.
 13. **Nuisances: Property.** The fact that a residence is in a rural area requires an expectation that the residence will be subjected to normal rural conditions, but not to such excessive abuse as to destroy the ability to live in and enjoy the home, or such as to reduce the value of the residential property.
 14. _____. It is true that rural residents must expect to bear with farm and livestock conditions normally found in the area where they reside. But, a rural home and a rural family, within reason, are entitled to the same relative protection as others.
 15. **Nuisances.** The right to have the air floating over one's premises free from noxious and unnatural impurities is a right as absolute as the right to the soil itself.

Appeal from the District Court for Knox County: PATRICK G. ROGERS, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Steven M. Virgil, of Creighton Legal Clinic, and, on brief, James M. Buchanan for appellants.

David A. Domina and Claudia L. Stringfield-Johnson, of Domina Law Group, P.C., L.L.O., for appellees.

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

STEPHAN, J.

Leslie N. Johnson and Amy A. Johnson, husband and wife, live near a cattle confinement facility operated by Knox County Feeders, Inc., on land owned by Knox County Partnership in rural Knox County, Nebraska. The Johnsons brought this action to enjoin certain operations of the confinement facility, alleging that it was in violation of county zoning regulations and constituted a nuisance. The district court for Knox County entered summary judgment in favor of both defendants, based on its determination that the confinement facility was not in violation of county zoning regulations. The Johnsons perfected this appeal. We conclude that while summary judgment was proper as to the claim based upon alleged zoning violations, there are genuine issues of material fact which preclude summary judgment on the claim that the operation of the confinement facility constituted a private nuisance.

FACTS

PARTIES

Since about 1990, the Johnsons have owned and resided on approximately 400 acres of land in Knox County. They conduct a farming operation, growing row crops and raising some livestock. Knox County Partnership (hereinafter the Partnership) owns approximately 50.5 acres of land in rural Knox County, located about three-quarters of a mile south-southeast of the Johnson farm. The Partnership, consisting of Donald Stange and Marion Rus, purchased the land in 2003. Knox County Feeders, Inc. (hereinafter Feeders), operates a cattle confinement facility on the Partnership's land. Stange and Rus are the principal shareholders of Feeders, having purchased their stock in that business from previous owners in 2003 at the same time the Partnership purchased the land. Feeders has operated a cattle confinement facility at this location since about 1993.

NEBRASKA'S DEPARTMENT OF ENVIRONMENTAL QUALITY

In 1993, Feeders was issued a permit by Nebraska's Department of Environmental Quality (DEQ) to operate a livestock waste control facility for 980 head of cattle. However, a site inspection by

DEQ in October 1999 revealed that Feeders had about 4,300 head of cattle in its confinement facility. Subsequently, DEQ demanded that Feeders obtain the appropriate operation and construction permits from DEQ to bring the cattle confinement facility into compliance with applicable state regulations. After finally complying with DEQ requirements, Feeders was issued a livestock waste control facility operating permit in December 2002 for 5,000 head of cattle. That operating permit was reissued by DEQ in February 2004 after Stange and Rus purchased Feeders.

KNOX COUNTY ZONING

In 1997, Knox County reinstated the enforcement of county zoning regulations. Knox County amended its zoning regulations in April 1999, adding, among other things, the following provisions:

ARTICLE XI: LIVESTOCK CONFINEMENT

....

11.2 NEW AND/OR EXPANDED LIVESTOCK CONFINEMENT: PERMIT REQUIRED

. . . No extension, enlargement, or addition of or to an existing livestock confinement by over 150 animal units shall be created unless a livestock confinement permit is first obtained from the Zoning Administration.

....

11.6 LAND BASE TO SPREAD MANURE

An appropriate land base is needed to spread and properly distribute the manure to prevent pollution to the soil, water, and air. An applicant must . . . properly spread and distribute the manure. . . .

....

11.8 NUISANCE PROTECTION ZONE (SET BACKS RELATIVE TO SIZE AND TYPE)

....

All livestock confinements must have a minimum set back from a residence that is relative to the size (one time capacity) and the type of the livestock confinement. For beef confinements, they must be a minimum distance of one foot from a residence for each animal unit. . . .

....

Set backs relative to size and type can be waived if the affected residences give appropriate waivers and easements. . . .

If a producer, upon asking permission within a setback, is denied, the producer may appeal to the Board of Adjustments. .

. . Upon this appeal, the Board of Adjustments will make [its] recommendations to the Board of Supervisors who will hold a hearing and make a final ruling on the appeal.

In May 2003, the Knox County zoning administrator informed Feeders that, based on DEQ inspection records, it had not undergone expansion as of April 1999 and was thus “grandfathered” for 5,000 head of cattle.

In February and March 2004, the Johnsons attended the Knox County Board of Supervisors’ meetings and presented complaints that the Partnership and Feeders were in violation of county zoning regulations. At its March meeting, the board of supervisors asked the Knox County Attorney to present a report at the next meeting on the issues raised by the Johnsons. The board also adopted a resolution that amended the article XI livestock confinement zoning regulations, adding to or modifying, among other things, the following provisions: Under part 11.1, “Definition of Livestock Confinement,” add “An existing confined livestock feeding operation/facility shall mean an operation that was in existence prior to April 29, 1999.” Under part 11.8, “Nuisance Protection Zone (Set Backs Relative to Size and Type),” add “All new livestock confinements must have a minimum set back from a residence or existing livestock confinement that is relative to the size (one time capacity) and the type of the livestock confinement.” At the April 2004 board of supervisors’ meeting, the county attorney reported that in his opinion, Feeders was “grandfathered” under the Knox County zoning regulations and that any expansion of the facility had been done before the 1999 county zoning regulations.

LEGAL PROCEEDINGS

On June 4, 2004, the Johnsons filed a complaint in the district court for Knox County against the Partnership. The Johnsons filed an amended complaint on August 3, adding Feeders as a defendant. In their amended complaint, the Johnsons recited the relevant parts of the April 1999 Knox County zoning regulations

regarding livestock confinements and alleged, restated, that (1) Feeders had in excess of 3,868 animal units, while the Johnsons' residence was only 3,867 feet from the Partnership and Feeders' cattle confinement facility, and (2) since 1999, Feeders has expanded its confinement facility by more than 150 animal units. The Johnsons also made the following allegations:

8. . . . Based upon information and belief, [the Johnsons] understand that . . . Feeders . . . has sufficient spreading acres for its cattle, but does not spread the manure on such acres, preferring instead to dump large quantities of manure within a small land area, particularly in areas proximate to the confinement. This concentrated dumping causes pollution to the [Johnsons'] soil, water and air.

9. . . . The continued operation and illegal expansion of the [Partnership and Feeders'] livestock confinement yards as well as concentrated dumping of manure in violation of county regulations creates a nuisance to the [Johnsons]. The [Johnsons] suffer from odor, physical intrusion of liquid manure created by [the Partnership and Feeders'] confinement [yards] and excessive dust from [the Partnership and Feeders'] unlawful confinement operation.

The Johnsons sought to enjoin the Partnership and Feeders from operating a cattle confinement facility in excess of that permitted by county zoning regulations and from concentrated dumping of manure.

The Partnership and Feeders denied the material allegations of the Johnsons' amended complaint and alleged various defenses. They moved for summary judgment, as did the Johnsons. After receiving evidence, the district court entered an order granting summary judgment in favor of the Partnership and Feeders and dismissing the Johnsons' amended complaint. In its order, the court noted:

[The Johnsons'] basic contention is that the [Partnership and Feeders] cannot operate a feedlot which contains more than a thousand head of cattle and that the Knox County Board of Supervisors and the Nebraska DEQ are in violation of the zoning regulations in issuing permits for the [Partnership and Feeders] to operate their feedlot with up to 5,000 head of cattle.

Referring to Neb. Rev. Stat. § 23-114.05 (Cum. Supp. 2006), the district court determined that the Johnsons had standing to sue based upon alleged violations of county zoning regulations, but found that “[t]here is nothing in the evidence to indicate that the [Partnership and Feeders] are currently violating any Knox County Zoning permit or use authorized by the zoning officials for Knox County. [The Johnsons] are, in essence, attacking the zoning officials’ judgment in issuing the permits that the defendants have.” The district court further determined that the board of supervisors, the county attorney, and the zoning administrator did not abuse their discretion in “grandfathering” the cattle confinement facility.

The Johnsons timely appealed, and we moved the appeal to our docket on our own motion, in accordance with this 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

The Johnsons assign, restated, that the district court erred in granting summary judgment for the Partnership and Feeders because the Johnsons’ complaint alleged a claim based on nuisance, which claim the district court did not address.

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. *Pogge v. American Fam. Mut. Ins. Co.*, 272 Neb. 554, 723 N.W.2d 334 (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] 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).

ANALYSIS

[4] We begin by identifying the theory or theories upon which the Johnsons sought injunctive relief. To determine the nature of an action, a court must examine and construe a complaint's essential and factual allegations by which the plaintiff requests relief, rather than the legal terminology utilized in the complaint or the form of a pleading. *Wendeln v. Beatrice Manor*, 271 Neb. 373, 712 N.W.2d 226 (2006). The Johnsons alleged that the existence and operation of the cattle confinement facility "violates Knox County zoning regulations concerning the operation of live-stock confinements." They further alleged that "[t]he continued operation and illegal expansion of the [Partnership and Feeders'] livestock confinement yards as well as concentrated dumping of manure in violation of county regulations creates a nuisance to the [Johnsons]." They claimed that they "suffer[ed] from odor, physical intrusion of liquid manure," and "excessive dust" caused by the cattle confinement facility.

The factual allegations set forth in the operative complaint indicate two separate theories of relief. Section 23-114.05 provides a procedure whereby owners of real estate affected by a violation of county zoning regulations may bring an action to enjoin the violation. See, *Omaha Fish and Wildlife Club, Inc. v. Community Refuse, Inc.*, 208 Neb. 110, 302 N.W.2d 379 (1981). While not specifically invoking § 23-114.05, the Johnsons' complaint includes factual allegations which, if proved, would entitle them to relief under this statutory remedy. But the Johnsons also alleged that the confinement facility constitutes a nuisance. Nebraska recognizes a common-law tort for private nuisance in both actions at law seeking damages and actions in equity seeking injunctions. See, *Goeke v. National Farms, Inc.*, 245 Neb. 262, 512 N.W.2d 626 (1994) (equitable action for injunctive relief); *Hall v. Phillips*, 231 Neb. 269, 436 N.W.2d 139 (1989) (action for damages). We examine each of the Johnsons' two theories separately to determine whether summary judgment was proper.

STATUTORY REMEDY TO ENFORCE ZONING REGULATIONS

The remedy afforded by § 23-114.05 lies where a violation of a county zoning regulation is proved. The district court concluded that there was “nothing in the evidence to indicate that the [Partnership and Feeders] are currently violating any Knox County Zoning permit or use authorized by zoning officials for Knox County.” The Johnsons do not assign error to this portion of the district court’s order. Accordingly, there is no genuine issue of material fact regarding the Johnsons’ allegations that the cattle confinement facility was conducted in violation of county zoning regulations. The Partnership and Feeders are entitled to judgment as a matter of law with respect to such claim.

PRIVATE NUISANCE

[5-7] The Johnsons alleged that the cattle confinement facility constituted a nuisance which subjected them to odor, physical intrusion of liquid manure, and excessive dust. “A private nuisance is a nontrespasory invasion of another’s interest in the private use and enjoyment of land.” *Hall v. Phillips*, 231 Neb. at 272, 436 N.W.2d at 142, quoting Restatement (Second) of Torts § 821D (1979). To establish their nuisance claim, the Johnsons were not required to prove that the cattle confinement facility existed or was operated in violation of zoning regulations or other law. With respect to an action in equity, a legitimate business enterprise is not a nuisance per se, but it may become a nuisance in fact by reason of the conditions implicit in and unavoidably resulting from its operation or because of the manner of its operation. *Omega Chem. Co. v. United Seeds*, 252 Neb. 137, 560 N.W.2d 820 (1997); *Flansburgh v. Coffey*, 220 Neb. 381, 370 N.W.2d 127 (1985). A legal and proper activity may be a nuisance in fact simply because of its location. *City of Syracuse v. Farmers Elevator, Inc.*, 182 Neb. 783, 157 N.W.2d 394 (1968). See, also, *Cline v. Franklin Pork, Inc.*, 219 Neb. 234, 361 N.W.2d 566 (1985).

[8,9] With respect to a nuisance in the context of an action in equity, the invasion of or interference with another’s private use and enjoyment of land need only be substantial. *Omega Chem. Co. v. United Seeds*, *supra*; *Hall v. Phillips*, *supra*. Where one’s business operation as conducted materially and injuriously affects the comfort and enjoyment and property rights of those in the

vicinity, it becomes a nuisance and may be enjoined. *Karpisek v. Cather & Sons Constr., Inc.*, 174 Neb. 234, 117 N.W.2d 322 (1962).

[10-15] To justify the abatement of a claimed nuisance, the annoyance must be such as to cause actual physical discomfort to one of ordinary sensibilities. *Goeke v. National Farms, Inc.*, 245 Neb. 262, 512 N.W.2d 626 (1994); *Flansburgh v. Coffey*, *supra*; *Cline v. Franklin Pork, Inc.*, *supra*. There is a presumption, in the absence of evidence to the contrary, that a plaintiff in an action for abatement of a nuisance has ordinary sensibilities. *Goeke v. National Farms, Inc.*, *supra*; *Flansburgh v. Coffey*, *supra*; *Cline v. Franklin Pork, Inc.*, *supra*. Even in an industrial or rural area, one cannot conduct a business enterprise in such manner as to materially prejudice a neighbor. *Botsch v. Leigh Land Co.*, 195 Neb. 509, 239 N.W.2d 481 (1976). The fact that a residence is in a rural area requires an expectation that the residence will be subjected to normal rural conditions, but not to such excessive abuse as to destroy the ability to live in and enjoy the home, or such as to reduce the value of the residential property. *Flansburgh v. Coffey*, *supra*; *Cline v. Franklin Pork, Inc.*, *supra*; *Botsch v. Leigh Land Co.*, *supra*. It is true that rural residents must expect to bear with farm and livestock conditions normally found in the area where they reside. But, a rural home and a rural family, within reason, are entitled to the same relative protection as others. *Botsch v. Leigh Land Co.*, *supra*. The right to have the air floating over one's premises free from noxious and unnatural impurities is a right as absolute as the right to the soil itself. *Flansburgh v. Coffey*, *supra*.

The record includes the deposition testimony of the Johnsons. Leslie testified that members of his family experience breathing problems, eye irritation, nausea, and headaches from dust and odor emanating from the cattle confinement facility. He also testified that liquid manure slurry pumped from high pressure spraying devices operated and maintained by Feeders would sometimes mist or run off onto his property. Amy testified regarding an incident when she was sprayed with liquid manure from the high pressure spraying devices while repairing a fence on the Johnson property. 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. *In re Adoption of Jaden M.*, 272 Neb. 789, 725 N.W.2d 410 (2006); *Brodine v. Blue Cross Blue Shield*, 272 Neb. 713, 724 N.W.2d 321 (2006). Applying this standard, we conclude that there are genuine issues of material fact as to whether the cattle confinement facility caused a substantial invasion of or interference with the Johnsons' private use and enjoyment of their property. Accordingly, the Partnership and Feeders were not entitled to summary judgment with respect to the private nuisance claim.

CONCLUSION

There are no genuine issues of material fact with respect to the Johnsons' claim that the cattle confinement facility conducted by Feeders on property owned by the Partnership violated zoning regulations. We affirm the entry of summary judgment in favor of the Partnership and Feeders on this claim. However, we reverse the entry of summary judgment with respect to the Johnsons' private nuisance claim because there exist genuine issues of material fact as to whether the feeding operation substantially invaded or interfered with the Johnsons' use and enjoyment of their property so as to constitute an actionable private nuisance. We remand the cause to the district court for further proceedings consistent with this opinion.

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

CHASE 3000, INC., APPELLEE AND CROSS-APPELLEE, v. NEBRASKA
PUBLIC SERVICE COMMISSION AND QWEST COMMUNICATIONS
CORPORATION, APPELLEES AND CROSS-APPELLANTS, AND NEBRASKA
TELECOMMUNICATIONS ASSOCIATION, APPELLANT, AND UNITED
TELEPHONE COMPANY OF THE WEST, DOING BUSINESS AS SPRINT AND
SPRINT COMMUNICATIONS COMPANY, L.P., ET AL., APPELLEES.

728 N.W.2d 560

Filed March 2, 2007. No. S-05-935.

1. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has

- jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
 3. **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.
 4. **Jurisdiction: Appeal and Error.** When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.
 5. **Statutes: Appeal and Error.** In the absence of ambiguity, courts must give effect to the statutes as they are written. If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.
 6. **Statutes.** A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in *pari materia* with any related statutes.
 7. **Statutes: Legislature: Intent.** A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent.
 8. **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.
 9. **Statutes: Legislature: Intent.** When a statutory term is reasonably considered ambiguous, a court may examine the legislative history of the act in question to ascertain the intent of the Legislature.
 10. **Administrative Law.** Generally, for purposes of construction, a rule or order of an administrative agency is treated like a statute.
 11. _____. Rulemaking by an administrative agency is properly characterized as a legislative process as contrasted with an administrative, judicial, or quasi-judicial process.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Reversed and remanded with directions.

Jack L. Shultz and Gregory D. Barton, of Harding, Shultz & Downs, for appellant.

Jon Bruning, Attorney General, and L. Jay Bartel for appellee Nebraska Public Service Commission.

Steven G. Seglin and Thomas E. Jeffers, of Crosby Guenzel, L.L.P., for appellee Chase 3000, Inc.

Jill Vinjamuri Gettman and Michael J. Mills, of Gettman & Mills, L.L.P., for appellee Qwest Communications Corporation.

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

STEPHAN, J.

This case requires us to determine whether there is a statutory right of appeal from an order of the Nebraska Public Service Commission (Commission) declining to exercise its rulemaking authority. We conclude that such an order is appealable under the procedures set forth in the Administrative Procedure Act (APA), Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 1999 & Cum. Supp. 2006). We further conclude that the district court erred in reversing the order of the Commission which is the subject of this appeal.

FACTS

On May 21, 2004, Chase 3000, Inc., a Nebraska Internet service provider (ISP), and several other ISP's filed a petition with the Commission requesting it either to initiate a rulemaking proceeding to establish rules applicable to the relationship between an incumbent local exchange carrier (ILEC) and its affiliated companies or, in the alternative, to initiate an investigation to allow public comment on the use of resources held by a monopoly that may be protected from competition. As paraphrased by the Commission, the petition requested that the Commission consider 11 separate issues as follows:

(1) Whether the Commission should establish regulations controlling the permissible relationship between ILEC's and their affiliates.

(2) Whether the details of the financial relationship of a regulated company with its affiliate company should be open to the public.

(3) Whether the sale of regulated services to an affiliate company and a nonaffiliated company be priced the same.

(4) Whether there should be a reasonableness test for all financial transactions between an ILEC and its affiliate company.

(5) What accounting requirements should be imposed on affiliated companies where a majority share of the affiliate is owned by the ILEC.

(6) Whether affiliate companies, whose stock is partially or wholly owned by an ILEC, should be subject to the same rules and regulations as the ILEC.

(7) Whether an ILEC, via its affiliate, can use predatory pricing to win a market share. Can a rate list, designed to assure the same price for the same service, be circumvented by having the affiliate company offer the service?

(8) Should a subsidized monopoly be allowed to use funds derived from said company to subsidize an affiliate and use it to compete with nonaffiliated businesses in providing nonregulated services?

(9) Should the ILEC be allowed to use resources such as buildings, tools, airplanes, vehicles, et cetera, to assist the affiliate company? If a competitor to the affiliate company wanted equal access to such resources, should it be possible to purchase access at the same rate paid by the affiliate?

(10) Should affiliate companies be able to provide services to the ILEC on a noncompetitive basis and at nonmarket rates? What protections exist to assure an accurate reflection of the cost of providing regulated services?

(11) If rules are ultimately promulgated, what remedies should be made available to the parties for violations of such rules?

By written order, the Commission sought public comment on the questions raised by the petition. The Nebraska Telecommunications Association (NTA) filed a petition for a declaratory ruling, arguing that the Commission lacked jurisdiction to either conduct a rulemaking proceeding or engage in an investigation of an ILEC's nonregulated affiliates. NTA then filed a motion to stay the proceedings pending resolution of its petition for declaratory ruling. The Commission denied the motion to stay but ruled that the parties could address the jurisdictional issue when submitting comments.

Several entities filed comments, including Chase 3000, NTA, Qwest Communications Corporation, and AT&T

Telecommunications of the Midwest, Inc. (AT&T). On September 21, 2004, the Commission entered an order closing the investigation in which it concluded:

Upon consideration of the Petition . . . and all comments filed in the . . . proceeding, the Commission is of the opinion and finds that it lacks jurisdiction to enact rules which generally govern a non-regulated affiliate of a local exchange carrier as the Petitioners' [sic] request.

The Commission agrees with the comments filed by the NTA that its jurisdiction is limited, extending to common carriers engaged in furnishing telecommunications services for hire in Nebraska. The Petition appears to be seeking a set of rules which would either directly or indirectly decide how non-regulated affiliate companies should be structured, and how they should operate.

. . . .

The Commission's jurisdiction does not extend to non-regulated services or rates provided by affiliates of common carriers who are not required to be certificated in the state, except as it relates to universal service and E911 as otherwise provided for in statute. . . .

That is not to say that such affiliates are not subject to any oversight. The Federal Communications Commission (FCC) has rules which govern how the ILECs must account for transactions with their affiliates. The FCC's rules impose auditing and reporting requirements and extend to services offered in state tariffs.

Moreover, as it pertains to the regulated entity itself, there are provisions in both state and federal law which prohibit discriminatory pricing. If there is a case for discriminatory pricing or anti-competitive behavior by an ILEC, it should be brought before the FCC or the Commission for determination under its jurisdiction to resolve complaints related to activities of the regulated common carriers.

However, at this point, the Commission is without evidence that there is a problem of statewide magnitude. It appears unnecessary to create additional rules applicable to all entities to resolve complaints relating to one or a few,

particularly, if they involve reporting duplicative information already provided to the FCC.

Chase 3000 filed a petition for judicial review in the district court for Lancaster County pursuant to the APA and Neb. Rev. Stat. §§ 75-136 (Reissue 2003) and 86-158 (Cum. Supp. 2006). No other entity appealed the order. In an order filed on June 29, 2005, the district court held that the Commission “erred in determining it was without jurisdiction to enact rules governing the relationship between ILECs and their nonregulated affiliates.” Based on this interpretation of the Commission’s order, the district court reversed and determined that the cause should be remanded to the Commission for an “investigation into whether or not a general rule or a case by case analysis is most appropriate.” NTA filed this timely appeal, and the Commission and Qwest Communications Corporation cross-appealed; all urged reversal. We moved the case to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

Appellant and cross-appellants assign, restated, that the order of the district court reversing and remanding the order of the Commission was arbitrary, capricious, and contrary to law.

STANDARD OF REVIEW

[1] Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties. *In re Interest of Sean H.*, 271 Neb. 395, 711 N.W.2d 879 (2006); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

[2] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *Zach v. Eacker*, 271 Neb. 868, 716 N.W.2d 437 (2006); *Campbell v. Omaha Police & Fire Ret. Sys.*, 268 Neb. 281, 682 N.W.2d 259 (2004).

[3] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors

appearing on the record. 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. *Wilson v. Nebraska Dept. of Health & Human Servs.*, 272 Neb. 131, 718 N.W.2d 544 (2006); *Zach v. Eacker*, *supra*.

ANALYSIS

SUBJECT MATTER JURISDICTION

[4] NTA contends that neither the district court nor this court has subject matter jurisdiction because there is no current statutory right to appeal a Commission's order declining to exercise its rulemaking authority. When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court. *Kaplan v. McClurg*, 271 Neb. 101, 710 N.W.2d 96 (2006); *Cummins Mgmt. v. Gilroy*, 266 Neb. 635, 667 N.W.2d 538 (2003). We address this threshold jurisdictional issue.

The rulemaking authority of the Commission is derived from Neb. Rev. Stat. § 75-110 (Reissue 2003), which provides that the Commission "shall adopt and promulgate rules and regulations which the commission deems necessary to regulate persons within the commission's jurisdiction." The APA authorizes any person to "petition an agency requesting the adoption of a rule or regulation." § 84-907.08. Within 60 days of the submission of the petition, the agency must "(1) deny the petition in writing, stating its reasons therefor, (2) initiate rulemaking or regulationmaking proceedings in accordance with the Administrative Procedure Act, or (3) if otherwise lawful, adopt a rule or regulation." § 84-907.08. Section 84-911 provides a procedure whereby a party may challenge the validity of an administrative rule or regulation, but there is no specific statutory provision for judicial review of an agency's decision not to exercise its rulemaking power.

Chase 3000 contends that judicial review of an order of the Commission declining to engage in rulemaking is permissible under § 75-136, which provides in relevant part: "Except as otherwise provided by law, if a party to any [Commission]

proceeding is not satisfied with the order entered by the commission, such party may appeal. Any appeal filed on or after August 31, 2003, shall be in accordance with the Administrative Procedure Act.” Chase 3000 contends that § 75-136 should be read in conjunction with § 86-158, which provides that appeals from the Commission’s orders entered pursuant to the Nebraska Telecommunications Regulation Act “shall be in accordance with the Administrative Procedure Act.” NTA counters that because the APA provides only for an appeal of “contested cases” as defined therein, see §§ 84-901(3) and 84-917, and because all parties agree that this is not a contested case, there is no right to appeal the order. Essentially, NTA contends that the broad right to appeal conferred by the first sentence of § 75-136 is implicitly limited by the second sentence.

[5,6] In the absence of ambiguity, courts must give effect to the statutes as they are written. If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *Turco v. Schuning*, 271 Neb. 770, 716 N.W.2d 415 (2006); *McCray v. Nebraska State Patrol*, 271 Neb. 1, 710 N.W.2d 300 (2006). A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in *pari materia* with any related statutes. *Zach v. Eacker*, 271 Neb. 868, 716 N.W.2d 437 (2006); *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn.*, 267 Neb. 158, 673 N.W.2d 15 (2004). We conclude that the phrase “in accordance with the Administrative Procedure Act” as used in §§ 75-136 and 86-158 is ambiguous and therefore open to construction because it is unclear whether it means that only contested cases decided by the Commission can be appealed or that all orders of the Commission may be appealed under the procedures which the APA prescribes for appealing contested cases.

[7-9] We apply familiar principles to resolve this ambiguity. A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent. *Zach v. Eacker, supra*; *A-1 Metro Movers v. Egr*, 264 Neb. 291, 647 N.W.2d 593 (2002). In construing a statute, an appellate court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results. *Bohaboj v. Rausch*, 272

Neb. 394, 721 N.W.2d 655 (2006); *Soto v. State*, 269 Neb. 337, 693 N.W.2d 491 (2005). When a statutory term is reasonably considered ambiguous, a court may examine the legislative history of the act in question to ascertain the intent of the Legislature. *Mogensen v. Board of Supervisors*, 268 Neb. 26, 679 N.W.2d 413 (2004). See *Sydow v. City of Grand Island*, 263 Neb. 389, 639 N.W.2d 913 (2002).

The second sentence of § 75-136 was added by amendment in 2003. See 2003 Neb. Laws, L.B. 187, § 27. Previously, the statute permitted an appeal of a Commission order “to the Court of Appeals as provided in section 75-137 to reverse, vacate, or modify the order.” § 75-136 (Cum. Supp. 2002). The 2003 amendment repealed § 75-137 and other provisions governing the procedure for appealing the Commission’s orders to the Nebraska Court of Appeals. See 2003 Neb. Laws, L.B. 187, § 37. During floor debate on L.B. 187, its sponsor stated that appeals from the Commission’s orders would be required to “follow the Administrative Procedures [sic] Act, which means now that the appeals would have to go to the district court, not to the Court of Appeals.” Floor Debate, 98th Leg., 1st Sess. 7374 (May 19, 2003). We noted in *Cox Nebraska Telecom v. Qwest Corp.*, 268 Neb. 676, 685, 687 N.W.2d 188, 195 (2004), that the “primary effect of § 75-136, as amended by L.B. 187, is that operative August 31, 2003, all appeals from the [Commission] are to be brought under the APA.” We find no indication that in enacting this amendment, the Legislature intended to limit the types of orders which could be appealed under § 75-136. Accordingly, we do not construe the second sentence of the statute as a substantive limitation on the first, but, rather, as a directive that all appeals from the Commission’s orders are to follow the procedural requirements of the APA. See § 84-917. We similarly construe § 86-158 and therefore conclude that the district court had jurisdiction to review the order in question and that we have jurisdiction to review the order of the district court.

MERITS OF APPEAL

[10] The district court concluded that the Commission “erred in determining it was without jurisdiction to enact rules governing the relationship between ILECs and their nonregulated

affiliates.” NTA and the Commission argue that this is a misinterpretation of the Commission’s order. Generally, for purposes of construction, a rule or order of an administrative agency is treated like a statute. *Utelcom, Inc. v. Egr*, 264 Neb. 1004, 653 N.W.2d 846 (2002); *Stratbucker Children’s Trust v. Zoning Bd. of Appeals*, 243 Neb. 68, 497 N.W.2d 671 (1993). Thus, to determine the meaning of the Commission’s order, we must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless. It is not within the province of a court to read anything plain, direct, and unambiguous out of the order. See, *Hall v. City of Omaha*, 266 Neb. 127, 663 N.W.2d 97 (2003); *Wilder v. Grant Cty. Sch. Dist. No. 0001*, 265 Neb. 742, 658 N.W.2d 923 (2003). Reading the order in its entirety, we conclude that the Commission did not simply determine that it lacked jurisdiction to proceed further in its investigation or rulemaking. Rather, it concluded (1) that it had no jurisdiction to regulate the affiliates of ILEC’s; (2) that it had jurisdiction to regulate the relationship between ILEC’s and their affiliates; and (3) that based upon the petition and comments received, it was unnecessary to engage in rulemaking with respect to the relationship between ILEC’s and their affiliates at the present time. The order of the district court was erroneous because it misinterpreted the administrative order under review.

[11] Rulemaking by an administrative agency is properly characterized as a “legislative process as contrasted with an administrative, judicial, or quasi judicial process.” *Johnson v. Nebraska Environmental Control Council*, 2 Neb. App. 263, 276, 509 N.W.2d 21, 29 (1993), quoting 73 C.J.S. *Public Administrative Law and Procedure* § 87 (1983). Under prior law which permitted appeals from the Commission’s orders to be taken directly to the appellate courts, we stated that where the order was administrative or legislative in character, the only issues to be determined by the reviewing court were whether the Commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made. See, *In re Proposed Amend. to Title 291*, 264 Neb. 298, 646 N.W.2d 650 (2002); *In re Application of E. Neb. Non-stock Trucking Coop*, 243 Neb. 662, 501 N.W.2d 712 (1993). The district court should have addressed those issues in this case. We do so here.

The fact that § 75-110 gives the Commission authority to adopt and promulgate rules and regulations which it “deems necessary to regulate persons within the commission’s jurisdiction” does not require the Commission to exercise such authority in any given instance. See *In re Application No. C-1889*, 264 Neb. 167, 647 N.W.2d 45 (2002) (holding statutory authority of Commission to promulgate rules to interpret law does not impose affirmative rulemaking requirement). Under § 84-907.08, the Commission could either exercise its rulemaking power or “deny the petition in writing, stating its reasons therefor.” By doing the latter, the Commission clearly acted within its statutory authority. The only remaining issue is whether it did so in a manner that was reasonable and not arbitrary.

Federal courts reviewing an agency’s decision not to engage in rulemaking are required under the federal Administrative Procedure Act to determine whether the decision was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A) (2000). Accord *American Horse Protection Ass’n, Inc. v. Lyng*, 812 F.2d 1 (D.C. Cir. 1987); *Arkansas Power & Light Co. v. I.C.C.*, 725 F.2d 716 (D.C. Cir. 1984). See, also, *Nat. Ass’n of Reg. Util. Com’rs v. Dept. of Energy*, 851 F.2d 1424 (D.C. Cir. 1988). Federal courts note that “[r]eview under the ‘arbitrary and capricious’ tag line [of the federal Administrative Procedure Act] encompasses a range of levels of deference to the agency” and that “an agency’s refusal to institute rulemaking proceedings is at the high end of the range.” *American Horse Protection Ass’n, Inc. v. Lyng*, 812 F.2d at 4-5, citing *WWHT, Inc. v. F. C. C.*, 656 F.2d 807 (D.C. Cir. 1981), and *ITT World Communications, Inc. v. F.C.C.*, 699 F.2d 1219 (D.C. Cir. 1983), *reversed on other grounds* 466 U.S. 463, 104 S. Ct. 1936, 80 L. Ed. 2d 480 (1984). Thus, an agency’s refusal to engage in rulemaking is overturned “‘only in the rarest and most compelling of circumstances’” which primarily involve “‘plain errors of law, suggesting that the agency has been blind to the source of its delegated power.’” *American Horse Protection Ass’n, Inc. v. Lyng*, 812 F.2d at 5, quoting *WWHT, Inc. v. F. C. C.*, *supra*, and *State Farm Mut. Auto. Ins. v. Department of Transp.*, 680 F.2d 206 (D.C. Cir. 1982), *vacated on other grounds sub nom. Motor Vehicle Mfrs. Assn. v. State Farm Mut.*, 463 U.S. 29, 103 S. Ct. 2856, 77 L. Ed.

2d 443 (1983). Review is generally limited to “‘ensuring that the agency has adequately explained the facts and policy concerns it relied on, and that the facts have some basis in the record.’” *Nat. Ass’n of Reg. Util. Com’rs v. Dept. of Energy*, 851 F.2d at 1430, quoting *Arkansas Power & Light Co. v. I.C.C.*, *supra*.

We conclude that similar deference should be given to a state agency’s decision not to engage in discretionary rulemaking. Here, after docketing the petition filed by Chase 3000 and other ISP’s, the Commission entered an order setting forth the specific issues raised by the petitioners and requesting public comment. Several detailed written comments were received. The Commission did not conduct an evidentiary hearing, but it was not under any statutory obligation to do so. Based upon the comments it received, the Commission concluded that it was unnecessary to engage in rulemaking for several reasons. It noted that ILEC’s were already subject to rules promulgated by the Federal Communications Commission which govern how the ILEC’s must account for transactions with their affiliates. It further reasoned that the regulated entities were subject to state and federal laws prohibiting discriminatory pricing. The Commission concluded that there was no showing of a “problem of statewide magnitude” and that it appeared “unnecessary to create additional rules applicable to all entities to resolve complaints relating to one or a few, particularly, if they involve reporting duplicative information already provided to the FCC.” Noting that some of the comments received referred to matters occurring outside Nebraska, the Commission stated that if there were specific complaints about a regulated entity’s conduct in Nebraska, “a complaint should be filed setting forth specific allegations and the grounds for relief.” Based upon this reasoned explanation, we conclude that the Commission did not act arbitrarily in deciding not to exercise its rulemaking authority.

CONCLUSION

The district court erred in interpreting the Commission’s order as a determination that it lacked jurisdiction to engage in the rulemaking requested by Chase 3000 and other ISP’s. The Commission recognized its jurisdiction to regulate certain conduct by ILEC’s but acted within its legal authority in declining to exercise that jurisdiction for reasons which were not arbitrary.

Accordingly, we reverse the judgment of the district court and remand the cause with directions to affirm the order of the Commission closing its investigation.

REVERSED AND REMANDED WITH DIRECTIONS.

RICHARD ZITTERKOPF AND DEBORAH ZITTERKOPF, APPELLANTS,
v. JESSE MALDONADO ET AL., APPELLEES.

727 N.W.2d 696

Filed March 2, 2007. No. S-05-1230.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.

Appeal from the District Court for Scotts Bluff County:
RANDALL L. LIPPSTREU, Judge. Affirmed.

Brenda L. Bartels, of Douglas, Kelly, Ostdiek, Bartels & Neilan, P.C., for appellants.

James L. Zimmerman, of Zimmerman Law Firm, P.C., L.L.O., for appellees Jesse Maldonado and Ice Castles, Inc.

John F. Simmons, of Simmons Olsen Law Firm, P.C., for appellees Thomas Moffet and Heartland Bedding.

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

McCORMACK, J.

NATURE OF CASE

Richard Zitterkopf and his wife, Deborah Zitterkopf, filed suit to recover damages allegedly stemming from an automobile accident. The district court dismissed the Zitterkopfs' case for exceeding the Supreme Court's progression standards. After their motion to vacate the order of dismissal was overruled, the Zitterkopfs filed a second case for the same cause of action against the same defendants under the savings clause statute, Neb. Rev. Stat. § 25-201.01 (Cum. Supp. 2006). The district court entered summary judgment in favor of the defendants in the Zitterkopfs'

second case on the ground that the savings clause did not allow that case to be filed outside the applicable statute of limitations. We affirm.

BACKGROUND

On September 7, 2000, an automobile collision occurred between Richard, Jesse Maldonado, and Thomas Moffet. At the time of the collision, Maldonado was working for Ice Castles, Inc., and Moffet was working for Heartland Bedding. The Zitterkopfs claim that as a result of the accident, Richard suffered injuries which required medical treatment.

On September 5, 2003, the Zitterkopfs brought suit against Maldonado, Moffet, Ice Castles, and Heartland Bedding (collectively the appellees). On March 3, 2005, just shy of 18 months after the Zitterkopfs filed the action, the district court issued an order to show cause why the case should not be dismissed for exceeding the progression standards. A hearing was held on the order to show cause, and on March 18, the district court dismissed the case on the ground that the Zitterkopfs failed to show why the case was not brought to trial within the time specified by the progression standards. The Zitterkopfs moved the district court to vacate the order of dismissal, which the court declined to do on the ground that extraordinary eventualities had not been shown as required by the progression standards. By that time, the 4-year statute of limitations on the Zitterkopfs' claim had expired.

The Zitterkopfs did not appeal the dismissal of their case. Instead, they filed a new action under the savings clause statute, § 25-201.01, which allows certain cases to be brought outside the statute of limitations. The appellees moved for summary judgment, which the district court granted. The court found as a matter of law that the savings clause did not allow the Zitterkopfs to file their second action outside the 4-year statute of limitations when their first action was dismissed because of their failure to prosecute their first action. The Zitterkopfs appeal the dismissal of their second action.

ASSIGNMENT OF ERROR

The Zitterkopfs claim the district court erred in granting the appellees' motions for summary judgment on the ground that the Zitterkopfs' claims were not subject to the savings clause statute.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.¹

ANALYSIS

The Zitterkopfs argue that their second action falls within the parameters of the savings clause. Section 25-201.01 provides:

(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 . . . (d) as a result of any other inaction on the part of the plaintiff where the burden of initiating an action was on the plaintiff.

The Zitterkopfs' first action was dismissed pursuant to a progression order. The Zitterkopfs did not appeal the dismissal of that action, and the issue of whether that dismissal was proper is not before us. Section 25-201.01(2)(d) clearly provides that a new action may not be brought under the savings clause when the original action failed because of the plaintiff's inaction where the plaintiff bears the burden of initiating the action. The dismissal of the Zitterkopfs' first case for failure to abide by the progression standards was a dismissal because of a lack of action on their part. Because the Zitterkopfs' first case was dismissed as a result of their inaction, the Zitterkopfs are precluded from bringing the present action out of time under § 25-201.01. Accordingly, we affirm the district court's dismissal of this action.

AFFIRMED.

¹ *Zach v. Eacker*, 271 Neb. 868, 716 N.W.2d 437 (2006).

STATE OF NEBRASKA EX REL. UPPER REPUBLICAN NATURAL
 RESOURCES DISTRICT ET AL., RELATORS, V. THE HONORABLE
 DISTRICT JUDGES OF THE DISTRICT COURT FOR
 CHASE COUNTY, NEBRASKA, RESPONDENTS.
 728 N.W.2d 275

Filed March 2, 2007. No. S-06-549.

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. **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.
3. **Mandamus: Pretrial Procedure: Appeal and Error.** In determining whether mandamus applies to an issue of discovery, the Supreme Court considers whether the trial court clearly abused its discretion in not issuing a protective order which limited the nature of the discovery.
4. **Public Meetings: Statutes.** Public meetings laws are broadly interpreted and liberally construed to obtain the objective of openness in favor of the public. Provisions permitting closed sessions and exemptions from openness of a meeting must be narrowly and strictly construed.
5. ____ : ____ . The Open Meetings Act does not provide for a closed session discovery privilege.
6. **Mandamus: Courts.** A request for relief first presented in a mandamus action will be disregarded inasmuch as the district court cannot have failed to perform an act which was not submitted to it for disposition.

Original action. Peremptory writ issued.

Donald G. Blankenau and Jaron J. Bromm, of Blackwell, Sanders, Peper & Martin, L.L.P., and Joel E. Burke for relators.

No appearance for respondents.

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

GERRARD, J.

The relators, the Upper Republican Natural Resources District (Upper Republican NRD) and its board of directors, seek a

peremptory writ of mandamus compelling the district court to vacate its previous orders compelling discovery of conversations that occurred during closed sessions convened under Nebraska's Open Meetings Act¹ where legal counsel was present. At issue in this case is whether the conversations in question are protected from discovery under the Open Meetings Act, the attorney-client privilege, or the state secrets privilege.

FACTS

The Upper Republican NRD is a natural resources district² and qualifies as a public body as defined in the Open Meetings Act.³ In addition to its other duties, the Upper Republican NRD is responsible for formulating and adopting an integrated management plan in conjunction with the Nebraska Department of Natural Resources as provided by the Ground Water Management and Protection Act.⁴

On April 21, 2005, WaterClaim, a Nebraska nonprofit corporation, and several individual irrigators who reside within the boundaries of the Upper Republican NRD (collectively WaterClaim) sued the Upper Republican NRD and its then-existing board of directors (collectively the relators). WaterClaim's complaint alleged that the relators "knowingly engaged in repeated, intentional, and pervasive closed sessions at public meetings at which public policy was debated and discussed" in violation of the Open Meetings Act. WaterClaim sought declaratory and injunctive relief.

As part of pretrial discovery, WaterClaim provided notice of its intention to depose the individual relators and Jasper Fanning, the manager of the Upper Republican NRD. The relators filed a motion to limit or terminate the depositions pursuant to Neb. Ct. R. of Discovery 26 (rev. 2001) on the basis that discussions held in a closed session are not subject to discovery because they are confidential and protected by the attorney-client privilege.

¹ Neb. Rev. Stat. § 84-1408 et seq. (Reissue 1999 & Cum. Supp. 2006).

² Neb. Rev. Stat. § 2-3201 et seq. (Reissue 1997 & Cum. Supp. 2006).

³ § 84-1409.

⁴ Neb. Rev. Stat. § 46-701 et seq. (Reissue 2004 & Cum. Supp. 2006).

The depositions proceeded without a ruling on this motion. During the first deposition, counsel for WaterClaim inquired into the substance of the discussions that took place in closed sessions between the relators and legal counsel. Counsel for the relators instructed the deponents not to answer questions pertaining to discussions that occurred during closed sessions. The depositions were discontinued, and WaterClaim filed a motion to compel discovery.

The judge presiding over the case entered an order sustaining WaterClaim's motion to compel discovery and ordered the relators to appear for depositions and answer all questions posed with regard to the closed sessions. The judge explained that

[i]f the Court were to rule in the [relators'] favor on this matter, it would prevent any lawsuit, at any time, claiming a violation of the Open Meetings [Act] to move forward because all of the evidence involved in the violation of the Open Meetings [Act] was at the meeting held in private.

In denying the relators' claim of attorney-client privilege, the judge explained that the relators failed to present sufficient evidence to prove that this privilege applied.

The relators filed a motion to amend or modify the order and asked the court to interview the deponents in camera to determine whether their anticipated testimony was protected by the Open Meetings Act or attorney-client privilege. During the course of this litigation, the original judge retired and a second, newly appointed, judge took office. The second judge denied the relators' motion and ordered the deponents to answer WaterClaim's questions.

The relators were granted leave to file an original action in this court. The relators filed a petition for peremptory writ of mandamus, asking this court to direct the district court to vacate its orders sustaining WaterClaim's motion to compel discovery.

ASSIGNMENT OF ERROR

The relators assert that the district court erred in denying their motion for a protective order seeking to prevent disclosure of communications that occurred during closed sessions under the Open Meetings Act.

ANALYSIS

[1,2] Our analysis begins with the well-settled principles governing actions for mandamus. 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.⁵ 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.⁶

[3] In the present case, the relators argue that they are entitled to a writ of mandamus because the district court erred in denying their motion for a protective order seeking to prevent WaterClaim from acquiring information discussed during a closed session. In our determination of whether mandamus applies to an issue of discovery, we consider whether the trial court clearly abused its discretion in not issuing a protective order which limited the nature of the discovery.⁷ Rule 26 sets forth the general provisions governing discovery in Nebraska. Rule 26(b)(1) states that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action”

The relators contend that the communications at issue in this case are privileged and not subject to discovery because the communications (1) are confidential and privileged under the Open Meetings Act, (2) are protected by the attorney-client privilege, and (3) are protected under the state secrets privilege.

⁵ *Crouse v. Pioneer Irr. Dist.*, 272 Neb. 276, 719 N.W.2d 722 (2006).

⁶ *State ex rel. Musil v. Woodman*, 271 Neb. 692, 716 N.W.2d 32 (2006).

⁷ *State ex rel. Acme Rug Cleaner v. Likes*, 256 Neb. 34, 588 N.W.2d 783 (1999).

OPEN MEETINGS ACT—CLOSED SESSION

The relators first argue that pursuant to the Open Meetings Act, all communications during a validly convened closed session are privileged. Relating to closed sessions, the Open Meetings Act provides in part that

[a]ny public body may hold a closed session by the affirmative vote of a majority of its voting members if a closed session is clearly necessary for the protection of the public interest or for the prevention of needless injury to the reputation of an individual and if such individual has not requested a public meeting. The subject matter and the reason necessitating the closed session shall be identified in the motion to close.⁸

[4] As an initial matter, with regard to our interpretation of public meetings laws, we have stated that public meetings laws are broadly interpreted and liberally construed to obtain the objective of openness in favor of the public.⁹ Provisions permitting closed sessions and exemption from openness of a meeting must be narrowly and strictly construed.¹⁰

Insofar as the relators argue that all communications during a closed session are privileged, such argument is in error. We find no language in the Open Meetings Act that would support the assertion that the Legislature intended to create an absolute privilege for all communications occurring while a public body is in a closed session. Unlike other Nebraska statutes where the Legislature expressly created discovery privileges, the Open Meetings Act is notably silent in this regard.

[5] For example, Neb. Rev. Stat. § 71-7903 (Reissue 2003), relating to peer review committees, provides that “[t]he proceedings, minutes, records, and reports . . . are privileged communications which may not be disclosed or obtained by legal discovery proceedings” Another example is found in Neb. Rev. Stat. § 25-2933(a) (Cum. Supp. 2006), which states that “a mediation communication is privileged . . . and is not subject to discovery

⁸ § 84-1410(1).

⁹ *Grein v. Board of Education*, 216 Neb. 158, 343 N.W.2d 718 (1984).

¹⁰ *Id.*

or admissible in evidence.” As is evident from these, and other similar statutes,¹¹ when the Legislature intends to create a discovery privilege, it does so with clear and unambiguous language. In view of the fact that the Open Meetings Act contains no language relating to a closed session discovery privilege, we conclude that no such privilege exists in Nebraska.

Our conclusion is also based on the fact that if these communications were privileged solely because they occurred during a closed session, a private litigant would be left without the ability to challenge the validity of the public body’s actions during a closed session. To determine whether a public body, in a closed session, has acted outside of its authority, a private litigant must have access to those communications by means of a legitimate discovery request. To conclude otherwise would, in essence, immunize a public body from any challenge relating to the propriety of its closed session.

We recognize that under certain circumstances, allowing a public body to enter into a closed session, away from the public view, serves to protect the public’s interest. However, we do not conclude that granting a litigant access to communications of a closed session, by way of a limited, legitimate discovery request, will harm the public interest. In dealing with a discovery request relating to information from a closed session, a trial court may increase its supervision of the discovery process to ensure that sensitive or confidential information is protected through the creation of an appropriately tailored protective order.

Furthermore, our determination that there is no absolute discovery privilege for communications that occur during closed sessions does not necessarily mean that all communications during closed sessions are discoverable. All other recognized evidentiary privileges are still applicable. Thus, although there is no absolute privilege for closed session communications, to the extent the communications implicate other evidentiary privileges, such as the attorney-client privilege, the communications are protected.

¹¹ See, Neb. Rev. Stat. § 44-154 (Reissue 2004); Neb. Rev. Stat. § 44-425 (Reissue 2004); Neb. Rev. Stat. § 44-1107 (Reissue 2004); Neb. Rev. Stat. § 71-1,202 (Reissue 2003); Neb. Rev. Stat. § 71-2048 (Reissue 2003).

We further note that our conclusion is in accord with the reasoning of cases from other jurisdictions that have addressed this issue. For example, in *Springfield Local Sch. v. Assn. of Pub. Sch.*,¹² the Ohio Court of Appeals explained that under Ohio's version of the Open Meetings Act, "there is no absolute privilege to be accorded discussions held in executive session" but "a trial court, in its discretion, may limit discovery." The court further stated:

Although these provisions [of the act] suggest a strong policy against public disclosure . . . the provisions protect only against access to the general public. They do not necessarily protect against disclosure in the course of litigation upon a proper discovery request, if the information is otherwise discoverable.¹³

Thus, we conclude that there is no absolute privilege for communications made during a closed session. However, to the extent those communications implicate other recognized privileges, the communications are protected.

ATTORNEY-CLIENT PRIVILEGE

We must next determine whether the district court correctly refused to grant a protection order protecting the relators' communications that qualify under the attorney-client privilege. Nebraska's attorney-client privilege, Neb. Evid. R. 503(2),¹⁴ provides in relevant part: "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (a) between himself or his representative and his lawyer or his lawyer's representative . . ."

In support of their contention that the communications are protected by the attorney-client privilege, the relators submitted the affidavit of Fanning, the manager of the Upper Republican NRD. In his affidavit, Fanning testified:

¹² *Springfield Local Sch. v. Assn. of Pub. Sch.*, 106 Ohio App. 3d 855, 868, 667 N.E.2d 458, 467 (1995).

¹³ *Id.* at 869, 667 N.E.2d at 467. See, also, *Tausz v. Clarion-Goldfield Community Sch.*, 569 N.W.2d 125 (Iowa 1997); *Gipson v. Bean*, 156 Ariz. 478, 753 P.2d 168 (Ariz. App. 1987).

¹⁴ Neb. Rev. Stat. § 27-503(2) (Reissue 1995).

During all closed sessions as referenced to by [Water Claim] in the past twelve months, one, if not both attorneys for the District were present and were advised and instructed on negotiation strategies. Further, the attorneys for the District advised the Board as to the possible implications of failing to meet the District's requirement as required by law including possible action in Court or in the interrelated water review board.

We find that this affidavit, although vague on the substance and context of the communications in the closed sessions, was sufficient to demonstrate that some of the communications at issue may be subject to the attorney-client privilege. Thus, the district court's determination that none of the communications qualified for the attorney-client privilege and its failure to perform a more thorough inquiry into the matter were in error.

In view of the facts surrounding the relators' request for a protection order, specifically, the testimony provided in Fanning's affidavit, we conclude that the district court had a ministerial duty to conduct a more extensive investigation into the relators' claim that the communications were protected by the attorney-client privilege. While the district court may not have been required to follow the procedures suggested by the relators, the court was obligated to facilitate some meaningful in camera review of the contested evidence in order to fully consider the relators' claim to the attorney-client privilege.

Accordingly, we conclude that a peremptory writ of mandamus should issue, directing the district court to vacate its orders compelling discovery and to allow the relators an opportunity to submit additional evidence for the purpose of clarifying which, if any, of the alleged communications qualify for protection under the attorney-client privilege.

STATE SECRETS PRIVILEGE

[6] In their remaining argument, the relators assert that their communications are protected from discovery pursuant to Neb. Evid. R. 509(1).¹⁵ This section provides in relevant part:

The government has a privilege to refuse to give evidence and to prevent any public officer from giving evidence as to

¹⁵ Neb. Rev. Stat. § 27-509(1) (Reissue 1995).

communications made by or to such public officer in official confidence when the public interest would suffer by the disclosure.¹⁶

We note that there is nothing in the record before us to suggest that this argument was raised to the district court. Accordingly, we will not address this argument as it was first presented in this mandamus action and a district court could not have had a ministerial duty to perform an act that it was not asked to perform.¹⁷

CONCLUSION

We determine, given the language of the Open Meetings Act, that there is no absolute privilege for communications made during a closed session. However, to the extent the communications implicate other recognized privileges, the communications are protected. We therefore conclude that a peremptory writ of mandamus shall issue, directing the district court to vacate its orders compelling discovery and to conduct an in camera review in order to evaluate whether the contested evidence is protected by the attorney-client privilege.

PEREMPTORY WRIT ISSUED.

¹⁶ *Id.*

¹⁷ See *State ex rel. AMISUB v. Buckley*, 260 Neb. 596, 618 N.W.2d 684 (2000).

LINDA L. KNAPP, APPELLEE, v. VILLAGE OF BEAVER CITY, DOING
BUSINESS AS BEAVER CITY MANOR, APPELLANT.

728 N.W.2d 96

Filed March 2, 2007. No. S-06-874.

1. **Workers' Compensation: Appeal and Error.** Under Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.

2. **Workers' Compensation: Statutes: Appeal and Error.** The meaning of a statute is a question of law, and an appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
3. **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.
4. **Statutes: Legislature: Intent.** It is a court's duty to discover, if possible, legislative intent from the statute itself.
5. ____: ____: _____. In order for a court to inquire into a statute's legislative history, the statute in question must be open to construction, and a statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous.
6. **Dismissal and Nonsuit: Attorney Fees.** The expense of employing attorneys in defending an action and the liability to further litigation over the same matter are not matters justifying the limitation of a plaintiff's right to dismiss without prejudice prior to submission.

Appeal from the Nebraska Workers' Compensation Court.
Affirmed.

John W. Iliff and Francie C. Riedmann, of Gross & Welch, P.C., L.L.O., for appellant.

Jamie Gaylene Scholz and Rolf Edward Shasteen, of Shasteen & Scholz, P.C., for appellee.

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

STEPHAN, J.

In 2005, the Nebraska Workers' Compensation Act was amended to include a provision that "[a]n action may be dismissed by the plaintiff, if represented by legal counsel, without prejudice to a future action, before the final submission of the case to the compensation court."¹ Linda L. Knapp, through her attorney of record, filed for, and was granted, a dismissal without prejudice 1 day before trial of her case in the Workers' Compensation Court. We agree with the compensation court that she had a statutory right to dismiss.

¹ Neb. Rev. Stat. § 48-177 (Cum. Supp. 2006); 2005 Neb. Laws, L.B. 13, § 29.

BACKGROUND

Knapp filed a petition against the Village of Beaver City, doing business as Beaver City Manor (the Village), in the Nebraska Workers' Compensation Court on April 18, 2005. Trial was set for January 25, 2006. On January 19, Knapp filed a motion to continue, seeking an order of the trial court to continue the trial for not less than 90 days so that Knapp could obtain further medical evidence. That motion was denied by the trial court in a written order on January 23.

On January 24, 2006, Knapp filed a "Dismissal Without Prejudice," purporting to dismiss her cause of action without prejudice to its refiling pursuant to her rights under § 48-177. The Village objected to the dismissal, claiming that the language in § 48-177 is discretionary with the court and that a plaintiff may not dismiss a suit without prejudice before trial as a matter of right where no good cause has been shown for the dismissal. By written order that same day, the trial court summarily granted Knapp's dismissal without prejudice.

The Village timely applied for review of the trial court's order by a review panel of the Workers' Compensation Court. In its application, the Village claimed the trial court (1) abused its discretion in granting the dismissal; (2) erred as a matter of fact or law, or was clearly wrong in granting the dismissal; and (3) failed to provide a reasoned decision as required by Workers' Comp. Ct. R. of Proc. 11 (2002). The review panel affirmed the trial court's order dismissing Knapp's claim against the Village without prejudice. Citing § 48-177, the review panel noted that the statute had been amended in 2005 to add language which created a nondiscretionary right to dismiss.

The Village timely appealed the review panel's order, 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.²

ASSIGNMENTS OF ERROR

The Village assigns, restated and consolidated, that the Workers' Compensation Court erred in (1) granting Knapp's

² See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

dismissal without prejudice and (2) failing to provide a reasoned decision as required by rule 11.

STANDARD OF REVIEW

[1] Under Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.³

[2,3] The meaning of a statute is a question of law, and an appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.⁴ 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.⁵

ANALYSIS

Plaintiffs in civil actions may dismiss the action without prejudice to a future action "before the final submission of the case to the jury, or to the court where the trial is by the court."⁶ Generally, the right of the plaintiff to voluntary dismissal is a right that is not a matter of judicial grace or discretion.⁷ A plaintiff may enter a dismissal as a matter of right at any time before final submission of the case.⁸ However, we held in *Grady v. Visiting Nurse*

³ *Worline v. ABB/Alstom Power Int. CE Servs.*, 272 Neb. 797, 725 N.W.2d 148 (2006).

⁴ *Estate of Coe v. Willmes Trucking*, 268 Neb. 880, 689 N.W.2d 318 (2004).

⁵ *Watson v. Watson*, 272 Neb. 647, 724 N.W.2d 24 (2006).

⁶ Neb. Rev. Stat. § 25-601(1) (Reissue 1995).

⁷ *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999).

⁸ *Kansas Bankers Surety Co. v. Halford*, 263 Neb. 971, 644 N.W.2d 865 (2002).

*Assn.*⁹ that § 25-601(1) did not apply to a workers' compensation action.

Prior to 2005, the Nebraska Workers' Compensation Act had no provision similar to § 25-601(1). The only provision pertaining to a plaintiff's voluntary dismissal of a workers' compensation action was found in the last sentence of § 48-177, which provided: "Upon a motion for dismissal duly filed by the plaintiff, showing that a dispute between the parties no longer exists, the compensation court may dismiss any such cause without a hearing thereon." In 2005, the Legislature amended § 48-177 to insert the following penultimate sentence: "An action may be dismissed by the plaintiff, if represented by legal counsel, without prejudice to a future action, before the final submission of the case to the compensation court."¹⁰ This new language is substantially similar to that of § 25-601(1), except for the requirement that a plaintiff seeking a voluntary dismissal of a workers' compensation action must be represented by counsel.

[4,5] The Village argues that the two sentences in § 48-177 are ambiguous when read together and that we must therefore resort to the legislative history in order to ascertain their meaning. But it is a court's duty to discover, if possible, legislative intent from the statute itself.¹¹ In order for a court to inquire into a statute's legislative history, the statute in question must be open to construction, and a statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous.¹² We perceive no ambiguity and have no difficulty determining the meaning and intent from the plain language of the statute. The last sentence of § 48-177 pertains to a dismissal by the plaintiff in the circumstance where there is no longer a dispute between the parties. The preceding sentence, added by the 2005 amendment, permits a voluntary dismissal where a dispute still exists, in that such dismissal is "without prejudice to a future action."

⁹ *Grady v. Visiting Nurse Assn.*, 246 Neb. 1013, 524 N.W.2d 559 (1994).

¹⁰ 2005 Neb. Laws, L.B. 13, § 29.

¹¹ *Alegent Health Bergan Mercy Med. Ctr. v. Haworth*, 260 Neb. 63, 615 N.W.2d 460 (2000).

¹² *Zach v. Eacker*, 271 Neb. 868, 716 N.W.2d 437 (2006).

The 2005 amendment to § 48-177 gave plaintiffs a statutory right which did not previously exist.¹³ We see no reason to construe it as substantively different from the right given to civil plaintiffs by § 25-601(1).

[6] Alternatively, the Village argues that even if § 48-177 gives a plaintiff the right to dismiss, the court may attach conditions to the dismissal where justice and equitable principles so require. This court has recognized exceptions to the right of a plaintiff to dismiss a civil action where it is necessary for the protection of any rights which have accrued to the defendant as a result of the bringing of the action.¹⁴ Assuming without deciding that a dismissal under § 48-177 would be subject to similar exceptions, they do not exist on this record. The Village contends that it was prejudiced by Knapp's dismissal because "it now opens the door for additional medical evaluation and testimony, which, according to the progression of the case, should have been accomplished well before January 24, 2006."¹⁵ It further asserts that any new medical opinion would require the Village to "review and refute that opinion."¹⁶ In essence, the Village appears to be complaining about the delay and related expense caused by the dismissal. However, we have held that the expense of employing attorneys in defending an action and the liability to further litigation over the same matter are not matters justifying the limitation of a plaintiff's right to dismiss without prejudice prior to submission.¹⁷

The Village also argues that dismissal without prejudice under § 48-177 would circumvent the requirements of Workers' Comp. Ct. R. of Proc. 8 (2006). Rule 8 states that "[a] continuance, under any circumstances, may be granted if good cause is shown; however, no continuance shall be granted within two weeks of the date of hearing unless an emergency arises." The

¹³ See *Grady v. Visiting Nurse Assn.*, *supra* note 9.

¹⁴ *Holste v. Burlington Northern RR. Co.*, *supra* note 7; *Kansas Bankers Surety Co. v. Halford*, *supra* note 8.

¹⁵ Brief for appellant at 12.

¹⁶ *Id.*

¹⁷ See, *Kansas Bankers Surety Co. v. Halford*, *supra* note 8; *Feight v. Mathers*, 153 Neb. 839, 46 N.W.2d 492 (1951).

Village contends that even though Knapp was previously denied a continuance, her dismissal without prejudice serves the same purpose. We are not persuaded by this argument. A dismissal without prejudice and a continuance are not the same. The former removes the case from the court's docket and subjects the plaintiff to the running of a limitations period, while the latter does not. We note that a plaintiff in a civil action may seek a continuance under Neb. Rev. Stat. § 25-1148 (Reissue 1995), which continuance is discretionary with the court, and if denied, the plaintiff may dismiss the action without prejudice under § 25-601.

Finally, the Village argues that the trial court failed to provide a well-reasoned opinion as required by rule 11 of the rules of procedure of the Nebraska Workers' Compensation Court. At the time of the compensation court's disposition of this case, that rule provided in part:

All parties are entitled to reasoned decisions which contain findings of fact and conclusions of law based upon the whole record which clearly and concisely state and explain the rationale for the decision so that all interested parties can determine why and how a particular result was reached. The judge shall specify the evidence upon which the judge relies. The decision shall provide the basis for a meaningful appellate review.

The "Dismissal Without Prejudice" filed by Knapp in this case states that such dismissal was "pursuant to [Knapp's] right as set forth in *Neb. Rev. Stat.* §48-177." The Village filed an objection in which it argued that the plaintiff's right to dismiss was discretionary and that no good cause had been shown for the dismissal. The compensation court found that "the dismissal should be granted," thus clearly indicating that it had resolved the parties' conflicting interpretations of § 48-177 in favor of Knapp. No further elucidation was necessary for our independent review of this issue of law.

CONCLUSION

For the reasons discussed, we affirm the judgment of the compensation court review panel which affirmed the order of the trial judge dismissing Knapp's action without prejudice to its refiling.

AFFIRMED.

SONJA WORTH, AS MOTHER AND NEXT FRIEND OF AUSTIN WORTH,
A MINOR, APPELLANT AND CROSS-APPELLEE, V. TERRENCE J.
KOLBECK, M.D., APPELLEE AND CROSS-APPELLANT.

728 N.W.2d 282

Filed March 9, 2007. No. S-05-269.

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. **Rules of Evidence: Appeal and Error.** 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.
3. **Judges: Words and Phrases.** An abuse of discretion in a ruling on the admissibility of evidence occurs when the trial judge's reasons or rulings are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
4. **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.
5. **Jury Instructions: Appeal and Error.** Jury instructions do not constitute prejudicial error if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence.
6. **Jury Instructions: Pleadings: Evidence.** A litigant is entitled to have the jury instructed upon only those theories of the case which are presented by the pleadings and which are supported by competent evidence.
7. **Proximate Cause: Words and Phrases.** A defendant's conduct is a proximate cause of an event if the event would not have occurred but for that conduct, but it is not a proximate cause if the event would have occurred without that conduct.
8. **Negligence: Parent and Child.** In actions filed on behalf of a child, the negligence of a parent cannot be imputed to an infant who is injured through the carelessness of another party.
9. **Negligence: Proximate Cause.** If a third person is the sole proximate cause of an innocent plaintiff's injuries, the plaintiff's recovery from a defendant is barred because the plaintiff's injuries are not attributable to the defendant's negligence.
10. **Negligence: Proximate Cause: Jury Instructions.** A third person's negligence is not imputed to an innocent plaintiff by a sole proximate cause instruction.
11. **Proximate Cause.** The concept of sole proximate cause rests on the notion that some third party or other independent event was the sole cause of the plaintiff's injuries.
12. **Malpractice: Negligence.** In medical malpractice cases, it is not necessary that the independent event or cause be the result of negligence.
13. **Negligence: Proximate Cause: Juries: Damages.** When the evidence is sufficient to raise a jury question as to whether a defendant's or a third person's negligence

- proximately caused or proximately contributed to a plaintiff's injuries, then a trial court must inform the jury that the plaintiff is entitled to recover damages, if any, from the defendant if the jury finds that the defendant is guilty of negligence which solely or in concurrence with a third person proximately caused or contributed to the plaintiff's injuries.
14. **Jury Instructions: Appeal and Error.** A court does not err in failing to give an instruction if the substance of the proposed instruction is contained in those instructions actually given.
 15. **Appeal and Error.** Plain error may be asserted for the first time on appeal or be noted by an appellate court on its own motion.
 16. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
 17. **Records: Appeal and Error.** It is incumbent on the party appealing to present a record which supports the errors assigned, and absent such a record, the decision of the lower court will be affirmed.
 18. **Trial: Witnesses: Rules of Evidence: Proof.** The burden to establish a declarant's unavailability is on the party seeking to introduce the evidence under Neb. Rev. Stat. § 27-804 (Reissue 1995), and the determination of whether a witness is unavailable to appear at trial and give testimony is within the discretion of the trial court.
 19. **Trial: Evidence: Appeal and Error.** To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about such evidence admitted or excluded.
 20. ____: ____: _____. Erroneous admission of evidence is harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact.

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

Ronald J. Palagi and Joseph B. Muller, of Law Offices of Ronald J. Palagi, P.C., L.L.O., for appellant.

Patrick G. Vipond and Denise M. Destache, of Lamson, Dugan & Murray, L.L.P., for appellee.

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

HEAVICAN, C.J.

NATURE OF CASE

This is a medical malpractice action brought by Sonja Worth on behalf of her son, Austin Worth, against Terrence J. Kolbeck,

M.D. Sonja alleged that Kolbeck's negligence caused severe brain injuries to Austin shortly before his birth. The case was tried to a jury, which returned a verdict in favor of Kolbeck. Sonja assigns errors related to the jury instructions and the court's admission of deposition testimony from Sonja's designated expert taken for discovery. We conclude that Sonja's assigned errors do not require reversal.

BACKGROUND

The bill of exceptions does not include most of the trial. It is limited to the arguments regarding the admissibility and the reading into evidence of deposition testimony from Sonja's medical expert, Dr. Stephen Glass; two jury instruction conferences; and the testimony of an expert document examiner, Marlin Rauscher.

The transcript shows that in April 1999, Sonja filed this action on behalf of Austin. Although the original action included a claim by the parents, Sonja and Mark Worth, that claim was dismissed at some point. Sonja alleged the following facts in her complaint. Sonja "has had controlled, Type I diabetes mellitus since 1992." On April 9, 1997, Sonja was 33 weeks pregnant with Austin and was admitted to an Omaha, Nebraska, hospital emergency room at 5:44 p.m., suffering from diabetic ketoacidosis. Ketoacidosis is the "presence of an excessive amount of ketone bodies [acids] in the tissues and body fluids."¹ Austin was diagnosed with hypoxic-ischemic encephalopathy, directly related to Sonja's ketoacidosis. This diagnosis refers to a perinatal brain injury due to lack of oxygen.²

Sonja alleged that from 6:15 to 6:30 p.m. on April 9, 1997, Austin's heartbeats were undetectable. The hospital placed Sonja on fetal monitoring and at 6:40 p.m., consulted Kolbeck. Austin's assessment did not change appreciably throughout the night, and at 7:40 the next morning, Kolbeck ordered an ultrasound, which Sonja alleged suggested "severe placental dysfunction and fetal compromise." At 9:44 a.m., an emergency cesarean section was performed. Sonja alleged that Austin suffered brain injuries as

¹ Attorney's Illustrated Medical Dictionary K5 (West 1997).

² See 1 Steven E. Pegalis & Harvey F. Wachsman, *American Law of Medical Malpractice* 2d §§ 7:7 and 7:12 (1992).

a proximate result of Kolbeck's negligence and that Austin is severely and permanently mentally retarded. Specifically, Sonja alleged that Kolbeck was negligent in failing to (1) order an immediate ultrasound on April 9, (2) recognize Austin's fetal distress and arrange for an emergency cesarean section on April 9, and (3) promptly respond to the ultrasound on April 10.

In his answer, Kolbeck denied that he was negligent or had caused Austin's injuries. Kolbeck affirmatively alleged that he had met the standard of care for physicians in his specialty in Omaha or similar communities. He also affirmatively alleged that Sonja and Mark had been negligent in caring for Sonja's illness, which had proximately caused Austin's condition and damages.

Sometime in early 2000, Sonja's counsel contacted Glass, a pediatric neurologist, to review Austin's case. In December 2000, Kolbeck's counsel conducted a discovery deposition of Glass.

A jury trial was conducted from October 4 through 20, 2004. At trial, Sonja was represented by attorneys other than the attorney who represented her at Glass' deposition. On October 19, Kolbeck moved to have Glass' deposition read into evidence. Sonja's counsel objected that he was not representing Sonja when Glass' deposition was taken and would not waive Sonja's right to cross-examination. Kolbeck's counsel stated that he had been unable to obtain Glass' presence for trial and offered the affidavit of a paralegal, averring that she had attempted to contact Glass on 2 different days, a week earlier.

Sonja's counsel argued that because defense counsel had not made a reasonable effort to obtain Glass' attendance, his deposition testimony was inadmissible under Neb. Rev. Stat. § 27-804(1)(e) (Reissue 1995). Sonja's counsel also argued that Sonja had not been afforded an opportunity to develop Glass' testimony because Kolbeck had taken the deposition strictly for discovery purposes.³ The court overruled the objections.

The portion of Glass' deposition that was read into the record included Glass' opinion that (1) Austin's condition was directly related to Sonja's ketoacidosis; (2) damage leading to irreversible loss of function started in the late evening on April 9, 1997; (3) as Sonja's metabolism was restored to a normal range, the

³ See § 27-804(2)(a).

impact of her condition on the fetus was lessened, which is why Austin's "Apgar scores" were not profoundly low when he was delivered the next morning; and (4) a delivery 2 hours earlier on the morning of April 10 would not have made any difference because by then, Sonja's condition had been restored to a more normal range.

On October 19, 2004, the same day Glass' deposition was read into the record, the court allowed Sonja to present rebuttal testimony from Rauscher, over Kolbeck's continuing objection. Rauscher, a document expert, testified that someone had altered two listed times on a document from another exhibit. The original exhibit is not part of this record, and Rauscher did not identify the document he had examined. Kolbeck contended that he was unfairly surprised by this expert and that Rauscher should therefore not be allowed to testify. The objection was overruled.

Also on October 19, 2004, the first jury conference was conducted. Instruction No. 6 advised the jury that it could not consider Sonja's acts or omissions in deciding whether Austin was entitled to damages. Kolbeck asked that the instruction "be modified to indicate to the jury that this in no way indicates that the acts or omissions of a parent cannot be a proximate cause of the injury to Austin." The court denied this request.

The next day, before closing arguments, Kolbeck requested that a supplemental jury instruction be given to the jury. Kolbeck argued that without the supplemental instruction, he could not argue that Sonja's actions were a proximate cause of Austin's injuries under instruction No. 6. The court agreed that while instruction No. 6 was correct, it needed modification. The court therefore allowed the supplemental instruction.

Supplemental instruction No. 6 advised the jury of Kolbeck's claim that Sonja's conduct was the only proximate cause of Austin's injuries. The court did not alter the original instruction No. 6, but renumbered it to supplemental instruction No. 7. The jury returned a unanimous verdict for Kolbeck.

ASSIGNMENTS OF ERROR

Although Sonja assigns four errors in her brief, we restate them in accordance with those actually argued in her 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.⁴ Sonja's assigned and argued errors are that the district court erred in (1) failing to properly instruct the jury; (2) failing to instruct the jury, on its own motion, on the issue of altered documents; and (3) allowing Glass' discovery deposition to be read into evidence after Sonja did not call Glass as a witness.

On cross-appeal, Kolbeck assigns that the trial court erred in allowing Rauscher to testify when Sonja failed to disclose him as an expert witness during discovery.

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.⁵

[2,3] Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.⁶ An abuse of discretion in a ruling on the admissibility of evidence occurs when the trial judge's reasons or rulings are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.⁷

ANALYSIS

JURY INSTRUCTION ON SOLE PROXIMATE CAUSE

Sonja contends that the court's giving of supplemental jury instruction No. 6 was reversible error as a matter of law because the instruction (1) implied that there could be only a single proximate cause of Austin's injuries and damages; (2) distracted the jurors from a direct assessment of Kolbeck's negligence and was intended to put Sonja's acts or omissions before the jury as an intervening cause; (3) misstated Sonja's burden of proof; (4) directly conflicted with supplemental instruction No. 7 by imputing Sonja's negligence to Austin; and (5) improperly emphasized

⁴ *State ex rel. Lemon v. Gale*, 272 Neb. 295, 721 N.W.2d 347 (2006).

⁵ *Castillo v. Young*, 272 Neb. 240, 720 N.W.2d 40 (2006).

⁶ *Curran v. Buser*, 271 Neb. 332, 711 N.W.2d 562 (2006).

⁷ See *id.*

Kolbeck's defense by negating language in other instructions. Sonja does not contend that the evidence was insufficient to support a sole proximate cause instruction.

Kolbeck contends that the record is insufficient to review any of Sonja's assigned errors. Kolbeck also contends that because Sonja's claim was dismissed, she was a nonparty to the action and he was entitled to the "conduct of nonparty third person" pattern instruction in NJI2d Civ. 3.44. Supplemental instruction No. 6 followed the pattern instruction in NJI2d Civ. 3.44 and provided: "[Kolbeck] claims that Sonja Worth's conduct was the only proximate cause of Austin Worth's injuries. By doing so, [Kolbeck] is simply denying that his conduct was a proximate cause of the injury. Remember, [Sonja] must prove that [Kolbeck's] negligence was a proximate cause of the injury."

[4-6] 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.⁸ Jury instructions do not constitute prejudicial error if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence.⁹ A litigant is entitled to have the jury instructed upon only those theories of the case which are presented by the pleadings and which are supported by competent evidence.¹⁰

Kolbeck argues that the second sentence of supplemental instruction No. 6 explained that he was simply denying that he was a proximate cause of Austin's injuries. The comments to NJI2d Civ. 3.44 clarify that this instruction is appropriate when the defendant claims that "the negligence of someone other than the defendant" is the sole proximate cause of the plaintiff's damages.¹¹

⁸ *Orduna v. Total Constr. Servs.*, 271 Neb. 557, 713 N.W.2d 471 (2006).

⁹ See *id.*

¹⁰ *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006).

¹¹ See, *Tapp v. Blackmore Ranch*, 254 Neb. 40, 575 N.W.2d 341 (1998) (Gerrard, J., concurring; White, C.J., and McCormack, J., join); *Weiseth v. Karlen*, 206 Neb. 724, 295 N.W.2d 103 (1980); *Steele v. Encore Mfg. Co.*, 7 Neb. App. 1, 579 N.W.2d 563 (1998).

[7,8] A defendant's conduct is a proximate cause of an event if the event would not have occurred but for that conduct, but it is not a proximate cause if the event would have occurred without that conduct.¹² In actions filed on behalf of a child, this court has long held that ““the negligence of a parent . . . cannot be imputed to an infant who is injured through the carelessness of another party.” . . .”¹³ This rule has been applied not only in cases in which separate actions were filed by the parent and the child,¹⁴ but also to actions filed solely on behalf of a child for personal injuries.¹⁵

[9] But if a third person is the sole proximate cause of an innocent plaintiff's injuries, the plaintiff's recovery from a defendant is barred because the plaintiff's injuries are not attributable to the defendant's negligence. In *Pearson v. Schuler*,¹⁶ a case dealing with the general rule that a driver's negligence may not be imputed to a passenger guest, the trial court instructed the jury as follows:

“If you find from a preponderance of the evidence in this case that . . . the driver of the automobile in which plaintiff's decedent was riding, at the time of the collision, was negligent, and that such negligence . . . was the *sole* proximate cause of the collision and resulting injuries to plaintiff's decedent, then your verdict will be in favor of the defendant”

On appeal, the deceased passenger's representative assigned error to this instruction. This court held that a passenger may not recover from a defendant for injuries sustained in a collision if the

¹² See *Shibata v. College View Properties*, 234 Neb. 134, 449 N.W.2d 544 (1989).

¹³ *Owen, Administrator v. Moore*, 166 Neb. 226, 238, 88 N.W.2d 759, 767 (1958). Accord, Restatement (Second) of Torts § 488(1) (1965); NJI2d Civ. 3.25 and 3.26 (citing Nebraska cases).

¹⁴ See *Owen, Administrator*, *supra* note 13.

¹⁵ See, e.g., *Wilson v. Thayer County Agricultural Society*, 115 Neb. 579, 213 N.W. 966 (1927).

¹⁶ *Pearson v. Schuler*, 172 Neb. 353, 361, 109 N.W.2d 537, 542 (1961) (emphasis in original).

negligence of the passenger's driver was the sole proximate cause of the accident. We stated:

This instruction does not tell the jury that the negligence of [the driver] was imputed to the deceased [passenger]. It does state that if it found [the driver's] negligence was the sole proximate cause of the collision and resulting injuries to the . . . decedent, it should find for the defendant That amounts to instructing that if [the driver's] negligence was the sole cause of the injury then it should return a verdict for defendant. That [the driver's] negligence was not otherwise imputed to the plaintiff's deceased is made more clear by instruction No. 11 which reads in part as follows: ". . . if you find that the injuries to plaintiff's decedent were the proximate result of the negligence of [the defendant] and the driver . . . and that such injuries would not have occurred except for the negligence of each of said parties, it is no defense to this action for the defendant . . . to prove that the negligence of [the driver] was a contributing cause to the injuries sustained by plaintiff's decedent."¹⁷

[10-12] *Pearson* demonstrates that the third person's negligence is not imputed to an innocent plaintiff by a sole proximate cause instruction. "The concept of sole proximate cause 'rests on the notion that some third party or other independent event was the sole cause of the plaintiff's injuries.'"¹⁸ Here, Kolbeck did allege that Sonja's conduct was the sole proximate cause of Austin's injuries, but in medical malpractice cases, it is not necessary that the independent event or cause be the result of negligence.¹⁹ Other courts, however, including this court, also require trial courts to give a limiting instruction that explains the plaintiff's right to recover if the plaintiff proves the defendant's

¹⁷ *Id.* at 361-62, 109 N.W.2d at 542.

¹⁸ *Estate of Long v. Broadlawns Med. Center*, 656 N.W.2d 71, 84-85 (Iowa 2002).

¹⁹ See, e.g., *Nassar v. County of Cook*, 333 Ill. App. 3d 289, 775 N.E.2d 154, 266 Ill. Dec. 592 (2002). Compare *Whittington v. Nebraska Nat. Gas. Co.*, 177 Neb. 264, 128 N.W.2d 795 (1964).

negligence proximately caused or proximately contributed to the plaintiff's injuries.²⁰

In *Barry v. Moore*,²¹ this court held that a trial court must inform the jury of "the respective legal rights and liabilities of the [parties] in the event that negligence of the defendant was found which was the proximate cause which cause was proximately contributed to by [the third person]." Specifically, the trial court must explain that "[i]f [the defendant] was guilty of negligence which solely, or in concurrence with [the third person], or which proximately contributed to the accident, the plaintiff being in nowise responsible for it, the plaintiff was entitled to a recovery of her damages, if any, from him."²²

Failure to give this instruction is reversible error, even if not requested, when the evidence raises a jury question as to whether (1) the defendant's negligence was the sole cause of the plaintiff's injuries, (2) a third person's negligence was the sole cause of the plaintiff's injuries, (3) negligence of the defendant and a third person concurred to cause the plaintiff's injuries; and (4) negligence of a third person or the defendant proximately caused the injuries, but the other's negligence contributed to the injuries.²³

[13] In other words, when the evidence is sufficient to raise a jury question as to whether a defendant's or a third person's negligence proximately caused or proximately contributed to a plaintiff's injuries, then a trial court must inform the jury that the plaintiff is entitled to recover damages, if any, from the defendant if the jury finds that the defendant is guilty of negligence which solely or in concurrence with a third person proximately caused or contributed to the plaintiff's injuries.

We have also applied this rule in a medical malpractice case when the plaintiff alleged that the defendant physician failed

²⁰ See, *Sullivan v. Edward Hosp.*, 335 Ill. App. 3d 265, 781 N.E.2d 649, 269 Ill. Dec. 852 (2002); *Nassar*, *supra* note 19. See, also, *Wheatley v. Heideman*, 251 Iowa 695, 102 N.W.2d 343 (1960).

²¹ *Barry v. Moore*, 172 Neb. 57, 63-64, 108 N.W.2d 401, 405 (1961).

²² *Id.* at 64, 108 N.W.2d at 405.

²³ See *id.* Accord *Zavoral v. Pacific Intermountain Express*, 181 Neb. 40, 146 N.W.2d 796 (1966).

to provide appropriate postoperative care and neither party alleged a third person's negligence had caused the plaintiff's injuries.²⁴ There was evidence at trial, however, that the plaintiff's mother had failed to follow instructions for the plaintiff's postoperative care and that another physician had failed to correctly diagnose the plaintiff's condition. Relying on *Barry*,²⁵ this court concluded that

[u]nder the evidence, the erroneous failure of the district court to inform the jury as to how to treat the separate independent negligent acts of more than one person which combined to proximately cause the same injury, if the jury found such to have been the case, violated the district court's duty and prejudiced [the plaintiff].²⁶

[14] A court does not err in failing to give an instruction if the substance of the proposed instruction is contained in those instructions actually given.²⁷ Here, supplemental instruction No. 5 advised the jury in part that "[a] proximate cause need not be the sole cause. It may be a substantial factor or substantial contributing cause in bringing about the injury or harm." In addition, supplemental instruction No. 7 advised the jury that

any act and/or omission of a parent does not relieve the Defendant of any liability the Defendant may have to the child for injuries or damages suffered by the child. In this case, if you find any acts and/or omissions on the part of Sonja L. Worth, caused or contributed to the injuries of Austin Worth[,] you must not consider them in deciding the damages, if any, to which the child is entitled.

In another guest passenger case, this court held that the trial court did not err by instructing the jury on the defendant's theory that the driver of the car in which the plaintiff was riding was the sole proximate cause of the plaintiff's injury when the court also instructed the jury that the negligence of the driver could not be

²⁴ See *McLaughlin v. Hellbusch*, 251 Neb. 389, 557 N.W.2d 657 (1997).

²⁵ *Barry*, *supra* note 21.

²⁶ *McLaughlin*, *supra* note 24, 251 Neb. at 395, 557 N.W.2d at 661.

²⁷ See *Roth v. Wiese*, 271 Neb. 750, 716 N.W.2d 419 (2006).

imputed to the plaintiff.²⁸ We conclude that, taken as a whole, the jury instructions were sufficient to ensure that Sonja's negligence did not operate to prevent Austin's recovery of damages if the jury concluded that Kolbeck's negligence was a concurring or contributing proximate cause of Austin's injuries.

Sonja's reliance on *Vieregger v. Robertson*,²⁹ is misplaced. In *Vieregger*, the parents brought a malpractice action on behalf of their son against the mother's two perinatologists for injuries their son sustained during delivery. The combination of the mother's diabetic condition and weight gain contributed to her unborn child's enlarged size, which caused delivery complications. At trial, the jury was instructed that the parents had the burden of proving that each physician had been negligent and that each physician's "negligence was *the proximate cause*" of the son's injuries.³⁰

The Nebraska Court of Appeals was concerned that the instruction enhanced the parents' burden of proof by requiring them to prove that *each* doctor was *the proximate cause* of the child's injuries. That concern is not raised here. As in *Vieregger*, there were two alleged causes of Austin's injuries: Sonja's negligence and Kolbeck's negligence. But supplemental instructions Nos. 2 and 5 advised the jury that Sonja must prove Kolbeck's negligence was "*a proximate cause of an injury to Austin*" (emphasis supplied) and that this requirement could be satisfied if the jury found Kolbeck's negligence was "*a substantial factor or substantial contributing cause in bringing about the injury or harm.*"

The Court of Appeals was also concerned that the instruction would improperly allow the jury to consider, in searching for *the proximate cause*, the mother's causative role in the development of her overly large unborn child. We agree that a pregnant woman's causative role in her unborn child's injuries cannot prevent her child's recovery from a negligent defendant unless the mother was the sole proximate cause of those injuries. But

²⁸ *Segebart v. Gregory*, 160 Neb. 64, 69 N.W.2d 315 (1955).

²⁹ *Vieregger v. Robertson*, 9 Neb. App. 193, 609 N.W.2d 409 (2000).

³⁰ *Id.* at 198, 609 N.W.2d at 414 (emphasis in original).

the defendants in *Vieregger* did not contend that the mother was the sole proximate cause of her unborn child's injuries. Here, the instructions were sufficient to allow Austin's recovery unless the jury concluded that Kolbeck's negligence, if any, was not a "substantial factor or substantial contributing cause in bringing about the injury or harm."

JURY INSTRUCTION ON ALTERED DOCUMENT

In her second assignment of error, Sonja argues that the district court committed plain error in failing to instruct the jurors, *sua sponte*, that they could infer that the altered medical record document was unfavorable to Kolbeck.³¹ Sonja admits that she did not request an adverse inference instruction. Nonetheless, Sonja contends that the trial court has a duty, whether requested or not, to instruct the jury on issues presented by the pleadings and evidence. That contention is correct,³² but here, the record is insufficient to review an assignment of plain error.

[15,16] Plain error may be asserted for the first time on appeal or be noted by an appellate court on its own motion.³³ Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.³⁴

Sonja argues that "[t]he Court was obligated to instruct the jury that had such an alteration not occurred, the office chart would have supported the testimony of both Sonja and Mark Worth as to the time of day that they contacted the Physician's office."³⁵ This argument concerns the testimony of Rauscher, the document expert who testified that two different listed times on a medical record document had been altered. Rauscher did not,

³¹ See *Stevenson v. Union Pacific R. Co.*, 354 F.3d 739 (8th Cir. 2004).

³² See, e.g., *Nebraska Depository Inst. Guar. Corp. v. Stastny*, 243 Neb. 36, 497 N.W.2d 657 (1993).

³³ *Zwygart v. State*, 270 Neb. 41, 699 N.W.2d 362 (2005).

³⁴ *Id.*

³⁵ Brief for appellant at 23-24.

however, identify the document he believed had been altered. Sonja's counsel stated that the document was part of exhibit 36, but we do not have exhibit 36 or testimony regarding exhibit 36 in the record. Even the document from exhibit 36 about which Rauscher was testifying was not admitted into evidence. Finally, we do not have Mark or Sonja's testimony and do not know whether Kolbeck used the document to rebut their purported testimony about the times they contacted a physician.

[17] Sonja's argument requires a factual inquiry into this record, which is wholly insufficient for this court to evaluate whether the absence of an adverse inference instruction prejudiced Sonja's case or led to a miscarriage of justice. It is incumbent on the party appealing to present a record which supports the errors assigned, and absent such a record, the decision of the lower court will be affirmed.³⁶ Because we cannot determine that the court's failure to give this instruction was error, the district court's ruling is affirmed.

ADMISSION OF GLASS' DEPOSITION TESTIMONY

In her third assignment of error, Sonja contends that the district court improperly allowed portions of Glass' deposition to be read into evidence. Sonja argues that the hearsay exception under § 27-804(2)(a) was not intended to allow for the admission of a discovery deposition because for that type of deposition, an attorney has less incentive to develop testimony than for a deposition to be used at trial. Sonja also argues that admitting discovery deposition testimony under the hearsay exception will have the chilling effect of requiring all attorneys to conduct a complete direct and redirect of all expert witnesses, prolonging the discovery phase and increasing costs to litigants. Finally, Sonja contends that the admission of a discovery deposition violates Neb. Rev. Stat. § 27-403 (Reissue 1995) because its probative value is substantially outweighed by the danger of unfair prejudice.

[18,19] The burden to establish a declarant's unavailability is on the party seeking to introduce the evidence under § 27-804, and the determination of whether a witness is unavailable to appear at trial and give testimony is within the discretion of the

³⁶ *Ondrak v. Matis*, 270 Neb. 46, 699 N.W.2d 367 (2005).

trial court.³⁷ To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about such evidence admitted or excluded.³⁸ As with Sonja's second assignment of error, the record is insufficient to review whether the admission of Glass' deposition testimony requires a new trial.

[20] Erroneous admission of evidence is harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact.³⁹ This court has specifically held that the erroneous admission of deposition testimony from a plaintiff's designated expert is not reversible error when there is other evidence to sustain the judgment.⁴⁰ Without a complete bill of exceptions, this court has no way of knowing whether Glass' deposition testimony was cumulative or whether other evidence sustained the judgment.

Also, Neb. Ct. R. of Discovery 32(a)(4) (rev. 2000) provides that "[i]f only part of a deposition is offered in evidence by a party, an adverse party may require him or her to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts relevant to the issues." On this record, we also have no way of knowing whether Sonja supplemented the portion of Glass' testimony that was read into evidence by offering another part of his deposition testimony. In other words, even if the admission was error, we have no way of knowing from this record whether it was harmless error and cannot conclude that the district court erred.

Because of our determination that Sonja's assignments of error do not require a new trial, it is unnecessary for us to reach Kolbeck's assignment of error on cross-appeal.

³⁷ See *Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992).

³⁸ *Perry Lumber Co. v. Durable Servs.*, 271 Neb. 303, 710 N.W.2d 854 (2006).

³⁹ *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006). See, also, *Behm v. Northwestern Bell Tel. Co.*, 241 Neb. 838, 491 N.W.2d 334 (1992); *Bailey v. Farmers Union Co-op Ins. Co.*, 1 Neb. App. 408, 498 N.W.2d 591 (1992).

⁴⁰ *Maresh*, *supra* note 37.

CONCLUSION

We conclude the district court did not err in instructing the jury on Kolbeck's theory that Sonja was the sole proximate cause of Austin's in utero injuries. Taken together, the instructions were sufficient to ensure that Austin would recover from Kolbeck if the jury concluded that Kolbeck's conduct was a contributing or concurring proximate cause and that Sonja's concurring or contributing negligence would not prevent Austin's recovery.

AFFIRMED.

W. PATRICK BETTERMAN, APPELLANT, V. STATE OF
NEBRASKA DEPARTMENT OF MOTOR VEHICLES
AND BEVERLY NETH, DIRECTOR, APPELLEES.

728 N.W.2d 570

Filed March 9, 2007. Nos. S-05-638, S-06-823.

1. **Administrative Law: Final Orders: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Administrative Law: Statutes: Appeal and Error.** The 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.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
5. **Actions: Jurisdiction.** Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.
6. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Police Officers and Sheriffs: Jurisdiction.** In an administrative license revocation proceeding, the sworn report of the arresting officer must, at a minimum, contain the information specified in the applicable statute, in order to confer jurisdiction.
7. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Proof.** The Department of Motor Vehicles makes a prima facie case for license revocation once it establishes that the officer provided a sworn report containing the statutorily required recitations.

Cite as 273 Neb. 178

8. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower courts.
9. **Administrative Law: Final Orders: Courts: Appeal and Error.** In reviewing final administrative orders under the Administrative Procedure Act, the district court functions not as a trial court but as an intermediate court of appeals.
10. **Administrative Law: Appeal and Error.** Generally, in an appeal under the Administrative Procedure Act, an appellate court will not consider an issue on appeal that was not presented to or passed upon by the administrative agency.
11. **Administrative Law: Evidence: Judicial Notice: Appeal and Error.** The Administrative Procedure Act does not authorize a district court reviewing the decision of an administrative agency to receive additional evidence, whether by judicial notice or other means.
12. **Statutes.** To the extent that a conflict exists between statutes on the same subject, specific statutes control over general statutes.
13. **Implied Consent: Blood, Breath, and Urine Tests.** An arrested motorist refuses to submit to a chemical test when the motorist's conduct, demonstrated under the circumstances confronting the officer requesting the chemical test, justifies a reasonable person's belief that the motorist understood the officer's request for a test and manifested a refusal or unwillingness to submit to the requested test.
14. **Administrative Law: Motor Vehicles: Licenses and Permits: Due Process.** Before a state may deprive a motorist of his or her driver's license, that state must provide a forum for the determination of the question and a meaningful hearing appropriate to the nature of the case.
15. **Administrative Law: Due Process: Notice: Evidence.** In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board.
16. **Police Officers and Sheriffs: Words and Phrases.** An arresting officer is an officer who is present at the scene of an arrest for purposes of assisting in it.
17. **Appeal and Error.** Error without prejudice provides no ground for appellate relief.
18. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Blood, Breath, and Urine Tests: Due Process.** The administrative license revocation provisions pertaining to motorists who refuse to submit to chemical testing do not violate the due process or equal protection rights of those motorists by treating them differently than motorists who submit to, but fail, such testing.
19. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party assigning the error.
20. **Courts: Jurisdiction: Appeal and Error.** In civil appeals, after an appeal to an appellate court has been perfected, a lower court is without jurisdiction to hear a case involving the same matter between the same parties.
21. **Administrative Law: Motions for New Trial: Evidence: Appeal and Error.** An administrative agency may rule on a motion for new trial on the ground of newly

discovered evidence, if timely presented, although the cause is pending in an appellate court for review.

22. **Motions for New Trial: Evidence: Proof.** In order to make a sufficient showing for a new trial on the ground of newly discovered evidence, the proof in support thereof must show that such evidence is now available which neither the litigant nor counsel could have discovered by the exercise of reasonable diligence and that the evidence is not merely cumulative, but competent, relevant, and material, and of such character as to reasonably justify a belief that its admission would bring about a different result if a new trial were granted.

Appeals from the District Court for Douglas County: DANIEL BRYAN, JR., and PETER C. BATAILLON, Judges. Affirmed.

W. Patrick Betterman, of Law Offices of W. Patrick Betterman, pro se.

Jon Bruning, Attorney General, and Edward G. Vierk for appellees.

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

WRIGHT, J.

I. NATURE OF CASE

W. Patrick Betterman sought judicial review of an order by the director of the Department of Motor Vehicles (DMV) revoking his driving privileges for 1 year for refusing to submit to chemical testing of his breath for the unlawful presence of alcohol. The district court affirmed the director's decision and a subsequent decision to refuse to vacate such order, and Betterman appeals. We affirm the judgments of the district court.

II. SCOPE OF REVIEW

[1,2] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act (APA) may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Kenley v. Neth*, 271 Neb. 402, 712 N.W.2d 251 (2006). When reviewing an order of a district court under the APA for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[3] 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. *Nebraska Liq. Distrib. v. Nebraska Liq. Cont. Comm.*, 272 Neb. 390, 722 N.W.2d 10 (2006).

III. FACTS

On September 19, 2004, Lt. Todd Schmaderer of the Omaha Police Department observed a car traveling at a high rate of speed. Schmaderer saw the car pass three vehicles without signaling before changing lanes. He activated the warning lights on his vehicle and pursued the car. When the car stopped at a red light, Schmaderer got out and approached the car. The driver was staring straight ahead and appeared not to notice the lights of the police car behind him or Schmaderer standing next to the driver's car. Schmaderer tapped on the window to get the driver's attention, and the driver rolled down his window.

The driver took out his wallet but had trouble finding his driver's license until Schmaderer pointed it out. Schmaderer identified Betterman by his driver's license. He also asked for Betterman's automobile registration and proof of insurance. Betterman fumbled unsuccessfully through his papers, and again, Schmaderer pointed out the appropriate documents. Schmaderer noted that Betterman's eyes were bloodshot and watery, that his speech was slurred, and that he smelled of alcohol.

After Officer Mark Kiley arrived on the scene, the officers attempted to conduct field sobriety tests, but Betterman refused to participate in any tests. Betterman was placed under arrest and was transported by Kiley to the police station. Schmaderer followed in his police vehicle.

At the police station, Betterman told the officers he was diabetic and requested a drink of water. Water was provided for him. With Schmaderer present, Kiley read to Betterman a postarrest chemical test advisement form. Betterman was unsure whether he wanted to take a chemical test, and he requested to contact an attorney. After speaking to someone on the telephone, Betterman signed the advisement, which indicated his knowledge that he was being asked to submit to a chemical test and that refusal to submit was a separate crime for which he could be charged. He then verbally agreed to take the test.

In the room where Breathalyzer tests were given, Betterman asked numerous times for another drink of water. His requests were denied because the police department's protocol was to observe a person for 15 minutes before conducting the breath test, during which time, the person was not allowed to put anything in his or her mouth.

Judy Kyler, a crime laboratory technician, instructed Betterman on how to perform the test. Betterman did not follow her instructions. According to Schmaderer, Betterman was "yelling the entire time" and was "argumentative [and] attempting to be intimidating." Betterman twice told Kyler he would not take the breath test until he had a drink of water. Kyler then concluded that Betterman was refusing the test.

Schmaderer, Kiley, and Kyler completed a sworn report stating that Betterman had been directed to submit to a chemical test but had refused. The handwritten list of reasons for Betterman's arrest stated: "[R]eckless driving. Driver displayed signs of alcohol intoxication. Refused all SFST and later breath test." The report was received by the DMV on September 23, 2004.

Betterman petitioned the DMV for an administrative license revocation (ALR) hearing, and a hearing was scheduled for October 15, 2004. At the request of the police officers, two continuances were granted, and the hearing date was moved to November 18. Betterman retained a temporary driver's license through the new hearing date.

Schmaderer and Kyler appeared at the ALR hearing, but Kiley was unable to attend. Betterman moved to dismiss because of Kiley's absence; the motion was overruled by the hearing officer. The DMV then requested a continuance so that Kiley could attend. Betterman was asked if he wanted to respond, and Betterman's attorney stated, "No response." The DMV presented its evidence, and the hearing officer then denied the request for a continuance.

After the hearing, the director administratively revoked Betterman's driver's license for 1 year. He petitioned for judicial review. The district court affirmed the director's order, and Betterman appealed.

While his appeal was pending in this court as case No. S-05-638, Betterman was acquitted in county court of the criminal

refusal-to-submit charge. Betterman filed with the DMV motions to vacate the ALR and for a new ALR hearing because of newly discovered evidence that he had been acquitted of the criminal refusal charge.

The director denied Betterman's motions, and he appealed to the district court. Although an appeal was pending in case No. S-05-638, the district court concluded it had jurisdiction over Betterman's appeal. It affirmed the director's refusal to vacate the ALR. Betterman appealed to this court from the district court's order, which appeal was docketed as case No. S-06-823. The two cases have been consolidated.

IV. ASSIGNMENTS OF ERROR

Betterman asserts, summarized, renumbered, and restated, that the district court erred (1) in finding that Schmaderer's testimony at the ALR hearing could cure the alleged deficiencies in the sworn report, (2) in finding that Betterman had waived his objection regarding the employment status of the hearing officer, (3) in not taking judicial notice that the hearing officer was an employee of the DMV, (4) in failing to either dismiss the proceedings or remand the case to the DMV for a determination of the hearing officer's employment status, (5) in finding that Betterman refused to submit to a chemical test of his breath in accordance with Neb. Rev. Stat. § 60-6,197 (Reissue 2004), (6) in applying the wrong standard of review, (7) in finding that the evidence before the hearing officer established that Kiley's appearance was not mandatory, (8) in finding that no error resulted from the director's denial of Betterman's motion to dismiss, (9) in finding that the director did not abuse her discretion by granting two continuances, (10) in finding that Neb. Rev. Stat. §§ 60-498.01 and 60-498.02 (Reissue 2004) are constitutional, and (11) in affirming the director's order refusing to vacate the ALR on the basis of newly discovered evidence.

V. ANALYSIS

1. SUFFICIENCY OF SWORN REPORT

[4] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case. *Merrill v. Griswold's, Inc.*, 270 Neb. 458, 703

N.W.2d 893 (2005). Betterman argues that the sworn report submitted at the ALR hearing was deficient in that it did not recite the matters required by § 60-498.01(2) and that, therefore, the director did not acquire jurisdiction or authority to administratively revoke Betterman's driver's license.

[5] In his petition for judicial review, Betterman did not assign as error that the director lacked jurisdiction because of a defective sworn report. Although the court discussed the report in the context of considering the sufficiency of the evidence, it did not consider the jurisdictional question. Nonetheless, lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte. *New Tek Mfg. v. Beehner*, 270 Neb. 264, 702 N.W.2d 336 (2005).

[6,7] The district court found that the sworn report lacked the statutorily required recitations, but the court found that the DMV established a prima facie case against Betterman by supplementing the report with testimony by Schmaderer at the hearing. This court has held that in an ALR proceeding, the sworn report of the arresting officer must, at a minimum, contain the information specified in the applicable statute, in order to confer jurisdiction. *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005). The DMV makes a prima facie case for license revocation once it establishes that the officer provided a sworn report containing the statutorily required recitations. *Id.* If the sworn report does not include information required by statute, the report may not be supplemented by evidence offered at a subsequent hearing. See *id.* The district court thus erred in concluding that a sworn report which allegedly lacked the required recitations could be cured by supplemental testimony by the arresting police officer to establish a prima facie case for the ALR.

[8] When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower courts. *In re Interest of Jedidiah P.*, 267 Neb. 258, 673 N.W.2d 553 (2004). There is no factual dispute as to what information was contained in the report. The district court concluded that the explanation on the sworn report for why Betterman was arrested did not state "the reasons for such arrest." See § 60-498.01(2). This court is required to reach an

independent conclusion whether the sworn report provided the required statutory information to confer authority upon the director to revoke Betterman's license.

In *Hahn*, the arrested motorist failed a chemical breath test and the officer filed a sworn report. Following an ALR hearing, the motorist's license was revoked. On appeal, the district court vacated the revocation because the sworn report did not meet the statutory requirements. The officer had not completed those portions of the sworn report form which would have shown that the motorist "'was requested'" to submit to the required test or "'the type of test'" to which he submitted. See *Hahn*, 270 Neb. at 171, 699 N.W.2d at 38. The director appealed.

The issue was whether the report was sufficient to confer authority upon the director to revoke the motorist's license. This court found that the report did not fully comply with the statutory requirements. We stated that the arresting officer's sworn report "triggers the administrative revocation process by establishing a prima facie basis for revocation." *Id.* at 169, 699 N.W.2d at 37. We considered when "an omission on a sworn report becomes a jurisdictional defect, as opposed to a technical one." *Id.* at 171, 699 N.W.2d at 38. The test was "whether, notwithstanding the omission, the sworn report conveys the information required by the applicable statute." *Id.*

In the present case, the applicable statute required the sworn report to state "(a) that the person was arrested as described in subsection (2) of section 60-6,197 and *the reasons for such arrest*, (b) that the person was requested to submit to the required test, and (c) that the person refused to submit to the required test." (Emphasis supplied.) § 60-498.01(2). The problem was not that required sections of the sworn report were omitted. The officers checked the appropriate boxes and filled out the required sections. The problem, according to the district court, was that the explanation given by the officers as to why Betterman was arrested was not specific enough to establish a prima facie basis for revocation.

The issue is whether the sworn report was sufficient to support a prima facie case for license revocation. In an ALR proceeding, the sworn report of the arresting officer must, at a minimum, contain the information specified in the applicable statute in

order to confer jurisdiction. *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005). A sworn report must state that the person was arrested as described in § 60-6,197(2) and the reasons for such arrest. See § 60-498.01(2). An arrest described in § 60-6,197(2) is an arrest “for any offense arising out of acts alleged to have been committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic liquor or drugs.”

The sworn report stated that Betterman was arrested because he had been driving recklessly, displayed signs of alcohol intoxication, and refused field sobriety tests and a breath test. The district court opined that the stated reason of “reckless driving” may have indicated why Betterman was stopped but did not indicate he was driving while under the influence of alcohol. The court also opined that Betterman’s refusal of the chemical test and field sobriety tests was not a factor indicating he was under the influence and that “‘displayed signs of alcohol intoxication’” was a broad conclusion and not sufficient to support probable cause that Betterman was driving under the influence of alcohol. The court stated that the officers should have listed such observations as slurred speech, bloodshot eyes, smelled of alcohol, mental confusion, or unsteadiness, observations which Schmaderer testified about at the hearing.

We conclude that the sworn report conveyed the information required by § 60-498.01(2). All the appropriate boxes were checked, and the proper sections were filled out. “[R]eckless driving” was a valid reason for a police officer to stop Betterman’s vehicle. And because Betterman “displayed signs of alcohol intoxication,” the officer had cause to allege that Betterman was “driving . . . a motor vehicle while under the influence of alcoholic liquor.” See § 60-6,197(2). A prima facie case for license revocation was made on the sworn report.

Betterman further claims the report was insufficient to confer jurisdiction (1) because the report stated that Betterman was arrested “pursuant to Neb. Rev. Stat. § 60-6,197,” instead of the statutory phrase “as described in subsection (2) of section 60-6,197,” and (2) because the report stated that “[t]he individual was directed to submit to a chemical test,” instead of the statutory phrase “the person was requested to submit to the required test.”

See, § 60-498.01(2); brief for appellant in case No. S-05-638 at 21-22. These claims are without merit. The test is not whether the sworn report used the verbatim language of the statute, but whether the report conveyed the information required by the applicable statute. See *Hahn, supra*.

2. EMPLOYMENT STATUS OF HEARING OFFICER

Betterman claims that the director violated Neb. Rev. Stat. § 84-913.04 (Reissue 1999) because the hearing officer was an employee of the DMV. Section 84-913.04(2) provides that a “person who is subject to the authority, direction, or discretion of one who has served as investigator, prosecutor, or advocate in a contested case or in its prehearing stage may not serve as hearing officer” unless all parties consent. Betterman’s theory is that the director acted as an “advocate” for the department when responding to the motion to dismiss filed by Betterman with the DMV. See brief for appellant in case No. S-05-638 at 22.

On appeal to the district court, Betterman claimed he was denied his right to a hearing before an impartial board because the hearing officer was an employee of the DMV. The court rejected Betterman’s argument because he had neither objected to the hearing officer nor presented any evidence on this issue in proceedings before the DMV. In his assignments of error before this court, Betterman asserts that the district court erred in finding that he had waived any objection regarding the hearing officer, in not taking judicial notice that the hearing officer was a DMV employee, and in failing to either dismiss the proceedings or remand the case to the DMV for a determination of the hearing officer’s employment status.

(a) Issue Not Raised in Administrative Proceedings

[9,10] In reviewing final administrative orders under the APA, the district court functions not as a trial court but as an intermediate court of appeals. *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997). Generally, in an appeal under the APA, an appellate court will not consider an issue on appeal that was not presented to or passed upon by the administrative agency. *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003). The court has discretion to remand a case to the agency for further proceedings if the court determines that the interest of justice would be served

by the resolution of any other issue not raised before the agency. See Neb. Rev. Stat. § 84-917(5)(b) (Reissue 1999).

Betterman did not object to the hearing officer's conducting the ALR hearing, and no evidence was presented on this issue at the hearing. No motion to recuse the hearing officer was filed in accordance with the DMV's regulations. See 247 Neb. Admin. Code, ch. 1, § 003.04 (2001). We conclude that the district court did not err in refusing to consider the issue of the hearing officer's employment status, an issue not presented to or passed upon by the agency. The court did not abuse its discretion in declining to remand the matter to the agency for further proceedings.

(b) No Judicial Notice

Betterman argues that the district court should have taken judicial notice of the hearing officer's employment status. He now asks this court to take judicial notice of this alleged fact.

[11] Assuming (without deciding) that the employment status of the hearing officer could properly be considered an adjudicative fact not subject to reasonable dispute, judicial notice could nevertheless not be taken. In *Wolgamott*, this court held that when reviewing a final decision of an administrative agency in a contested case under the APA, a court may not take judicial notice of an adjudicative fact that was not presented to the agency, because the taking of such evidence would impermissibly expand the court's statutory scope of review de novo on the record of the agency. The APA does not authorize a district court reviewing the decision of an administrative agency to receive additional evidence, whether by judicial notice or other means. *Wolgamott, supra*.

Betterman points out that this court has also announced a rule that seemingly contradicts the holding in *Wolgamott*. We have noted that “[i]n a de novo review on the record of an agency, the record consists of the transcripts and bill of exceptions of the proceedings before the agency and facts capable of being judicially noticed pursuant to Neb. Evid. R. 201.” *Vinci v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 423, 437, 571 N.W.2d 53, 62 (1997). See, also, *Slack Nsg. Home v. Department of Soc. Servs.*, 247 Neb. 452, 528 N.W.2d 285 (1995).

In the cases of *Vinci* and *Slack Nsg. Home*, this court suggested that the record could include facts capable of being judicially noticed. But in neither case was judicial notice at issue. *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997), on the other hand, involved the issue of whether judicial notice is appropriate in an appeal from an agency decision. In that case, a motorist appealed the administrative revocation of his driver's license for failure to submit to chemical testing. The motorist claimed that the advisory form read to him by the arresting officer was defective. The advisory form did not appear in the record of the administrative hearing, and the motorist claimed that the lower courts should have taken judicial notice of the form. This court disagreed and held that a court may not take judicial notice of an adjudicative fact that was not presented to the agency.

We expressly considered the issue of judicial notice in *Wolgamott*, and therefore, it is the controlling case with regard to judicial notice in an appeal from an agency decision. To the extent that *Vinci* and *Slack Nsg. Home* suggest that the record of an agency may include adjudicative facts not presented to the agency, that interpretation is disapproved.

Betterman further argues that under Neb. Rev. Stat. § 84-915.01(3) (Reissue 1999), the "record," for review purposes, included matters that were required to be considered by "another statute." Brief for appellant in case No. S-05-638 at 25. At all times relevant to this case, § 84-915.01(3) provided: "Except to the extent that the act or *another statute* provides otherwise, the agency record shall constitute the exclusive basis for . . . judicial review thereof." (Emphasis supplied.) Betterman asserts that under Neb. Rev. Stat. § 27-201 (Reissue 1995), a court must take judicial notice if requested by a party and supplied with the necessary information and that judicial notice may be taken at any stage of a proceeding. He thus argues that "another statute" (i.e., § 27-201) required the district court (and this court) to take judicial notice of the employment status of the hearing officer.

[12] To the extent that a conflict exists between statutes on the same subject, specific statutes control over general statutes. See

In re Application of Metropolitan Util. Dist., 270 Neb. 494, 704 N.W.2d 237 (2005). Betterman's interpretation of § 84-915.01(3) is incorrect. Section 27-201 is a general rule of evidence concerning judicial notice of adjudicative facts. Both §§ 84-915.01 and 84-917(5) specifically address judicial review of agency decisions, and these statutes provide that the record of the agency is the exclusive basis for review. The "record" under § 84-917(5) has been interpreted to exclude judicial notice of adjudicative facts. See *Wolgamott, supra*.

The district court did not err in refusing to consider Betterman's argument with regard to the impartiality of the hearing officer or in refusing to take judicial notice of the employment status of the hearing officer.

3. REFUSAL OF BREATH TEST

[13] Betterman maintains the district court erred in finding that he refused to submit to a chemical test of his breath in accordance with § 60-6,197. An arrested motorist refuses to submit to a chemical test when the motorist's conduct, demonstrated under the circumstances confronting the officer requesting the chemical test, justifies a reasonable person's belief that the motorist understood the officer's request for a test and manifested a refusal or unwillingness to submit to the requested test. *Urwiller v. Neth*, 263 Neb. 429, 640 N.W.2d 417 (2002). Anything short of an unqualified, unequivocal assent to an officer's request that the arrested licensee take the test constitutes a refusal to do so. *Id.*

Schmaderer testified that Betterman refused all field sobriety tests, including a preliminary breath test, and that he appeared annoyed with the officers' requests to perform such tests. At the police station, Betterman requested a drink of water, and water was given to him. Betterman signed a postarrest chemical test advisement form, which indicated Betterman's knowledge that he was being asked to submit to a chemical test and that refusal to submit was a separate crime for which he could be charged, and he verbally agreed to take the test.

In the room where Breathalyzer tests were given, Betterman again asked for water several times, but his requests were denied because the police department's protocol was to observe a person for 15 minutes before conducting the breath test, during

which time, the person was not allowed to put anything in his or her mouth. Given that Betterman had earlier been provided a glass of water, that he was being argumentative, and that the officers explained to him that he would be provided more water once he completed the test, Schmaderer testified that Betterman “appeared to be . . . being obstructive with us” by repeatedly asking for water. Betterman refused to follow Kyler’s instructions regarding the breath test. He twice said he would not take the breath test until he had a drink of water. Kyler concluded that Betterman was refusing the test.

In light of Betterman’s actions, a reasonable person could believe that Betterman understood the request for a test and manifested a refusal or unwillingness to submit. Accordingly, we conclude that competent evidence supports the district court’s finding that Betterman refused to submit to the chemical test.

4. STANDARD OF REVIEW APPLIED BY DISTRICT COURT

Proceedings for review of a final decision of an administrative agency are held to the district court, which conducts the review without a jury *de novo* on the record of the agency. See, § 84-917(5)(a); *Wolgammott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997). Betterman claims the district court applied the wrong standard of review. According to Betterman, the court applied a “‘substantial evidence’” test instead of reviewing the case *de novo* on the record. See brief for appellant in case No. S-05-638 at 30. A review of the record indicates that the court applied the correct standard of review. The court used the phrase “substantial evidence” in response to Betterman’s allegation that the director’s order was “unsupported by competent, material, and substantial evidence.” But before beginning its analysis, the court expressed the standard of review as “*de novo*,” and at the end, the court declared that it had conducted a “*de novo* review” of the record and affirmed the director’s decision. Betterman’s claim is without merit.

5. ABSENCE OF OFFICER KILEY FROM ALR HEARING

Schmaderer, Kiley, and Kyler signed the sworn report in the area labeled “Signatures of Arresting Officer(s).” Schmaderer and Kyler appeared at the ALR hearing, but Kiley was unable to attend. Betterman’s motion to dismiss based on Kiley’s absence

was overruled. The DMV asked for a continuance so Kiley could attend, and Betterman had no response. On review, the district court found that Schmaderer was best able to provide the hearing officer with information relating to the factors underlying the revocation and that, therefore, Kiley's appearance was not required to satisfy the agency's own regulation (247 Neb. Admin. Code, ch. 1, § 017.02 (2001)) or to satisfy Betterman's right to due process. 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. *Nebraska Liq. Distrib. v. Nebraska Liq. Cont. Comm.*, 272 Neb. 390, 722 N.W.2d 10 (2006).

Betterman asserts that his constitutional rights to due process were violated by Kiley's absence. Betterman cites several cases from other jurisdictions to support this claim. However, the cases cited in Betterman's brief are inapposite, because none of them answer the questions involved in this appeal. In those cases, the motorists had no opportunity to cross-examine *any* arresting officer; whereas, Betterman was able to cross-examine two of the three persons who signed the sworn report.

[14,15] Before a state may deprive a motorist of his or her driver's license, that state must provide a forum for the determination of the question and a meaningful hearing appropriate to the nature of the case. *Kenley v. Neth*, 271 Neb. 402, 712 N.W.2d 251 (2006). In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board. *Id.* The DMV's regulations provide that the "failure of the arresting officer to appear [at the ALR hearing] or be otherwise available for cross-examination shall be cause for dismissal of the administrative license revocation by the Department of Motor Vehicles except when the motorist does not appear or make any showing." See § 017.02.

[16] The question presented is, When there are multiple arresting officers, how many of them must appear at the hearing? In *Arndt v. Department of Motor Vehicles*, 270 Neb. 172, 699 N.W.2d 39 (2005), a motorist argued that the sworn report was not completed by the arresting officer, as required by § 60-498.01.

This court determined that an arresting officer is an officer who is present at the scene of the arrest for purposes of assisting in it. In this case, both Schmaderer and Kiley assisted in arresting Betterman. For purposes of § 60-498.01, then, both officers were “arresting” officers.

When defining the term “arresting officer” in *Arndt*, this court approved the definition set forth by the Nebraska Court of Appeals in *Connelly v. Department of Motor Vehicles*, 9 Neb. App. 708, 618 N.W.2d 715 (2000). In that case, two officers arrested a motorist who failed a chemical test, but only one of the officers prepared the ALR documents and appeared at the hearing. In considering the meaning of the term “arresting officer” for purposes of § 017.02, the Court of Appeals first determined that because the term could reasonably be subjected to more than one interpretation, it was subject to judicial determination. The court stated that an “arresting officer” was an officer who was present at the scene of the arrest for purposes of assisting in it.

The Court of Appeals then addressed whether the due process requirements of § 017.02 could be satisfied by the presence of only one officer at the ALR hearing. It held that the presence of one of two arresting officers at an ALR hearing satisfied the due process requirements of § 017.02 if the officer who was present questioned and tested the motorist and was best able to provide the hearing officer with information relating to the factors underlying the revocation.

We conclude that the due process requirements of § 017.02 are satisfied in a refusal-to-submit ALR proceeding by the presence of an arresting officer who questioned the motorist, who observed the motorist refuse to submit to a chemical test, and who can provide the hearing officer with information relating to the factors underlying the revocation.

In an ALR hearing, the factors underlying a revocation for refusal to submit are:

- (A) Did the peace officer have probable cause to believe the person was operating or in the actual physical control of a motor vehicle in violation of section 60-6,196 or a city or village ordinance enacted in conformance with such section[?]; and

(B) Did the person refuse to submit to or fail to complete a chemical test after being requested to do so by the peace officer[?]

§ 60-498.01(6)(c)(i).

In the present case, Schmaderer observed Betterman's erratic driving and conducted the traffic stop. He observed that Betterman exhibited bloodshot and watery eyes; that he talked with slurred speech; that he acted confused when trying to find his driver's license, automobile registration, and proof of insurance; and that he smelled of alcohol. Schmaderer questioned Betterman and attempted to conduct field sobriety tests, which Betterman refused to perform. With assistance from Kiley, Schmaderer arrested Betterman. Although Kiley transported Betterman to the police station, Schmaderer observed Betterman refusing to submit to the breath test at the police station. Thus, Schmaderer meets the above-given description of the arresting officer required to attend the ALR hearing, and he was available for cross-examination at the ALR hearing.

The district court did not err in finding that the evidence before the hearing officer established that Kiley's appearance at the ALR hearing was not mandatory because Schmaderer could provide the hearing officer with information relating to the factors underlying the revocation. Betterman's claim that his due process rights were violated by Kiley's absence is without merit.

6. DMV'S GRANTING OF TWO CONTINUANCES

The DMV regulations provide that continuances may be granted upon good cause shown. See 247 Neb. Admin. Code, ch. 1, §§ 010.01 and 010.04 (2001). Betterman's ALR hearing was originally scheduled for October 15, 2004. Kiley gave notice to the DMV on October 12 that Kyler would not be able to attend the hearing because she was on vacation. The director found good cause to continue the hearing, and it was rescheduled for November 2. Betterman's temporary license was extended through the new hearing date. On October 20, Schmaderer notified the DMV that he could not appear November 2 because he was on special duty. The director found good cause to continue the hearing, and it was rescheduled for November 18. Betterman's temporary license was again extended through the new hearing date.

Betterman moved to dismiss the proceedings because of the two continuances. The hearing officer denied Betterman's motion. On review, the district court found that the officers' notices to the director provided too few facts for the director to have found good cause; however, the court found that no prejudice resulted from the denial of Betterman's motions to dismiss because no substantial injustice resulted to him. Betterman asserts that the court erred in so finding.

[17] In *Searcey v. Nebraska Dept. of Motor Vehicles*, 12 Neb. App. 517, 679 N.W.2d 242 (2004), the Court of Appeals found that good cause had not been shown for a continuance but concluded that the director did not abuse her discretion in granting the continuance because it did not cause the motorist substantial injustice, given that he retained his privilege to drive. Error without prejudice provides no ground for appellate relief. *Lamar Co. v. Omaha Zoning Bd. of Appeals*, 271 Neb. 473, 713 N.W.2d 406 (2006). Assuming, for purposes of argument, that good cause was not shown and that the director erred in granting the continuances, Betterman has not shown that such error prejudiced him. Betterman retained his driving privileges until the hearing was held. His argument is without merit.

7. HOLDING OF HEARING BEYOND 20-DAY LIMIT

Although the ALR hearing was held more than 20 days after Betterman requested it because of the continuances, the district court found that the time limit in § 60-498.01(6)(b) is directory, not mandatory, and that the director did not abuse her discretion by granting the continuances. Betterman assigns this ruling as error.

The Court of Appeals has held that the timeframe for holding an ALR hearing is directory, not mandatory. See, *Searcey, supra*; *Randall v. Department of Motor Vehicles*, 10 Neb. App. 469, 632 N.W.2d 799 (2001). In *Randall*, the court concluded that a violation of the regulatory time limit did not invalidate the ALR proceedings unless the motorist could show that he or she was prejudiced by the delay. The court explained:

In the instant case, the time limitation in [the regulation] is not “‘essential to the main objective’” of the ALR statutes. “[T]he purpose of ALR is to protect the public from the health and safety hazards of drunk driving by quickly

getting [driving while under the influence] offenders off the road. At the same time, the ALR statutes also further a purpose of deterring other Nebraskans from driving drunk.” *State v. Young*, 249 Neb. 539, 541-42, 544 N.W.2d 808, 811 (1996), citing *State v. Hansen*, 249 Neb. 177, 542 N.W.2d 424 (1996). The time limitation in [the regulation] is not essential to the purpose of the ALR statutes, but, rather, the time limitation ensures order and promptness in ALR proceedings. The failure to strictly abide by the time limitation . . . does not interfere with the fundamental purpose of the ALR statutes. The main goal of removing drunk drivers off the roads can still be attained when hearings are held past the . . . time limitation. Therefore, [the regulation] is directory rather than mandatory.

Randall, 10 Neb. App. at 477-78, 632 N.W.2d at 806.

We agree with the Court of Appeals. The failure to hold a hearing within the time provided in § 60-498.01(6)(b) does not invalidate the ALR proceedings unless the motorist can show that he or she was prejudiced by the delay. Betterman has not shown that he was prejudiced because the hearing was more than 20 days after his request. The delay was minor in length, during which time, Betterman retained his privilege to drive. The district court did not err in finding that the director did not abuse her discretion by continuing the hearing beyond the 20-day limitation.

8. CONSTITUTIONALITY OF ALR STATUTES

[18] Betterman claims that §§ 60-498.01 and 60-498.02 violate the Equal Protection and Due Process Clauses of the Nebraska and U.S. Constitutions. He argues that the statutory scheme impermissibly treats differently two classes of persons—i.e., motorists who submit to and fail a chemical test and motorists who refuse to submit to a chemical test. We have previously held that the ALR provisions pertaining to motorists who refuse to submit to chemical testing do not violate the due process or equal protection rights of those motorists by treating them differently than motorists who submit to, but fail, such testing. See *Kenley v. Neth*, 271 Neb. 402, 712 N.W.2d 251 (2006).

[19] Betterman also claims that the ALR statutes violate the prohibition against special legislation in article III, § 18, of the Nebraska Constitution. However, he makes no argument in

support of this claim. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party assigning the error. *Heitzman v. Thompson*, 270 Neb. 600, 705 N.W.2d 426 (2005).

Betterman's arguments regarding the constitutionality of the ALR statutory scheme are without merit. We conclude that the district court did not err in finding that the ALR statutes were constitutional.

9. ACQUITTAL AS NEWLY DISCOVERED EVIDENCE

While case No. S-05-638 was pending in this court, Betterman was acquitted of the criminal refusal charge lodged against him. Betterman then filed a motion with the DMV in which he asked the director to vacate the order that had administratively revoked his driver's license. He claimed another hearing was required because of newly discovered evidence, including evidence that he had been acquitted of the criminal refusal charge. The director denied Betterman's request because no statutory provision permitted her to vacate such revocation if a motorist was acquitted of criminal charges arising from the same incident. Betterman appealed to the district court, and the court refused to reverse the director's ruling.

[20,21] Generally, in civil appeals, after an appeal to an appellate court has been perfected, a lower court is without jurisdiction to hear a case involving the same matter between the same parties. *Ventura v. State*, 246 Neb. 116, 517 N.W.2d 368 (1994). However, in *Ventura*, we held that an administrative agency may rule on a motion for new trial on the ground of newly discovered evidence, if timely presented, although the cause is pending in an appellate court for review.

[22] The issue presented is whether the fact that Betterman was acquitted of the criminal refusal-to-submit charge was newly discovered evidence necessitating a new ALR hearing. Under Neb. Rev. Stat. § 25-1142 (Cum. Supp. 2006), a new trial may be granted if new evidence has been discovered which materially affects the substantial rights of the moving party. In order to make a sufficient showing for a new trial on the ground of newly discovered evidence, the proof in support thereof must show that such evidence is now available which neither the litigant nor counsel could have discovered by the exercise of reasonable

diligence and that the evidence is not merely cumulative, but competent, relevant, and material, and of such character as to reasonably justify a belief that its admission would bring about a different result if a new trial were granted. *Woodhouse Ford v. Laflan*, 268 Neb. 722, 687 N.W.2d 672 (2004).

In cases of motorists who refuse to submit to chemical testing, the ALR statutory scheme does not operate to reinstate the motorist's administratively revoked driver's license if he or she is acquitted of the criminal refusal charge. See *Kenley v. Neth*, 271 Neb. 402, 712 N.W.2d 251 (2006). This court has consistently opined that a civil ALR proceeding is separate and distinct from a criminal prosecution for driving under the influence or refusal to submit to chemical testing arising from the same incident. See *id.* Accordingly, we have stated that "although a motorist who refuses to submit to testing could subsequently be acquitted of the corresponding criminal charge, this fact is irrelevant to the ALR process." *Id.* at 410, 712 N.W.2d at 260.

In the present case, even if evidence of Betterman's acquittal in the criminal case were to be admitted in a new ALR hearing, its admission would not affect the outcome. Therefore, the district court did not err in refusing to reverse the director's order.

VI. CONCLUSION

The district court did not err in affirming both the director's order administratively revoking Betterman's driver's license and the director's refusal to vacate such order. Therefore, we affirm the judgments of the district court.

AFFIRMED.

IN RE INTEREST OF MICHAEL U., ALLEGED TO BE
A MENTALLY ILL DANGEROUS PERSON.
STATE OF NEBRASKA, APPELLEE, v.
MICHAEL U., APPELLANT.

728 N.W.2d 116

Filed March 9, 2007. No. S-05-1525.

1. **Mental Health: Appeal and Error.** The district court reviews the determination of a mental health board de novo on the record. In reviewing a district court's

Cite as 273 Neb. 198

judgment, appellate courts will affirm the district court's judgment unless the appellate court finds, as a matter of law, that the judgment is not supported by clear and convincing evidence.

2. **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.
3. **Final Orders: Appeal and Error.** Neb. Rev. Stat. § 25-1902 (Reissue 1995) defines a final order as an order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment.
4. ____: _____. There are three types of final orders which may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 1995): (1) an order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment; (2) an order affecting a substantial right made in a special proceeding; and (3) an order affecting a substantial right made upon summary application in an action after judgment has been rendered.
5. **Jurisdiction: Appeal and Error.** When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.

Petition for further review from the Nebraska Court of Appeals, IRWIN, MOORE, and CASSEL, Judges, on appeal thereto from the District Court for York County, ALAN G. GLESS, Judge. Judgment of Court of Appeals affirmed in part, and in part reversed and vacated.

Bruce E. Stephens for appellant.

C. Jo Petersen, Deputy Hamilton County Attorney, for appellee.

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

McCORMACK, J.

NATURE OF CASE

Michael U. was determined by the Mental Health Board of the Fifth Judicial District (the Board) to be a mentally ill and dangerous person under Neb. Rev. Stat. § 71-901 et seq. (Cum. Supp. 2004 & Supp. 2005) of the Nebraska Mental Health Commitment Act. The Board ordered Michael committed for involuntary inpatient treatment. The district court, sitting as an appellate court

under § 71-930, affirmed the Board's decision. Michael appealed, and the Nebraska Court of Appeals affirmed.¹ We granted Michael's petition for further review.

BACKGROUND

Michael was convicted of first degree sexual assault based upon acts committed against an individual less than 16 years of age and, in June 1995, was sentenced to 80 to 240 months' imprisonment. Michael served 10 years of that sentence and was scheduled to be released from his imprisonment on May 3, 2005.

On April 28, 2005, the State filed a petition with the Board alleging that Michael was believed to be mentally ill and dangerous. The State further alleged that neither voluntary hospitalization nor other treatment alternatives less restrictive of Michael's liberty than the Board-ordered treatment would suffice. Attached to the petition was a letter dated March 17, 2005, from Dr. Mark E. Weilage, a clinical psychologist and mental health supervisor at the Omaha Correctional Center where Michael was imprisoned. In the letter, Weilage recommended that Michael be reviewed by the Board for postincarceration commitment. Weilage's reasoning as set out in his letter was that

[b]ased on a review of his file, it appears [Michael] would fit the profile of a Pedophile and likely be deemed mentally ill and dangerous. Therefore it is recommended that he be reviewed by the . . . Board for post incarceration commitment at the time of his release. Inpatient sex offender treatment would be the ideal treatment intervention as he appears to be a continued risk for sexually assaultive behavior.

On May 10, 2005, a hearing was held before the Board. At the hearing, the sole person to testify in support of Michael's involuntary commitment was Dr. Angela Boykin, a psychologist at Mary Lanning Memorial Hospital, who testified regarding Michael's mental illness and dangerousness. Boykin testified that she met with Michael on four separate occasions and reviewed Weilage's March 17 letter, which was admitted into evidence without objection for the sole purpose of establishing foundation for Boykin's opinion.

¹ *In re Interest of Michael U.*, 14 Neb. App. 918, 720 N.W.2d 403 (2006).

At the hearing, Boykin was asked her opinion on Michael's mental status. Boykin testified that she had diagnosed Michael with an unspecified adjustment disorder, a history of prior diagnosis of pedophilia, and a history of alcohol and marijuana abuse. Boykin explained that she determined Michael is mentally ill based on her diagnosis of an unspecified adjustment disorder. She testified that Michael's adjustment disorder means that he has some issues and some stress related to his being released from prison after 10 years of incarceration and thereafter being brought before the Board. She further testified, however, that her belief that Michael needs to be further evaluated is not based upon Michael's adjustment disorder, but is instead based upon Michael's history of pedophilia and that prior diagnosis, which history and diagnosis she obtained from Weilage's letter.

When asked her opinion on whether Michael is a dangerous individual, Boykin testified that based upon Michael's history, in particular, his history of pedophilia and diagnosis of that disorder, "there is concern about the potential dangerousness, and he needs to be further evaluated by someone with expertise in sex offender issues." She testified, however, that she is not qualified to evaluate sex offender issues and could not state that there is a substantial likelihood that Michael will engage in dangerous behavior unless restraints are applied. She also testified that at that point, she was not prepared to state to a reasonable degree of medical or psychological certainty that there is a substantial likelihood that Michael will engage in dangerous behavior absent restraints.

On May 13, 2005, the Board issued an order and, on May 18, issued an amended order adjudicating Michael. The Board found clear and convincing evidence that Michael was a mentally ill and dangerous person pursuant to § 71-908(1). Pursuant to § 71-925(7), the Board ordered that Michael be transported to either the Lincoln Regional Center or the Norfolk Regional Center to undergo an inpatient psychiatric and psychological evaluation, which was to include an evaluation of his sex offender treatment needs. The Board directed that Michael's evaluation was to occur before another hearing was scheduled before the Board to determine the entry of a treatment order.

On June 3, 2005, Michael filed an appeal from the May 13 order of adjudication. The transcript contains “Judges Minutes” filed June 30 in the district court for York County which stated: “This record on appeal contains no final order. Appeal dismissed & case remanded to the . . . Board for further proceedings. Motion to continue appeal hearing mooted by dismissal.” Michael did not further appeal the dismissal of that appeal.

On August 11, 2005, a hearing was held before the Board on Michael’s disposition. Dr. Daniel Sturgis, a psychologist at the Norfolk Regional Center, evaluated Michael for the sole purpose of determining the appropriate and least restrictive placement for Michael. Sturgis testified that Michael should be placed at the Lincoln Regional Center for its inpatient sex offender treatment program.

That same day, the Board issued an order of final disposition committing Michael to the Department of Health and Human Services for inpatient treatment. Michael appealed this dispositional decision on August 29, 2005. On December 7, the district court entered its judgment on appeal, affirming the Board’s adjudication and treatment order. The court found that upon its de novo review of the record, there was clear and convincing evidence that Michael was mentally ill and dangerous and that neither voluntary hospitalization nor other treatment alternatives less restrictive of Michael’s liberty were available or would suffice to prevent the harm described in § 71-908.

Michael appealed this decision to the Court of Appeals, assigning, among other errors, the determination that evidence was sufficient to find that he was mentally ill and dangerous or that voluntary hospitalization or alternatives less restrictive than inpatient would not suffice to prevent the harm described in § 71-908.

The Court of Appeals affirmed the decision of the district court. Relevant to the appeal presently before us, the Court of Appeals found that the order of adjudication entered in May 2005 was a final order from which an appeal may be taken and that Michael’s appeal from that order had been dismissed for lack of a final order. The Court of Appeals further found that the first time the district court, which was sitting as an appellate court, considered issues relating to the adjudication hearing was in

Michael's appeal from the order of disposition. Referencing the law-of-the-case doctrine, the Court of Appeals determined that Michael was not precluded from having that court consider those assignments of error arising out of the adjudication hearing, because the first time they were considered by an appellate court was in the appeal from the order of disposition. As to whether there was sufficient evidence to find that Michael was mentally ill and dangerous, the Court of Appeals stated that considering Michael's sexual history and the fact that he has not completed any offense-specific treatment while incarcerated, it could not state "as a matter of law that the acts committed over 10 years ago were too remote to be probative of Michael's present state of dangerousness."² We granted Michael's petition for further review of the Court of Appeals' decision.

ASSIGNMENTS OF ERROR

Michael claims, restated, that the Court of Appeals erred in (1) finding there was sufficient evidence that he is mentally ill and dangerous and (2) finding there were not errors of law to which he objected that were improperly overruled and, therefore, improperly admitted into evidence.

STANDARD OF REVIEW

[1] The district court reviews the determination of a mental health board de novo on the record. In reviewing a district court's judgment, appellate courts will affirm the district court's judgment unless the appellate court finds, as a matter of law, that the judgment is not supported by clear and convincing evidence.³

ANALYSIS

Before addressing the first assignment of error asserted by Michael, we must first determine whether this court has jurisdiction.⁴ The State argues that the order of adjudication finding Michael to be mentally ill and dangerous was a final order.

² *In re Interest of Michael U.*, *supra* note 1, 14 Neb. App. at 932-33, 720 N.W.2d at 414.

³ See *In re Interest of Kochner*, 266 Neb. 114, 662 N.W.2d 195 (2003).

⁴ See *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006).

Because Michael failed to appeal from the district court's determination that the order of adjudication was not a final order, the State argues that this court does not have jurisdiction to address those issues relating to that order.

[2-4] For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken.⁵ A final order is defined as “[a]n order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment”⁶ There are three types of final orders which may be reviewed on appeal under the provisions of § 25-1902: (1) an order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment; (2) an order affecting a substantial right made in a special proceeding; and (3) an order affecting a substantial right made upon summary application in an action after judgment has been rendered.⁷

We have not previously considered whether an order adjudicating an individual to be mentally ill and dangerous within the meaning of § 71-908 is a final, appealable order. The Court of Appeals, however, confronted this issue in *In re Interest of Saville*.⁸

In *In re Interest of Saville*, the appellant was adjudged to be mentally ill and dangerous by the Board and ordered to be retained in the custody of the Board until such time as the Board determined the best available treatment alternative. Just over a month after the order of adjudication was entered, the Board entered an order of disposition finding that neither voluntary hospitalization nor other treatment alternatives less restrictive of the appellant's liberty than a Board-ordered treatment disposition would suffice. The Board ordered that the appellant be

⁵ *Id.*

⁶ Neb. Rev. Stat. § 25-1902 (Reissue 1995).

⁷ See *In re Guardianship of Sophia M.*, 271 Neb. 133, 710 N.W.2d 312 (2006).

⁸ *In re Interest of Saville*, 10 Neb. App. 194, 626 N.W.2d 644 (2001).

committed to the Lincoln Regional Center for inpatient treatment for an indeterminate period of time. The appellant did not appeal the order of adjudication, but did appeal the order of final disposition, claiming there was insufficient evidence to support the Board's finding that he was a mentally ill and dangerous person.

The Court of Appeals determined that the order adjudicating the appellant to be a mentally ill and dangerous person in that case was a final order. Since no appeal was taken from that order, the appellant could not question the evidence relied upon by the Board in its adjudication order. The Court of Appeals found that the order of adjudication was a special proceeding and that it affected a substantial right of the appellant. The court noted that in *State v. Guatney*,⁹ this court determined that an order finding an appellant not competent to stand trial and directing the appellant to be confined to the Lincoln Regional Center for an indeterminate amount of time was a final order in a special proceeding affecting a substantial right. In *State v. Guatney*, we stated:

We, therefore, find little reason or sense in suggesting that one may be deprived of his liberty under a court order finding him incompetent . . . and have no recourse from that order. . . . The court, by virtue of its order, has . . . denied the appellant his liberty for an undetermined time. It is difficult, if not impossible, to see how that order, therefore, does not affect a substantial right or is not an order from which the appellant should be entitled to appeal¹⁰

The Court of Appeals reasoned that the appellant had similarly been ordered to be retained in custody for an indeterminate amount of time pending the entry of an order of final disposition. The Court found that as in *State v. Guatney*, the order deprived the appellant of his liberty and accordingly affected a substantial right. Because the appellant in *In re Interest of Saville* did not appeal the order of adjudication, the Court of Appeals held that he could not then challenge the sufficiency of the evidence relied upon by the Board in its adjudication order.

We agree with the Court of Appeals' reasoning in *In re Interest of Saville* that the order of adjudication in that case was a final

⁹ *State v. Guatney*, 207 Neb. 501, 299 N.W.2d 538 (1980).

¹⁰ *Id.* at 507-08, 299 N.W.2d at 543.

order. With that in mind, we turn to the circumstances of the present case.

In an amended order dated May 18, 2005, the Board adjudged Michael to be a mentally ill and dangerous person. A review of the Board's amended order of adjudication reveals that like the appellant in *In re Interest of Saville*, Michael was ordered to be retained in custody for an indeterminate amount of time pending an inpatient psychiatric and psychological evaluation and the entry of an order of disposition by the Board. Like the order of adjudication in *In re Interest of Saville*, the amended order of adjudication in this case ordering that Michael be retained for an indeterminate amount of time deprived Michael of his liberty and this denial affects a substantial right. As such, the amended order of adjudication in this case was a final order from which an appeal may be taken pursuant to § 71-930. Thus, if Michael wished to question the sufficiency of the Board's findings in issuing that order, he needed to appeal that order, which he did. However, that appeal was dismissed by the district court for lack of a final order. Michael did not further appeal the dismissal of his appeal.

In *In re Interest of D.M.B.*,¹¹ we stated that the general rule that a court does not ordinarily review the validity of a juvenile adjudication order in a juvenile case does not apply where the facts pleaded and developed at the adjudication hearing are not sufficient for the juvenile court to acquire jurisdiction over the juvenile. In *In re Interest of D.M.B.*, the court's jurisdiction over the minor depended on establishing a lack of parental care by reason of the fault or habits of the mother. We found, however, that there was no allegation or proof that the mother's fault or habits in any way injured or put the minor at risk of harm.¹²

The situation in the present case is substantially different. *In re Interest of D.M.B.* was based in part on the failure of the petition on its face to allege anything that would give the juvenile court jurisdiction. Here, the petition contains the allegation that Michael is a mentally ill and dangerous person and, therefore, within the jurisdiction of the Board.

¹¹ *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992).

¹² See, also, *In re Interest of Constance G.*, 247 Neb. 629, 529 N.W.2d 534 (1995).

[5] Because the order of adjudication was a final order, the district court had jurisdiction over the matter in Michael's appeal of the adjudication order. But Michael did not appeal the district court's finding that the order of adjudication was not a final order and the dismissal of his appeal of that order. Accordingly, we conclude that the Court of Appeals did not have jurisdiction to address those issues on appeal relating to the order of adjudication and neither does this court. When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.¹³ Since we have determined that neither the Court of Appeals nor this court has jurisdiction, we do not address Michael's first assignment of error as to the sufficiency of the evidence that he was mentally ill and dangerous.

In his second and final assignment of error, Michael asserts that the Court of Appeals erred in finding there were not errors of law to which he objected that were improperly overruled. Although Michael assigns this error, he failed to argue it in his brief on appeal, and therefore, we do not address this assignment of error on appeal.¹⁴

CONCLUSION

For the reasons discussed above, we reverse that portion of the Court of Appeals' opinion addressing that court's jurisdiction to consider those assignments of error relating to the adjudication order. Because the Court of Appeals did not have jurisdiction to address Michael's claims relating to the adjudication order, we vacate that portion of the judgment of the Court of Appeals addressing those claims. Because Michael has not assigned and argued any errors on petition for further review relating to the order of disposition, we affirm without discussion the remainder of the Court of Appeals' decision.

AFFIRMED IN PART, AND IN PART
REVERSED AND VACATED.

¹³ *Kaplan v. McClurg*, 271 Neb. 101, 710 N.W.2d 96 (2006).

¹⁴ See *Epp v. Lauby*, 271 Neb. 640, 715 N.W.2d 501 (2006) (errors that are assigned but not argued will not be addressed by appellate court).

KEITH MOGENSEN, APPELLANT AND CROSS-APPELLEE, V. STEVEN
MOGENSEN, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE
AND CROSS-APPELLANT, BRIAN MOGENSEN, THIRD-PARTY
DEFENDANT, APPELLEE, SANDRA MOGENSEN, THIRD-PARTY
DEFENDANT, APPELLEE AND CROSS-APPELLEE, AND
OPAL MOGENSEN, THIRD-PARTY DEFENDANT,
APPELLANT AND CROSS-APPELLEE.

729 N.W.2d 44

Filed March 16, 2007. No. S-05-879.

1. **Specific Performance: Equity: Appeal and Error.** An action for specific performance sounds in equity, and on appeal, an appellate court decides factual questions de novo on the record and will resolve questions of fact and law independently of the trial court's conclusions.
2. **Declaratory Judgments: Equity: Appeal and Error.** In reviewing an equity action for a declaratory judgment, an appellate court decides factual issues de novo on the record and reaches conclusions independent of the trial court. But when credible evidence is in conflict on material issues of fact, the court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
3. **Equity: Estoppel: Fraud: Limitations of Actions.** Equitable estoppel is not limited to circumstances of fraud but may also be applied to prevent an inequitable resort to a statute of limitations. And a defendant may, by his or her representations, promises, or conduct, be so estopped where the other elements of estoppel are present.
4. **Partnerships: Statutes.** Nebraska's Uniform Partnership Act of 1998 governs when property is considered partnership property.
5. **Partnerships: Property: Title: Presumptions.** The presumption in Neb. Rev. Stat. § 67-412(3) (Reissue 2003) can apply when the partnership provides only a portion of the purchase price, and it can apply even though a third party who is not a partner to the firm holds title.
6. **Partnerships: Property: Presumptions: Intent.** In determining whether a party has rebutted the presumption in Neb. Rev. Stat. § 67-412(3) (Reissue 2003), no single factor or combination of factors is dispositive. Ultimately, the partners' intentions control whether property belongs to the partnership, at least among the partners themselves.
7. **Partnerships: Property: Title: Presumptions: Intent.** A presumption of prima facie individual ownership of real property exists in the titleholder, but the inference concerning the partners' intent from the use of partnership funds outweighs any inference from the state of the title.

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

Galen E. Stehlik, of Lauritsen, Brownell, Brostrom, Stehlik, Myers & Daugherty, P.C., L.L.O., for appellants.

Cathy S. Trent-Vilim, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., and, on brief, Barry D. Geweke, of Stowell, Kruml, Geweke & Cullers, P.C., L.L.O., for appellee Steven Mogensen.

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

CONNOLLY, J.

Keith Mogensen sued Steven Mogensen to force him to sell his partnership interest in Mogensen Bros. Land & Cattle Company (Mogensen Bros.). Keith sought to enforce a buyout provision in the partnership agreement. Steven counterclaimed against Keith, Sandra Mogensen, and Opal Mogensen, seeking a declaration that two real estate parcels, known as DeWulf Place and Mahoney Place, are partnership property. Opal is the titled owner of DeWulf Place, and Keith owns Mahoney Place.

In Keith's claim, the district court found that under the partnership agreement, Keith failed to exercise the buyout within 90 days as provided in the partnership agreement. In Steven's counterclaim, the court found that Opal's DeWulf Place was partnership property, but denied Steven's claim that Mahoney Place was partnership property.

We have two questions to consider: (1) when did the 90-day provision start and (2) whether the two real estate parcels titled in Opal's and Keith's names are partnership property.

I. BACKGROUND

1. THE PARTIES

In 1982, brothers Brian Mogensen, Keith, and Steven entered a partnership agreement forming Mogensen Bros., a farming operation. Third-party defendant Opal is their mother, and third-party defendant Sandra is Keith's wife. The brothers are also the shareholders in a family construction company called Ranch and Farm Agricultural Systems, Inc. (Ranch and Farm).

2. THE PARTNERSHIP'S BUYOUT PROVISION

The Mogensen Bros. partnership agreement contains a buyout option. Paragraph 19 of the partnership agreement provides that a partner who wishes to withdraw and dispose of his interest must give the other partners written notice of his intent and

an opportunity to purchase his interest. This provision further requires that a partner electing to purchase must provide notice of his intent to the withdrawing partner within 90 days after the withdrawing partner gives notice that he intends to dispose of his interest. The withdrawing partner must then sell his interest to the purchasing partner at book value.

3. STEVEN'S PRIOR LAWSUIT

For several years, tension had been building between Steven and his brothers. Brian, Keith, and Steven attempted to reach an agreement in dissolving and winding up the partnership, but those attempts failed. On October 3, 2002, Steven sued Mogensen Bros., Keith, and Brian, seeking to have the partnership dissolved and its assets liquidated under the Uniform Partnership Act of 1998.¹ The district court, however, found that under § 67-404(1), judicial dissolution was inappropriate. The court found that under § 67-404(1), the partnership agreement governs relations between partners. And because the Mogensen Bros. partnership agreement provides a method for a partner to withdraw from the partnership, the court found the partnership agreement governs the partnership dissolution. On July 28, 2003, the court granted summary judgment against Steven. Steven did not appeal.

4. KEITH SUES STEVEN TO FORCE THE BUYOUT PROVISION

Keith alleges that Steven's 2002 lawsuit to dissolve the partnership amounted to written notice that Steven intended to dispose of his interest in Mogensen Bros. Consequently, on August 25, 2003, Keith notified Steven that he intended to exercise the option to purchase Steven's partnership interest. He sent another letter to Steven on October 15, 2003, with an accountant's evaluation of Steven's interest. Steven refused to sell his partnership interest to Keith.

On March 29, 2004, Keith sued Steven to specifically enforce the buyout provision. The district court found that when Steven filed his 2002 lawsuit for dissolution, he gave notice of his intent to dispose of his partnership interest. But the court also found

¹ See Neb. Rev. Stat. §§ 67-401 to 67-467 (Reissue 2003 & Cum. Supp. 2006).

that Keith did not exercise his option to purchase within 90 days. The court determined that Steven's notice to sell his interest was effective the day he filed suit. Because Keith did not give notice of his intent to purchase until nearly 1 year later, the district court found that Keith failed to timely exercise the buyout option. The court dismissed Keith's complaint. Keith appeals, arguing that the July 28, 2003, order granting summary judgment—not the date Steven filed his action—triggered the start of the 90-day notice period and that thus, his August 25 and October 15 letters were timely notice. Steven does not appeal the court's finding that his lawsuit triggered the buyout provision.

5. STEVEN'S COUNTERCLAIM

In Steven's counterclaim to Keith's lawsuit, he requested a declaration that Mogensen Bros. owns two parcels of real estate known as DeWulf Place and Mahoney Place. Although neither property is titled in the partnership's name, Steven claims that Mogensen Bros. owns both parcels.

(a) Evidence Regarding Ownership of DeWulf Place

Brian, Keith, and Steven decided to purchase DeWulf Place at auction. Opal, however, is the title owner of DeWulf Place. Opal testified she acquired title because "[t]he boys decided that they wanted to put it in my name and I agreed to it." She testified they put the property in her name to benefit from a government farm subsidy program. She further testified Mogensen Bros. paid 10 percent of the purchase price, about \$10,000 to \$12,000, and she financed the remaining 90 percent through a loan from Ranch and Farm.

For about 8 years, from 1990 to 1998, the partnership paid no rent, but made improvements and paid the taxes on the property. Opal testified that Mogensen Bros. "developed the land, they put pivots on it, [and] they put wells down," and the partnership listed the irrigation development at DeWulf Place as a partnership asset. Keith and Opal testified, however, that the improvements and taxes were considered rent. At some point after 8 years, Mogensen Bros. began paying Opal \$30,000 in annual rent, and Opal testified she paid the real estate taxes and made the \$25,000 loan payment to Ranch and Farm. Mogensen Bros., however, reimbursed Opal for real estate taxes on DeWulf Place in 2002.

Some documents also show Mogensen Bros. as the owner of DeWulf Place, including the ground water well registration. And Mogensen Bros. listed DeWulf Place as a partnership asset on the Mogensen Bros. 2003 tax asset schedule. Keith or Opal, however, informed the partnership's accountant that DeWulf Place should not have been on the tax schedule, and the accountant removed it. Opal testified that she considers the farm to be hers.

The district court determined that Mogensen Bros. owns DeWulf Place. It found that "the evidence clearly shows that . . . DeWulf [P]lace was acquired solely with partnership assets." Keith and Opal appeal.

(b) Evidence Regarding Ownership of Mahoney Place

Keith is the title owner of Mahoney Place. Keith and Sandra borrowed the funds to purchase Mahoney Place, and they have made the annual loan payments. After acquiring the property, Keith and Sandra annually leased it to Mogensen Bros. Mogensen Bros. and Keith have both paid for irrigation developments on the property. The district court found that Keith and Sandra own Mahoney Place.

II. ASSIGNMENTS OF ERROR

Keith and Opal assign, restated and renumbered, that the district court erred in (1) holding that Keith did not timely exercise the buy-sell provision of the partnership agreement and (2) determining that DeWulf Place is a partnership asset.

On cross-appeal, Steven assigns, restated, that the court erred in determining that Mahoney Place is not a partnership asset.

III. STANDARD OF REVIEW

[1] Regarding Keith's claim to enforce the buyout provision, an action for specific performance sounds in equity, and on appeal, we decide factual questions de novo on the record. We will resolve questions of fact and law independently of the trial court's conclusions.²

[2] Regarding Steven's counterclaim, in reviewing an equity action for a declaratory judgment, we decide factual issues de

² See *Langemeier v. Urwiler Oil & Fertilizer*, 265 Neb. 827, 660 N.W.2d 487 (2003).

novo on the record and reach conclusions independent of the trial court. But when credible evidence is in conflict on material issues of fact, we may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.³

IV. ANALYSIS

1. BUY-SELL AGREEMENT

(a) Timeliness of Keith's Election to Purchase Steven's Interest

Keith contends that he timely exercised his option to purchase Steven's partnership interest under the buyout provision. He argues that he complied with the timeframe because he gave notice of his intention to buy out Steven's partnership interest within 90 days of July 28, 2003, the date of the summary judgment order in Steven's prior lawsuit.

We have not previously addressed the issue of when a lawsuit for dissolution of a partnership triggers a buy-sell provision. But other courts have held that the filing of a lawsuit to dissolve a partnership or service of the complaint gives notice of a partner's intent to withdraw or dissolve a partnership. In *Logan v. Logan*,⁴ the plaintiffs brought an action for dissolution of a partnership. In response, the defendant tendered an election to purchase the plaintiffs' interest under the buy-sell provision in their partnership agreement. After the plaintiffs refused to sell, the defendant counterclaimed for specific performance. The Washington Court of Appeals held that by filing suit, the plaintiffs had provided notice of their intention to withdraw. The court stated, "The *filing* of the groundless lawsuit was an act inconsistent with the continuation of the partnership."⁵ The defendant was therefore entitled to specific performance of the buyout provision. Similarly,

³ See *City of Ashland v. Ashland Salvage*, 271 Neb. 362, 711 N.W.2d 861 (2006).

⁴ *Logan v. Logan*, 36 Wash. App. 411, 675 P.2d 1242 (1984).

⁵ *Id.* at 423, 675 P.2d at 1249 (emphasis supplied). See, also, *Clark v. Allen et al*, 215 Or. 403, 410, 333 P.2d 1100, 1103 (1959) ("[t]he filing of the complaint was notice of dissolution").

in *Maus v. Galic*,⁶ the Minnesota Court of Appeals addressed whether a lawsuit triggered dissolution of a partnership. The court stated, “[N]othing could send a clearer message of intent to terminate and provide more reasonable notice of such termination than *service of a complaint* seeking as relief dissolution of the partnership.”⁷

We conclude that service of the complaint on Keith, rather than either the summary judgment order or the filing of the lawsuit, provided notice of Steven’s intent to withdraw and dispose of his interest. Although the record does not show the date of service, it does show that Keith moved for summary judgment on May 20, 2003, which indicates he had at least received notice by that date. Keith’s first letter of intent to purchase Steven’s interest in the partnership, dated August 25, 2003, was outside the 90-day limitation period. We affirm the district court’s order denying specific performance.

(b) Equitable Relief

Keith also argues that Steven is equitably estopped from asserting the 90-day time period as a defense. Throughout this litigation, Steven has denied that he invoked the partnership agreement’s buy-sell provision when he sued to dissolve the partnership. Keith contends that it is inequitable for Steven to now gain protection from the same partnership provision he has attempted to avoid through this litigation.

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

⁶ *Maus v. Galic*, 669 N.W.2d 38 (Minn. App. 2003).

⁷ *Id.* at 45 (emphasis supplied).

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. The first prong of this test is met when one lulls his or her adversary into a false sense of security, thereby causing that person to subject his or her claim to the bar of the statute of limitations, and then pleads the very delay caused by his or her conduct as a defense to the action when it is filed.⁸

[3] Equitable estoppel is not limited to circumstances of fraud but may also be applied to prevent an inequitable resort to a statute of limitations. And a defendant may, by his or her representations, promises, or conduct, be so estopped where the other elements of estoppel are present.⁹

Keith asserts that Steven's conduct in filing his lawsuit and denying that he provided notice of his intent to withdraw creates a basis for equitable estoppel. We disagree. Steven did not make any promise or representation, or engage in any conduct, that would have led Keith to delay sending notice of his intent to purchase Steven's shares. Keith argues, "While Steven may not have 'lulled' Keith into a sense of security, thereby causing him to subject the instant suit to the bar of a time provision limitation, Steven's prior suit for judicial dissolution is akin to the same when all of the facts of the matter are examined."¹⁰ It is unclear how filing a lawsuit or denying Keith's claims could cause Keith to act to his detriment. If anything, the initiation of litigation against Keith should have alerted him of the need to diligently protect his interests. This argument is without merit.

2. DEWULF PLACE IS PARTNERSHIP PROPERTY

[4] Steven, in his counterclaim, alleged that DeWulf Place is partnership property despite being titled in Opal's name. Nebraska's Uniform Partnership Act of 1998 governs when property is considered partnership property. Section 67-412(3) of the act provides:

⁸ *Olsen v. Olsen*, 265 Neb. 299, 657 N.W.2d 1 (2003). See, also, *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002).

⁹ *Olsen v. Olsen*, *supra* note 8.

¹⁰ Brief for appellants at 21.

Property is presumed to be partnership property if purchased with partnership assets, even if not acquired in the name of the partnership or of one or more partners with an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership.

The district court found that "the evidence clearly shows that . . . DeWulf [P]lace was acquired solely with partnership assets." The court therefore applied the presumption in finding that DeWulf Place is partnership property. Keith and Opal argue that Mogensen Bros. did not purchase DeWulf Place with partnership assets, so the district court should not have applied the presumption in § 67-412(3).

[5] Although the record reflects that DeWulf Place was not acquired solely with partnership assets, we find that the presumption in § 67-412(3) applies because Mogensen Bros. supplied at least part of the purchase price. Although Keith and Opal argued that Mogensen Bros. contributed funds either as rent or as a loan to Opal, the record does not support this argument. Further, the presumption can apply even when the partnership provides only a portion of the purchase price.¹¹ And it can apply even though a third party who is not a partner to the firm holds title.¹²

[6,7] In determining whether a party has rebutted the presumption, no single factor or combination of factors is dispositive.¹³ Ultimately, the partners' intentions control whether property belongs to the partnership, at least among the partners themselves.¹⁴ Common factors in considering partners' intent include the partnership's use of the property for partnership purposes, the erection of buildings and other improvements at partnership expense, whether partnership books and accounts treat property as partnership property, whether the property is listed in credit

¹¹ See, *Bachand v. Walker*, 455 N.W.2d 851 (S.D. 1990); 59A Am. Jur. 2d *Partnership* § 250 (2003).

¹² See, *In re Wilson's Estate*, 50 Wash. 2d 840, 315 P.2d 287 (1957); 59A Am. Jur. 2d, *supra* note 11, § 258.

¹³ See *Bachand v. Walker*, *supra* note 11.

¹⁴ See Unif. Partnership Act (1997), § 204, comment 3, 6 U.L.A. 97 (2001).

applications and tax returns as a partnership asset, and whether the partnership is involved in the payment of taxes.¹⁵ However, a presumption of “prima facie individual ownership of real property” also exists in the titleholder.¹⁶ But “[t]he inference concerning the partners’ intent from the use of partnership funds outweighs any inference from the State of the title”¹⁷

We addressed some of these factors in *Von Seggern v. Von Seggern*.¹⁸ There, farm property was titled in the name of John Von Seggern, a partner in a farming partnership. Another partner, however, claimed the partnership made some of the payments, making the farm partnership property. We determined that the partnership had not purchased the farm with partnership funds. Further, the evidence reflected that the other partners did not want the farm and that John should have it as his own. We also considered that John paid the taxes in concluding that the farm did not belong to the partnership.

The South Dakota Supreme Court also considered several factors that rebutted the presumption. In *Bachand v. Walker*,¹⁹ land was titled in the name of Bruce Walker and his wife, and Walker made most of the payments individually. The partnership, however, made two payments with partnership funds. The court recognized the rebuttable presumption that property purchased with partnership funds becomes partnership property. But the court also considered several other factors. Walker and his wife had purchased the property before the partnership was formed. He paid for the property taxes, insurance, and improvements in excess of \$500. Further, the partnership never listed the property as an asset in any partnership documents. The court determined that the parties did not intend the property to be partnership property.

Here, although some evidence does indicate an ownership interest in Opal, it is not enough to overcome the presumption in

¹⁵ See 59A Am. Jur. 2d, *supra* note 11, §§ 252 and 253.

¹⁶ *Id.*, § 254 at 364.

¹⁷ Unif. Partnership Act (1997), *supra* note 14, comment 4 at 98.

¹⁸ *Von Seggern v. Von Seggern*, 196 Neb. 545, 244 N.W.2d 166 (1976).

¹⁹ See *Bachand v. Walker*, *supra* note 11.

§ 67-412(3). We conclude that the brothers purchased the property for the partnership. The most convincing proof of their intent is that Brian, Keith, and Steven decided they wanted the property²⁰ and then decided to put it in Opal's name to take advantage of a government program. The brothers essentially controlled the transaction in obtaining the land, including using partnership funds to pay for the property. The facts that the partnership developed the land, paid the real estate taxes, and improved the farm for the first 8 years without paying rent further bolster our conclusion.²¹ The record reflects that the partnership now pays Opal \$30,000 annually in rent, which Opal uses to pay the real estate taxes and the annual loan payment to Ranch and Farm. But the record fails to show whether Opal made payments on the loan during the period when the partnership was not paying rent.

The use of partnership funds in the purchase and the other evidence suggest that Opal owns DeWulf Place in name only. However, equity dictates that Opal should not be liable for the debt on DeWulf Place—real estate she no longer owns. Once we acquire equity jurisdiction, we can adjudicate all matters properly presented and grant complete relief to the parties.²² We hold that DeWulf Place is partnership property, subject, however, to Mogensen Bros.' paying the balance of the indebtedness owed to Ranch and Farm.

3. STEVEN'S CROSS-APPEAL; MAHONEY PLACE IS NOT PARTNERSHIP PROPERTY

Steven contends that Mahoney Place is partnership property. The evidence, however, shows that the presumption in § 67-412(3) does not apply. Instead, the opposite presumption applies. Section 67-412(4) provides:

Property acquired in the name of one or more of the partners, without an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership and *without use of partnership*

²⁰ Cf. *Von Seggern v. Von Seggern*, *supra* note 18.

²¹ Cf. *Bachand v. Walker*, *supra* note 11.

²² See *Denny Wiekhorst Equip. v. Tri-State Outdoor Media*, 269 Neb. 354, 693 N.W.2d 506 (2005).

assets, is presumed to be separate property, even if used for partnership purposes.
(Emphasis supplied.)

Here, Keith is the title owner of Mahoney Place, with no indication in the deed that he owns it in his capacity as a partner. Keith purchased it solely with his funds, and he is liable for the loan payments. Thus, the presumption in § 67-412(4) applies. Further, no significant evidence exists that would overcome the presumption. The district court did not err in finding that Mahoney Place is not partnership property.

V. CONCLUSION

We conclude that Keith did not timely exercise the buy-sell provision of the partnership agreement. DeWulf Place is partnership property subject to Mogensen Bros.’ paying the balance of the indebtedness owed to Ranch and Farm, and Mahoney Place is not partnership property. Accordingly, we affirm as modified the district court’s decision.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V.
DENISE KUEHN, APPELLANT.
728 N.W.2d 589

Filed March 16, 2007. No. S-05-888.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
2. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.
3. **Expert Witnesses.** Four factors govern the admissibility of expert testimony: (1) whether the witness is qualified as an expert, (2) whether the testimony is relevant, (3) whether the testimony will assist the trier of fact, and (4) whether the probative value of the testimony, even if relevant, is outweighed by the danger of unfair prejudice or other considerations.
4. **Expert Witnesses: Physicians and Surgeons.** The preferred form of establishing the certainty of a medical expert’s opinion is to ask for the opinion in terms of a reasonable degree of certainty or probability.
5. ____: _____. An expert’s opinion is to be judged in view of the entirety of the opinion and is not validated or invalidated solely on the presence or lack of the words “reasonable degree of medical certainty or probability.”

6. **Trial: Expert Witnesses.** Whether an expert's opinion is too speculative to be admitted is a question for the trial court's discretion.
7. **Rules of Evidence: Other Acts.** Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), prohibits the admission of evidence of other bad acts for the purpose of demonstrating a person's propensity to act in a certain manner.
8. ____: _____. Evidence of other crimes which is relevant for any purpose other than to show the actor's propensity is admissible under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995).
9. ____: _____. The admissibility of evidence under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), must be determined upon the facts of each case and is within the discretion of the trial court.
10. ____: _____. Evidence of other bad acts falls into two categories under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), according to the basis of the relevance of the acts: (1) evidence which is relevant only to show propensity, which is not admissible, and (2) otherwise relevant (nonpropensity) evidence, which is admissible.
11. **Rules of Evidence: Other Acts: Appeal and Error.** An appellate court reviews the admission of other bad acts evidence under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 1995), by considering (1) whether the evidence was relevant, (2) whether the evidence had a proper purpose, (3) whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice, and (4) whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted.
12. **Criminal Law: Evidence: Intent: Proof.** Evidence of other crimes which are similar to the crime charged is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged.
13. **Negligence: Intent: Minors.** When a defendant asserts that a child's injuries were accidental, the defendant has placed in issue whether the injuries were indeed the result of an accident.
14. **Convictions: 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, viewed and construed most favorably to the State, is sufficient to support the conviction.
15. **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.
16. **Trial: Witnesses.** The right of cross-examination is an essential and fundamental requirement of a fair trial.
17. **Trial: Evidence: Witnesses.** A ruling on evidence of a collateral matter that is intended to affect the credibility of a witness comes within the discretion of a trial court.
18. **Trial: Witnesses: Testimony: Appeal and Error.** When the object of the cross-examination is to collaterally ascertain the accuracy or credibility of the witness,

some latitude should be permitted, and the scope of such latitude is ordinarily subject to the discretion of the trial judge, and, unless abused, its exercise is not reversible error.

19. **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.
20. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.
21. **Sentences: Probation and Parole.** When a court sentences a defendant to probation, it may impose any conditions of probation that are authorized by statute.

Appeal from the District Court for Madison County: ROBERT B. ENSZ, Judge. Affirmed.

George H. Moyer, of Moyer, Moyer, Egley, Fullner & Montag, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

WRIGHT, J.

NATURE OF CASE

Denise Kuehn provided childcare in her home in Norfolk, Nebraska. After a child she cared for became seriously injured, Kuehn was charged with child abuse. A jury found her guilty of negligent child abuse. Kuehn argues that certain medical testimony should have been excluded and that evidence of prior injuries to the child in question was improperly admitted. For the reasons stated herein, the judgment of the district court is affirmed.

SCOPE 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 discretion a factor in determining admissibility. *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006).

[2] The standard for reviewing the admissibility of expert testimony is abuse of discretion. *State v. King*, 269 Neb. 326, 693 N.W.2d 250 (2005).

FACTS

On August 4, 2004, 10-month-old Cameron Lampert was seriously injured at Kuehn's home. Kuehn testified that as she began to lift Cameron out of a playpen, he arched his back, fell, and hit his head on the corner of the playpen. She said he landed on his back on the floor of the playpen, striking his head a second time. The playpen had a padded base and fabric sides with netting that covered the collapsible frame. In an interview with police, Kuehn stated that she may have shaken Cameron once as she picked him up but that he then fell out of her arms and hit his head on the playpen.

After the fall, Cameron began fussing and trying to get out of the playpen. He stood up and fell backward. Kuehn said Cameron "didn't seem right," his eyes were almost completely closed, and he was limp. When Cameron's father, Brian Lampert (Lampert), arrived, Kuehn suggested he take Cameron to the hospital or a doctor.

Lampert testified that Cameron was lethargic and limp, and his eyes had rolled back in his head. He knew immediately that something was wrong, and he took Cameron to the hospital in Norfolk, Nebraska. Cameron was then taken by helicopter to Children's Hospital in Omaha, Nebraska. There it was determined that he had a subdural hematoma. Cameron also sustained retinal hemorrhages in all four quadrants of each eye.

Medical experts testified that Cameron's injury was caused when the two hemispheres of his brain were moved violently back and forth inside the skull. Dr. Jeffrey DeMare, medical director of the children's advocacy team at Children's Hospital, testified that Cameron's injury was entirely consistent with a child's being violently shaken and was not caused by a fall and blow to the skull, as described by Kuehn.

Cameron was hospitalized for approximately 1 month. Upon discharge, he was unable to hold up his head or move his left arm and he had to be fed through a tube to his stomach. A shunt had been placed in his head to remove pressure on his brain. At the time of trial, Cameron was 18 months old and was unable to sit up

for more than 30 seconds. He was developmentally delayed and blind, suffered from epilepsy, and had spasticity, or rigid muscles, on his left side.

A jury acquitted Kuehn of intentional child abuse but convicted her of negligent child abuse. She was sentenced to 24 months' probation, fined \$1,000, and ordered to pay court costs of \$1,519.56. The terms of her probation required her to serve 90 days in jail, including 30 days immediately and the balance at the end of her probation. Kuehn was ordered to perform 200 hours of community service, and she was ordered not to provide any type of childcare program without first obtaining a state childcare license. She appeals.

ASSIGNMENTS OF ERROR

Kuehn assigns the following errors, which, summarized and restated, claim that the district court erred in (1) overruling her objections to medical testimony; (2) allowing evidence of prior bad acts; (3) ordering Kuehn to pay certain deposition expenses; (4) instructing the jury; (5) overruling her motion to dismiss or, in the alternative, for a directed verdict; (6) allowing impeachment of a defense witness; and (7) imposing an excessive sentence.

ANALYSIS

ADMISSION OF MEDICAL TESTIMONY

[3] Kuehn objects to the admission of certain evidence, including testimony of the physicians who treated Cameron. The standard for reviewing the admissibility of expert testimony is abuse of discretion. *State v. King*, 269 Neb. 326, 693 N.W.2d 250 (2005). Four factors govern the admissibility of expert testimony: (1) whether the witness is qualified as an expert, (2) whether the testimony is relevant, (3) whether the testimony will assist the trier of fact, and (4) whether the probative value of the testimony, even if relevant, is outweighed by the danger of unfair prejudice or other considerations. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). See, also, *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990), *disapproved on other grounds*, *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991). We therefore consider whether the district court abused its discretion in admitting the medical testimony.

Dr. Ivan Pavkovic, a pediatric neurologist who treated Cameron after his injury, testified that Cameron was developmentally delayed and blind, displayed spasticity, and had epilepsy as the result of a brain injury. Pavkovic stated that Cameron's injury was caused by rotational force, which occurs when the brain is rotated inside the skull. CT scans of Cameron's brain showed atrophy, which indicated a brain injury. Cameron's brain was shrunken, and corresponding fluid-filled spaces outside the brain were larger than normal because his brain was smaller than normal. His brain damage was diffuse. Pavkovic stated that a subdural hematoma which pressed on the surface of the brain caused dysfunction and problems such as motor function, paralysis, or seizures. Pavkovic testified that blunt trauma to an infant rarely results in subdural hemorrhage and even more rarely results in retinal hemorrhage, both of which were evident in Cameron. Pavkovic stated that Cameron's condition was due to inflicted or nonaccidental traumatic injury to the brain. CT scans and MRI results indicated that Cameron had also sustained subdural hematomas in the weeks or months prior to August 2004.

In response to Kuehn's objection of no proper and sufficient foundation, speculation, and conjecture, Pavkovic stated:

[Cameron's] initial presentation to the hospital . . . involved the presence of subdural hematomas . . . one of which was chronic. [O]ne was new. He had bleeding into both his retinal, what we call retinal hemorrhages and he had mental status changes and initially seizure activity too. And when you take all of those positive findings in combination with the fact that there was no history to support any kind of major trauma to his head, the only conclusion that can be reached is that this was some type of inflicted traumatic injury to his brain.

Additional medical testimony was provided by DeMare, who stated that Cameron's physical findings were consistent with an inflicted traumatic brain injury. He explained that any time a child has a brain injury as significant as Cameron's, it is the result of a significant amount of force. DeMare stated:

This is the kind of injury we'd expect from a fall from a couple stories high, from a high speed car accident, that's the kind of force we're talking about. In the absence of any

explanation that would mirror that, we have to assume that inflicted injury is the only other reasonable explanation.

.....
[This is] a child who's got a brain injury that would require enough force that there's no way that it could happen without somebody knowing what happened. We're talking about a lot of force here. This isn't just a[n], oops, someone — the kid fell over and hit his head and this injury happened. There's a lot of force that's involved and someone must know what happened to the child.

In addition to Pavkovic and DeMare, testimony was received from several other medical experts. Dr. Phillip Eckstrom, a radiologist who performed a CT scan on Cameron on August 4, 2004, stated that Cameron had subdural hematomas on both sides of the brain which were of different ages. This indicated that Cameron had experienced trauma at more than one time prior to August 4. Eckstrom was asked if he had an opinion as to the force normally associated with the injury Cameron had suffered, and over Kuehn's objection, Eckstrom said the injury was caused by rotational force. Dr. Robert Troia, an ophthalmologist, stated that Cameron's blindness was due to retinal hemorrhages Cameron had suffered. Dr. Daniel Davis, a forensic pathologist, stated that on August 4, Cameron suffered a primary sublethal brain injury that involved deep structures of his brain and possibly his upper cervical spinal cord.

Throughout the medical testimony, Kuehn interposed objections based on lack of foundation, speculation, conjecture, and a violation of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). These objections were overruled.

On appeal, Kuehn claims the district court improperly overruled her objections based on speculation and conjecture. We interpret her argument as a complaint that the medical testimony should not have been admitted because the physicians did not couch their opinions in terms of "reasonable medical certainty."

[4] The preferred form of establishing the certainty of a medical expert's opinion is to ask for the opinion in terms of a reasonable degree of certainty or probability. In *Paulsen v. State*, 249 Neb. 112, 121, 541 N.W.2d 636, 643 (1996), we stated:

Our well-known preference for the use of the phrases “reasonable degree of medical certainty” or “reasonable degree of probability” is an indication to courts and parties of the necessity that the medical expert opinion must be stated in terms that the trier of fact is not required to guess at the cause of the injury.

Where the medical expert’s testimony gives rise to conflicting inferences of equal degree of probability such that the choice between them is a matter of conjecture, the testimony should be excluded. See *id.* An opinion which is equivocal and is based upon such words as “could,” “may,” or “possibly” lacks the certainty required to sustain the burden of proof of causation for which the opinion has been offered.

We have stated that “[a]lthough expert medical testimony need not be couched in the magic words ‘reasonable medical certainty’ or ‘reasonable probability,’ it must be sufficient as examined in its entirety to establish” a crucial causal link between a victim’s injuries and a defendant’s actions. See *Fackler v. Genetzky*, 263 Neb. 68, 74, 638 N.W.2d 521, 527-28 (2002) (referring to link between plaintiff’s injuries and defendant’s negligence).

[5,6] An expert’s opinion is to be judged in view of the entirety of the opinion and is not validated or invalidated solely on the presence or lack of the words “reasonable degree of medical certainty or probability.” See *Paulsen v. State*, 249 Neb. at 121, 541 N.W.2d at 643. Such words are not necessary. See, *Edmonds v. IBP, inc.*, 239 Neb. 899, 479 N.W.2d 754 (1992); *Hohnstein v. W.C. Frank*, 237 Neb. 974, 468 N.W.2d 597 (1991). The expert’s opinion must be sufficiently definite and relevant to provide a basis for the fact finder’s determination of an issue or question. See *Hohnstein v. W.C. Frank*, *supra*. Whether an expert’s opinion is too speculative to be admitted is a question for the trial court’s discretion. *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003).

In the case at bar, the principal witnesses on the issue of causation were Pavkovic and DeMare. Both stated that Cameron’s injuries were caused by inflicted or nonaccidental trauma to the brain. The physicians did not speculate as to the cause of Cameron’s injury. They testified that (1) the injury was caused by rotational force when the brain was rotated inside the skull; (2) blunt

trauma in an infant rarely results in a subdural hemorrhage such as that suffered by Cameron; (3) blunt trauma even more rarely causes retinal hemorrhages such as those seen in Cameron; (4) Cameron's injury was due to inflicted or nonaccidental traumatic injury to the brain; (5) a brain injury as significant as Cameron's is the result of a significant amount of force, such as a fall from a height of several stories or a high-speed car accident; and (6) Cameron's injury was entirely consistent with a child's being violently shaken. Pavkovic testified that inflicted traumatic brain injury was the "only conclusion that [could] be reached" on the basis of the history and objective findings. DeMare testified that in the absence of a history of significant accidental trauma, an "inflicted injury [was] the only other reasonable explanation."

As noted above, four factors govern the admissibility of expert testimony. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). Kuehn does not question the first factor: whether any of the witnesses were qualified to present expert testimony. The second factor concerns whether their testimony was relevant. The medical expert testimony was relevant to the question of whether Cameron's injury was sustained by accident or through an intentional action. The third factor is whether the experts' testimony will assist the trier of fact. In this case, it assisted the jury in understanding the extent of Cameron's injury and the manner in which it occurred, which was a controverted factual issue. We also find that the fourth factor was present: The probative value of the evidence was not outweighed by the danger of unfair prejudice.

Therefore, we conclude that the district court did not abuse its discretion in admitting the State's testimony elicited from the medical experts. The evidence was sufficient to sustain the jury's verdict finding Kuehn guilty of negligent child abuse.

Kuehn also interposed objections throughout the testimony of Pavkovic and DeMare as being in violation of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Because these objections were overruled, we will address whether admission of the testimony violated the requirements of *Daubert*.

During a pretrial hearing referred to as a "Daubert hearing" by the district court, Dr. Robert Prokop, a forensic pathologist who

had reviewed Cameron's records, opined that an injury could not be defined as intentional or accidental without knowledge of the entire facts of the incident. Prokop's testimony was the only evidence offered by Kuehn at the hearing.

In a *Daubert* challenge, the initial task falls on the party opposing expert testimony to sufficiently call into question the reliability of some aspect of the anticipated testimony, and then the proponent of the expert testimony has the burden of showing that the testimony is reliable. See *State v. Mason*, 271 Neb. 16, 709 N.W.2d 638 (2006). Prokop suggested that Cameron's injury could not be defined as intentionally inflicted when all of the facts related to the incident were not known. We do not consider Prokop's testimony to be *Daubert* evidence, but, rather, an attempt to impeach the medical evidence presented by the State. The district court did not abuse its discretion in overruling Kuehn's objections made on the basis of *Daubert*.

Kuehn also complains that the district court erred in failing to sustain her hearsay objection to a statement made by Dr. Joe Metcalf II, an emergency room physician, to Joe O'Brien, a police investigator. On redirect examination by the State, O'Brien stated that he had asked Metcalf whether Cameron's injuries could have been caused by dropping the child. Kuehn objected on the bases of hearsay and improper redirect because O'Brien was being asked about statements in his deposition. The court sustained this objection. O'Brien was then asked what he wrote in a report about Metcalf's "telling you about the likelihood of this being caused by dropping." Kuehn objected on the basis of hearsay, and the court overruled the objection. O'Brien testified, "I asked Doctor Metcalf if — I asked if it could have been caused by dropping Cameron. Doctor Metcalf told me that it didn't appear likely that that was the case."

Prior to the exchange that led to Kuehn's objections, O'Brien had been cross-examined by Kuehn's attorney, who read portions of O'Brien's deposition into the record. During that cross-examination, counsel elicited the fact that Metcalf had stated that Cameron had a subdural hematoma and that it was probably caused by Cameron's having been dropped. After defense counsel repeated information in O'Brien's deposition concerning Metcalf's opinion as to the cause of Cameron's injuries, the State

sought on redirect to clarify the information, leading to the questions which Kuehn objected to as hearsay. Kuehn initiated the line of questioning concerning statements made by Metcalf to O'Brien. The testimony was initially elicited by Kuehn's counsel, and the district court did not abuse its discretion in allowing the testimony on redirect.

EVIDENCE OF PRIOR BAD ACTS

Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Reissue 1995), provides in relevant part:

(2) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

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. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006).

At Kuehn's trial, evidence was presented of earlier incidents involving Cameron. Kuehn asserts that the district court erred in giving a limiting instruction to the jury during the trial and at the close of the trial and in refusing to grant a mistrial because of the instruction. The court instructed the jury that evidence received concerning injuries to Cameron on June 15 and 28, 2004, was received to help the jury determine whether the August 4 injury was the result of an absence of mistake or accident.

Evidence was presented during the trial that Cameron had suffered prior injuries while in Kuehn's care on June 15 and 28, 2004. On June 15, Denise Gates, Cameron's mother, noticed a bump on Cameron's head and a bruise that covered his left eyebrow when she picked him up from Kuehn's house. Kuehn told Gates that she went to check on Cameron when he was crying and found that his diaper and bedding were wet. Kuehn allegedly set Cameron on the floor to change him and to change the bedding, and he leaned forward and hit his head twice. Cameron vomited twice before leaving Kuehn's house and again when he arrived home. Gates called Cameron's physician because "Cameron

didn't seem right. Cameron was a very happy, playful boy . . . he just wasn't himself." Gates took Cameron to the doctor the next morning. He continued to vomit for about 10 days, and Gates took him to the doctor several times.

On June 28, 2004, Cameron was "pale-like and dry heaving" when Gates picked him up at Kuehn's house. He was "crabby," did not want to play, and did not have a good appetite. Gates took Cameron to the doctor on June 30. Cameron vomited periodically until July 4. Pamela Williams, a registered nurse, testified that on June 28, Kuehn called the clinic where Williams worked and reported that Cameron had suddenly gone limp and that his eyes had rolled back in his head. Williams told Kuehn the clinic could get Cameron's parents' permission to treat him, but Kuehn told Williams that she would contact the parents and then bring Cameron in. Kuehn called later in the day and reported that she had not been able to contact Cameron's parents but that he had eaten lunch, taken a bottle, and seemed fine. Williams stated that she again recommended that Kuehn bring Cameron in because it is difficult to make a diagnosis over the telephone.

At a hearing concerning rule 404 evidence, Dr. Sandra Allbery, a pediatric radiologist at Children's Hospital, testified to the results of an MRI on Cameron that was completed on August 9, 2004. She stated that Cameron had brain hemorrhages that were of three different ages. One of the subdural hemorrhages was weeks to months old, and one was at least 3 days old. The subdural hemorrhages surrounded both hemispheres of his brain.

DeMare testified that Cameron had blood within the cranial cavity that was three different ages. Cameron had bilateral retinal hemorrhages that involved all four quadrants of the eye and signs and symptoms of traumatic brain injuries that ranged from less than 3 days old to months old. DeMare reviewed Cameron's medical records and stated that his symptoms were what would be expected with some type of repeated traumatic brain injury. He testified that the subdural hematomas occurred on June 15 and 28 and August 4, 2004. The district court found by clear and convincing evidence that Kuehn inflicted the injuries to Cameron on June 15 and 28 and that evidence of those injuries was admissible under rule 404(2) as proof of absence of mistake or accident as to the injury of August 4.

[7-9] Rule 404(2) prohibits the admission of evidence of other bad acts for the purpose of demonstrating a person's propensity to act in a certain manner. *State v. McPherson*, 266 Neb. 715, 668 N.W.2d 488 (2003). Evidence of other crimes which is relevant for any purpose other than to show the actor's propensity is admissible under rule 404(2). *State v. McPherson, supra*. The admissibility of evidence under rule 404(2) must be determined upon the facts of each case and is within the discretion of the trial court. *State v. Wisinski*, 268 Neb. 778, 688 N.W.2d 586 (2004).

[10,11] Evidence of other bad acts falls into two categories under rule 404(2), according to the basis of the relevance of the acts: (1) evidence which is relevant only to show propensity, which is not admissible, and (2) otherwise relevant (nonpropensity) evidence, which is admissible. *State v. McManus*, 257 Neb. 1, 594 N.W.2d 623 (1999). An appellate court reviews the admission of other bad acts evidence under rule 404(2) by considering (1) whether the evidence was relevant, (2) whether the evidence had a proper purpose, (3) whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice, and (4) whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted. *State v. McManus, supra*.

[12] This court has stated that a basic reason for refusing to allow evidence of other crimes is that "such evidence is apt to be given too much weight, rather than too little, by the jury, thus resulting in the conviction of a defendant because he is a bad man and not because of his specific guilt of the offense with which he is charged.'" *State v. Casados*, 188 Neb. 91, 95, 195 N.W.2d 210, 213 (1972). Evidence of other crimes which are similar to the crime charged is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged. *Id.*

In *State v. Ray*, 191 Neb. 702, 704, 217 N.W.2d 176, 177 (1974), we quoted with approval from "I Wharton's Criminal Evidence (11th Ed.), § 350," as follows:

"Testimony of other similar offenses has been admitted to show intent where there is or may be, from the evidence, an inference of mistake, accident, want of guilty knowledge, lawful purpose or innocent intent. Where an act is equivocal

in its nature, and may be criminal or honest according to the intent with which it is done, then other acts of the defendant, and his conduct on other occasions, may be shown in order to disclose the mastering purpose of the alleged criminal act.’”

We have noted that “[t]he principle reflected in that statement is peculiarly applicable to child abuse cases. Evidence of intent, in such cases, is ordinarily circumstantial, and injuries to children are ordinarily claimed to be accidental and unintentional.” *State v. Morosin*, 200 Neb. 62, 68, 262 N.W.2d 194, 197 (1978). In child abuse cases, both the relevance and the prejudicial effect of evidence of prior similar acts is obvious. We held that testimony of a social worker as to a child’s injuries and admission of a photograph of the child’s injuries were both admissible for the limited purpose for which the evidence was considered based on “balancing tests frequently employed under modernized or codified rules of evidence.” *Id.*

Other courts have also found that evidence of prior child abuse is admissible to show identity, intent, or lack of accident or mistake. See *State v. Widdison*, 4 P.3d 100 (Utah App. 2000). In that case, the defendant had made several statements that the child’s injuries were the result of an accident in her crib, which required the State to prove absence of accident or mistake. In the case at bar, Kuehn told police that she may have shaken Cameron once when she picked him up and that he then fell out of her arms and hit his head on the playpen. The State therefore needed to show that Kuehn’s actions were not the result of an accident.

The U.S. Court of Appeals for the Seventh Circuit has noted that there are usually no eyewitnesses to identify the source of injuries in child abuse prosecutions. *U.S. v. Leight*, 818 F.2d 1297 (7th Cir. 1987), *abrogated on other grounds*, *Huddleston v. United States*, 485 U.S. 681, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988). These cases are therefore “commonly built upon circumstantial evidence showing a pattern of repeated injuries suggesting child abuse,” and the defendant often challenges the circumstantial evidence by arguing that the injuries were caused accidentally. *Id.* at 1301. The court stated that “[b]ecause of the difficulties commonly encountered in showing that a child has

been abused, courts have often treated evidence of abuse of other children as relevant and admissible.” *Id.* at 1303. It held that because the defense was based on the theory that the child’s injuries were accidental, the evidence that the defendant physically abused other children in her care was generally relevant to the contested issue.

[13] When a defendant asserts that a child’s injuries were accidental, the defendant has placed in issue whether the injuries were indeed the result of an accident. *Branstetter v. State*, 346 Ark. 62, 57 S.W.3d 105 (2001). See, also, *United States v. Naranjo*, 710 F.2d 1465 (10th Cir. 1983) (evidence of previous batteries of victim became admissible when defendant testified that shooting was accidental); *United States v. Woods*, 484 F.2d 127 (4th Cir. 1973) (exception for lack of accident ordinarily invoked only where accused admits he did acts charged but denies intent necessary to constitute crime).

Previous abuse of a child is admissible under rule 404(2) because it is “probative of a material issue other than character; that is, it was evidence of malice and absence of accidental death.” *U.S. v. Boise*, 916 F.2d 497, 501 (9th Cir. 1990). In *State v. Norlin*, 134 Wash. 2d 570, 951 P.2d 1131 (1998), the Supreme Court of Washington held that evidence of prior injuries to a child is admissible in child abuse prosecutions to show absence of accident only if the State shows by a preponderance of the evidence that there is a connection between the defendant and the injuries.

The evidence of prior incidents in which Cameron was injured or ill while in Kuehn’s care was properly admitted. The jury could have drawn legitimate inferences from the evidence. Courts have quoted the “doctrine of chances,” which provides that “highly unusual events are highly unlikely to repeat themselves; ‘the recurrence of a similar result . . . tends to establish . . . the presence of the normal, i.e. criminal, intent accompanying such an act’” *U.S. v. York*, 933 F.2d 1343, 1350 (7th Cir. 1991) (quoting 2 John Henry Wigmore, *Evidence in Trials at Common Law* § 302 (James H. Chadbourne rev. 1979), *overruled on other grounds, Wilson v. Williams*, 182 F.3d 562 (7th Cir. 1999). The federal court continued, “The man who wins the lottery once is envied; the one who wins it twice is investigated.” *Id.*

Evidence of other bad acts which is relevant for any purpose other than to show the actor's propensity to commit the act is admissible under rule 404(2). *State v. McManus*, 257 Neb. 1, 594 N.W.2d 623 (1999). The evidence in this case showed that Cameron had sustained a bump on his head and a bruise on his left eyebrow while in Kuehn's care on June 15, 2004. Kuehn's explanation was that she set Cameron on the floor to change his diaper and that he leaned forward and hit his head twice. He vomited before leaving Kuehn's home and continued to vomit for about 10 days. On June 28, Kuehn called a clinic when Cameron suddenly went limp and his eyes rolled back in his head. He was "dry heaving" and vomited periodically for another 6 days. These are unusual events that occurred while Cameron was in Kuehn's care. The fact that Cameron had twice before shown either physical evidence of injuries or illness allowed the jury to consider whether Kuehn was responsible for Cameron's injury on August 4. The evidence was not offered to reflect on Kuehn's character, but, rather, to refute her contention that the injury was accidental.

Related to the rule 404(2) issue, Kuehn also assigns as error the district court's refusal to give the following proffered instruction:

1. There is no evidence that Denise Kuehn intentionally or knowingly caused an injury to Cameron Lampert on June 15, 2004.
2. There is no evidence that Denise Kuehn intentionally or knowingly caused an injury to Cameron Lampert on June 28, 2004.
3. There is no evidence that Cameron Lampert suffered any injury whatsoever on June 28, 2004.
4. There is no medical evidence establishing that any injury which occurred on June 15, 2004[,] and the event that occurred on June 28, 2004[,] is the proximate cause of either of the chronic subdural hematomas seen in Cameron Lampert on and after August 4, 2004[,] or the proximate cause or a proximate contributing cause of any injury which Cameron Lampert suffered on August 4, 2004.

And you must therefore completely disregard this evidence and put it out of your minds.

At the rule 404 hearing, the district court found that Kuehn had inflicted injuries upon Cameron on June 15 and 28, 2004. The jury was properly instructed regarding the evidence of the June 15 and 28 incidents, and the court did not err in refusing to give Kuehn's proposed instruction.

Kuehn also claims that errors related to the rule 404 evidence occurred during the State's opening statement and its closing argument. During opening statement, the State said that at the end of the case, it would ask the jury, "How many chances does a person get with a small child . . . to call it an accident?" Kuehn objected that the State was making a closing argument rather than an opening statement. The court overruled the objection. During closing argument, the State said it was returning to the question asked during opening statement concerning how many times a child can be injured and still have those injuries be considered accidental. Kuehn objected that the statement was an improper argument, irrelevant, and immaterial and that it drew an improper inference. Having determined that the evidence of the prior incidents was admissible, we conclude that this assignment of error is without merit.

MOTION TO DISMISS OR FOR DIRECTED VERDICT

Kuehn also assigns error to the district court's overruling of her motion to dismiss or, in the alternative, for a directed verdict which she made at the close of the State's case. She argued that there was no competent admissible evidence that she intentionally or deliberately harmed Cameron on August 4, 2004, or at any other time. Kuehn argued that the only evidence as to causation was so speculative that it was insufficient to sustain a verdict. The district court overruled Kuehn's motion. This alleged error was waived when Kuehn offered evidence in her defense. See *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005). Kuehn renewed her motions at the close of her case, and the court overruled these motions.

[14] 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, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Castor*, 257 Neb. 572, 599 N.W.2d 201 (1999).

The record shows that Cameron was injured while he was in Kuehn's care and that his injury caused severe damage. The physicians testified that Cameron's condition was not the result of a drop or fall as described by Kuehn. There was evidence of prior incidents in which Cameron sustained bruises or became ill while in Kuehn's care. The evidence was sufficient to support the conviction, and the district court did not err in failing to sustain the motion to dismiss or for a directed verdict made at the end of the trial.

CROSS-EXAMINATION OF DR. JOHN PLUNKETT

[15] Kuehn claims that the district court erred in overruling her objections to certain questions of a physician who testified on her behalf. 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. *State v. Stark*, 272 Neb. 89, 718 N.W.2d 509 (2006).

During cross-examination, Dr. John Plunkett was asked about other cases in which he had testified as an expert witness. Kuehn posed numerous objections, including that the questions were beyond the scope of direct examination, and attempted to impeach the witness on a collateral matter. Kuehn requested a "standing objection to impeaching a witness from nine years ago."

Neb. Rev. Stat. § 27-611(2) (Reissue 1995) provides that "[c]ross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The judge may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." See, also, *State v. McLemore*, 261 Neb. 452, 623 N.W.2d 315 (2001).

[16-18] The right of cross-examination is an essential and fundamental requirement of a fair trial. *State v. Lewis*, 241 Neb. 334, 488 N.W.2d 518 (1992). In *Lewis*, a defendant claimed that the court improperly restricted his ability to cross-examine a witness. We stated, "[A] defendant is entitled to engage in searching and

wide-ranging cross-examination, including anything tending to affect the accuracy, veracity, or credibility of a witness. . . .” *Id.* at 345, 488 N.W.2d at 526. We noted that a ruling on evidence of a collateral matter that is intended to affect the credibility of a witness comes within the discretion of a trial court. *Id.* “‘When the object of the cross-examination is to collaterally ascertain the accuracy or credibility of the witness, some latitude should be permitted, and the scope of such latitude is ordinarily subject to the discretion of the trial judge, and, unless abused, its exercise is not reversible error.’” *Id.* at 345, 488 N.W.2d at 526 (quoting *State v. Ballard*, 237 Neb. 729, 467 N.W.2d 662 (1991)).

Kuehn has not demonstrated that the district court abused its discretion in refusing to sustain her objections to the cross-examination of Plunkett. The State’s questioning was not intended to impeach Plunkett on collateral matters, but, rather, was intended to question his credibility.

[19] Kuehn also assigns as error the district court’s rulings on a number of other objections made during Plunkett’s testimony. Kuehn has not specifically argued any of these assignments of 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. *State v. Deckard*, 272 Neb. 410, 722 N.W.2d 55 (2006). We find no merit to Kuehn’s assigned errors related to Plunkett’s testimony.

DEPOSITION EXPENSES

The district court entered an order on March 22, 2005, directing Kuehn to pay \$500 in advance for depositions of physicians. State law provides that in criminal cases, a defendant may apply in writing for a court order to examine witnesses prior to trial. See Neb. Rev. Stat. § 29-1904 (Reissue 1995). Kuehn assigns as error the district court’s order.

The record in this case includes only a journal entry indicating that a telephone conference hearing had been held concerning fees to be paid in advance to three physicians for depositions. The district court directed Kuehn to pay \$500 to each doctor prior to deposition, stating that reasonable fees would be determined at a later date if necessary. The record does not include a transcript of the telephonic hearing.

Kuehn filed an interlocutory appeal from the district court's order, and the appeal was dismissed for lack of jurisdiction by the Nebraska Court of Appeals on June 1, 2005, because there was no final, appealable order. See *State v. Kuehn*, 13 Neb. App. lxxvii (No. A-05-516, June 1, 2005). We interpret Kuehn's complaint to be that she was directed to pay the witnesses for their depositions. We find no error in the district court's order. This court has held that a state statute

does not provide for the taking of depositions at county expense in advance of the trial. Defendant was entitled to an order entitling him to take the depositions of witnesses, but when he coupled with it a demand that it be done at the expense of the county, he was not entitled to have his motion sustained.

Vore v. State, 158 Neb. 222, 227, 63 N.W.2d 141, 144 (1954), citing § 29-1904.

Kuehn did not seek status as an indigent, and we find no authority to suggest that she should not have been required to pay the expenses associated with depositions taken for her case. This assignment of error has no merit.

EXCESSIVE SENTENCE

At all times relevant to this case, child abuse committed negligently was punishable by a maximum of 1 year in prison, a fine of \$1,000, or both. See Neb. Rev. Stat. §§ 28-707(3) and 28-106 (Cum. Supp. 2004). Kuehn was ordered to pay a fine of \$1,000 and placed on probation for 24 months, with terms including a 90-day sentence in jail and 200 hours of community service. She claims the sentence was excessive.

[20,21] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed. *State v. Griffin*, 270 Neb. 578, 705 N.W.2d 51 (2005). When a court sentences a defendant to probation, it may impose any conditions of probation that are authorized by statute. *State v. Lobato*, 259 Neb. 579, 611 N.W.2d 101 (2000). We find no abuse of discretion in the sentence imposed, and this assignment of error has no merit.

CONCLUSION

Finding no merit to Kuehn's assigned errors, the judgment of conviction and sentence are affirmed.

AFFIRMED.

HEAVICAN, C.J., not participating.

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

728 N.W.2d 606

Filed March 16, 2007. No. S-05-1033.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the lower courts' findings.
2. **Juvenile Courts: Proof.** When an adjudication is based upon Neb. Rev. Stat. § 43-247(1) (Reissue 2004), the allegations must be proved beyond a reasonable doubt.
3. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
4. **Criminal Law: Statutes.** Although penal statutes are strictly construed, they are given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.
5. ____: _____. Nebraska's stalking statutes focus both on the behavior of the perpetrator and on the experience of the victim.
6. **Circumstantial Evidence: Intent: Proof.** Although a perpetrator's state of mind is a question of fact, such fact may be proved by circumstantial evidence.
7. **Statutes: Legislature: Appeal and Error.** In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
8. **Criminal Law: Statutes: Legislature: Intent.** Given the language of Nebraska's stalking statutes and the purpose announced by the Legislature for enacting the statutes, an objective construction of the statutes is appropriate, and the victim's experience resulting from the perpetrator's conduct should be assessed on an objective basis.

Petition for further review from the Nebraska Court of Appeals, INBODY, Chief Judge, and IRWIN and CARLSON, Judges, on appeal thereto from the Separate Juvenile Court of Douglas County, VERNON DANIELS, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Thomas C. Riley, Douglas County Public Defender, and David J. Tarrell for appellant.

Stuart J. Dornan, Douglas County Attorney, Amy Schuchman, and Kris Morgan and Stacy Jo Ferrel, Senior Certified Law Students, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

In this delinquency proceeding brought under the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 2004), the separate juvenile court of Douglas County found that Jeffrey K. had committed the criminal misdemeanor offense of stalking as set forth in Neb. Rev. Stat. §§ 28-311.02(2)(a) and 28-311.03 (Cum. Supp. 2004) and adjudicated Jeffrey under § 43-247(1). Jeffrey appealed the adjudication order. The Nebraska Court of Appeals determined that there was not sufficient evidence to support a finding that Jeffrey had violated Nebraska's stalking statutes and reversed. *In re Interest of Jeffrey K.*, 14 Neb. App. 818, 717 N.W.2d 499 (2006). The State petitioned for further review. We granted the State's petition. Because we determine that the evidence was sufficient to support the adjudication, we reverse the decision of the Court of Appeals and remand the cause with directions to affirm the juvenile court's adjudication order.

STATEMENT OF FACTS

On April 15, 2005, the State filed a petition in the separate juvenile court of Douglas County alleging that Jeffrey, born July 20, 1988, was within the meaning of § 43-247(1), which provides generally that the juvenile court has jurisdiction over any juvenile who has committed a misdemeanor under the laws of this state. Specifically, the petition alleged that from September through November 4, 2004, Jeffrey willfully stalked a fellow student at Omaha Westside High School, with the intent to injure, terrify, threaten, or intimidate her, in violation of § 28-311.03.

An adjudication hearing was held on August 12, 2005, at which hearing the court received testimony from the victim. The victim

generally testified that beginning in September 2004, Jeffrey had carried out a continuing pattern of calling her names at school, such as “fat ass,” “fat penguin,” “whore,” and “fat bitch.” The victim testified that initially, Jeffrey’s name-calling did not occur on a daily basis, but, rather, it would occur “maybe a couple of times a week.” She further testified, however, that beginning in late October, the frequency of the name-calling incidences increased, and Jeffrey began to do it “on a daily basis when [she] came into school or when [she] just passed [him] in the hallway.” She testified that his tone of voice was “kind of mean.”

When asked to estimate how many times Jeffrey called her names, the victim testified that he called her “fat ass” between 75 to 100 times. She estimated that he called her “whore” and “fat penguin” approximately 25 times each, and she stated that he called her “fat bitch” approximately 10 times. All of the name-calling happened during school, in front of other students.

The victim testified that beginning in the late fall of 2004, Jeffrey began to engage in conduct that went beyond name-calling. Specifically, the victim testified concerning one incident when Jeffrey kicked a chair at her as she was walking in the lunchroom. The chair hit the victim, causing her to stumble. The victim also testified that on several occasions, Jeffrey threw food at her, yelling on at least one occasion “[e]at some more, fat ass” The victim testified that she was struck by the food approximately 9 or 10 times.

The victim stated that because of Jeffrey’s conduct, she moved to a different area of the lunchroom. She also stated that she “changed [her path] completely so that [she] wouldn’t be anywhere near” Jeffrey. When asked how Jeffrey’s actions affected her, she testified “[q]uite negatively. [She felt e]motionally very badly. [She felt] very put-down quite a bit.”

Following the hearing, the juvenile court found that the charges against Jeffrey were true on proof beyond a reasonable doubt. On August 15, 2005, the juvenile court entered an order adjudicating Jeffrey as a child within the meaning of § 43-247(1) and set the matter for disposition. Jeffrey appealed the juvenile court’s adjudication order to the Court of Appeals, claiming, in part, that there was not sufficient evidence to support the adjudication.

In a divided decision, the Court of Appeals determined that the evidence did not support the juvenile court's finding that Jeffrey was "stalking" the victim, as that term was used in Nebraska's stalking statutes. The majority determined that Jeffrey's conduct did not demonstrate stalking, but, rather, that the conduct was carried out for Jeffrey's "own juvenile amusement." *In re Interest of Jeffrey K.*, 14 Neb. App. 818, 825, 717 N.W.2d 499, 506 (2006). The Court of Appeals reversed the decision of the juvenile court. One judge dissented and stated that the "fact that Jeffrey found his behavior amusing does not justify the conclusion that Jeffrey did not intend to intimidate the victim." *Id.* at 826, 717 N.W.2d at 506 (Carlson, Judge, dissenting).

The State petitioned for further review from the Court of Appeals' decision. We granted the petition.

ASSIGNMENT OF ERROR

The State claims that the Court of Appeals erroneously determined that there was insufficient evidence to support a finding that Jeffrey violated § 28-311.03 and, therefore, erred in reversing the order of adjudication.

STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the lower courts' findings. See *In re Interest of Brandon M.*, ante p. 47, 727 N.W.2d 230 (2007).

ANALYSIS

On further review, the State claims that the Court of Appeals erroneously determined that there was insufficient evidence to support a finding that Jeffrey had violated § 28-311.03 and, therefore, erred in reversing the order of adjudication entered by the juvenile court. We find merit in the State's argument. As explained below, we determine that the Court of Appeals erred in its construction of Nebraska's stalking statutes and in its corresponding assessment of the significance of the record. We further determine that given the record, which we review de novo, there was sufficient evidence to support a finding that Jeffrey had violated the stalking statute, § 28-311.03, and that therefore, the juvenile court did not err in adjudicating Jeffrey as a child within

the meaning of § 43-247(1). Accordingly, we reverse the decision of the Court of Appeals and remand the cause with directions to affirm the decision of the juvenile court, which adjudicated Jeffrey as a child under § 43-247(1).

[2] When an adjudication is based upon § 43-247(1), the allegations must be proved beyond a reasonable doubt. § 43-279(2). *In re Interest of Kyle O.*, 14 Neb. App. 61, 703 N.W.2d 909 (2005). The State sought to adjudicate Jeffrey on the basis that Jeffrey had committed the misdemeanor offense of stalking as defined in § 28-311.03. Section 28-311.03 provides: “Any person who willfully harasses another person with the intent to injure, terrify, threaten, or intimidate commits the offense of stalking.” Section 28-311.02(2)(a) defines “harass” as “engag[ing] in a knowing and willful course of conduct directed at a specific person which seriously terrifies, threatens, or intimidates the person and which serves no legitimate purpose.”

[3,4] We have not previously construed the provisions of the stalking statutes. In considering these provisions, we apply familiar principles. When interpreting statutes, statutory language is to be given its plain and ordinary meaning. *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006). Although penal statutes are strictly construed, they are given a sensible construction in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served. See *State v. Rabourn*, 269 Neb. 499, 693 N.W.2d 291 (2005).

The Legislature has stated its intent with respect to the stalking statutes as follows:

(1) It is the intent of the Legislature to enact laws dealing with stalking offenses which will protect victims from being willfully harassed, intentionally terrified, threatened, or intimidated by individuals who intentionally follow, detain, stalk, or harass them or impose any restraint on their personal liberty and which will not prohibit constitutionally protected activities.

§ 28-311.02(1).

[5] Initially, we note that Nebraska’s stalking statutes focus both on the behavior of the perpetrator, see §§ 28-311.02(2)(a) and 28-311.03, and on the experience of the victim, see

§ 28-311.02(2)(a). With respect to the perpetrator's conduct, § 28-311.03 provides that the acts complained of must be done "willfully." Moreover, § 28-311.02(2)(a) defines "harass" as the perpetrator's "engag[ing] in a knowing and willful course of conduct directed at a specific person." There is no real dispute on appeal that Jeffrey's actions were intentional, and we therefore determine on appeal that the record supports the determination that Jeffrey acted "willfully" and that his conduct was directed at a specific person as required under the statutes.

[6] In addition to requiring that the perpetrator's actions be intentional, § 28-311.03 requires that the perpetrator intend to either "injure, terrify, threaten, or intimidate" the victim. In reversing the juvenile court's adjudication order in this case, the Court of Appeals determined that there was "no evidence in the record which would support a finding that Jeffrey intended to injure, terrify, or threaten the victim." *In re Interest of Jeffrey K.*, 14 Neb. App. 818, 825, 717 N.W.2d 499, 505 (2006). We do not agree. Contrary to the observation of the Court of Appeals, the cumulative effect of Jeffrey's words and actions, and the extensive, ongoing, and escalating nature of his conduct described above clearly show that Jeffrey intended to intimidate the victim in this case. Further, although a perpetrator's state of mind is a question of fact, such fact may be proved by circumstantial evidence. See *State v. White*, 272 Neb. 421, 722 N.W.2d 343 (2006). Given the evidence, which we have reviewed de novo, we determine that the State did adduce sufficient evidence from which the juvenile court could properly find beyond a reasonable doubt that Jeffrey intended to intimidate the victim.

As noted, the stalking statutes focus on both the perpetrator's conduct, which we have discussed above, as well as the victim's experience in response to the perpetrator's conduct. In order to constitute stalking, § 28-311.02(2)(a) requires that the perpetrator's conduct be such that it "seriously terrifies, threatens, or intimidates" the person at whom it is directed. In examining this statutory requirement, the Court of Appeals assumed this provision was a subjective standard, and because the victim testified at one point that Jeffrey's tone of voice was "mean but not really — like, a threatening voice," the Court of Appeals concluded that the evidence was insufficient to support a finding that Jeffrey

had committed a violation of § 28-311.03. As explained below, the Court of Appeals erred when it construed § 28-311.02(2)(a) as a subjective rather than objective requirement, and because a reasonable person confronted by Jeffrey's conduct would feel intimidated, we conclude that there is evidence beyond a reasonable doubt that Jeffrey's conduct satisfied the requirements of Nebraska's stalking statutes, as the juvenile court found. The conclusion of the Court of Appeals to the contrary was in error.

[7] In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *State v. Rieger*, 270 Neb. 904, 708 N.W.2d 630 (2006). It is apparent from the announced intent of the statute, to "protect victims from being willfully harassed, intentionally terrified, threatened, or intimidated," § 28-311.02(1), that the Legislature was not concerned with the subjective response of a victim but was instead concerned with intentional conduct by which a reasonable person would be harmed. Giving the entire statute a sensible construction, we conclude that the Legislature intended to "protect victims" and that to achieve this purpose, the language "seriously terrifies, threatens, or intimidates" ought to be applied objectively and that the evidence should therefore be assessed on the basis of what a reasonable person under the circumstances would experience.

[8] In determining that Nebraska's stalking statutes must be construed objectively when considering the experience of the victim, we are aware that the language of the stalking statutes in other states differs from that of Nebraska and that some states apply a subjective standard, such that under these statutes, it must be shown that the victim was actually placed in fear by the perpetrator's actions. See 2 Wayne R. LaFave, *Substantive Criminal Law* § 16.4(d) and n.110 (2d ed. 2003). Nevertheless, given the language of Nebraska's stalking statutes and the purpose announced by the Legislature for enacting the statutes, we conclude that an objective construction is appropriate and that the victim's experience resulting from the perpetrator's conduct should be assessed on an objective basis. Compare *U.S. v. Smith*, 973 F.2d 603, 604 (8th Cir. 1992) (stating, in appeal involving crime of bank robbery, that "[i]ntimidation is conduct 'reasonably

calculated to put another in fear,’” and “[u]nder this test ‘the subjective courageousness or timidity of the victim is irrelevant; the acts of the defendant must constitute an intimidation to an ordinary, reasonable person,’” quoting *U.S. v. Higdon*, 832 F.2d 312 (5th Cir. 1987)).

Viewing Jeffrey’s actions by an objective standard, it is readily apparent that a reasonable person would be seriously intimidated by Jeffrey’s conduct. As previously noted, the record reflects that from the period of September through November 4, 2004, Jeffrey yelled at his victim close to 200 times, in front of her friends and other students at school. Moreover, he threw food at her and shoved a chair directly in the victim’s path, causing the chair to hit her. A reasonable person could be expected to alter his or her course to avoid such intimidation. We are required to review the record de novo, see *In re Interest of Brandon M.*, ante p. 47, 727 N.W.2d 230 (2007), and based upon our review, we determine that the record contains evidence beyond a reasonable doubt demonstrating that a reasonable person would be “seriously . . . intimidated” by Jeffrey’s ongoing verbal and physical attacks as required under § 28-311.02(2)(a).

The juvenile court correctly found the allegations of stalking in the petition to be true beyond a reasonable doubt and adjudicated Jeffrey a child as defined by § 43-247(1). The Court of Appeals erred in reversing the adjudication. Accordingly, we reverse the decision of the Court of Appeals and remand the cause with directions to affirm the decision of the juvenile court.

CONCLUSION

Based upon our de novo review of the record, we determine that Jeffrey’s conduct in this case violated Nebraska’s stalking statute, § 28-311.03, and that the juvenile court did not err in adjudicating Jeffrey as a child within the meaning of § 43-247(1). The reversal by the Court of Appeals of the adjudication was error. We reverse the decision of the Court of Appeals and remand the cause with directions to affirm the decision of the juvenile court adjudicating Jeffrey as a juvenile as defined by § 43-247(1).

REVERSED AND REMANDED WITH DIRECTIONS.

Jon Bruning, Attorney General, and Fredrick F. Neid for appellants.

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

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

CONNOLLY, J.

In *Halpin v. Nebraska State Patrolmen's Retirement System*,¹ we determined that Nebraska State Patrol officers employed before January 4, 1979, are entitled to receive payments for unused sick leave accumulated during their last 3 years of employment included in their retirement annuities. When we decided *Halpin*, State Patrol officers received 240 hours of sick leave per year under Nebraska statute. Later, a labor agreement reduced the sick leave hours from 240 to 108. The officers sued the appellants, alleging that the appellants could not change sick leave hours included in the officers' retirement calculation.

This case requires us to decide two questions: (1) whether reducing the amount of sick leave implicates a retirement program, which cannot be bargained under Neb. Rev. Stat. § 81-1377(2) (Reissue 1999), and (2) whether by reducing sick leave hours, the appellants unconstitutionally impaired the officers' contract rights in their retirement benefits. The district court found that by reducing sick leave included in officers' retirement annuities, the State bargained a retirement program, which is prohibited under § 81-1377(2). We reverse, because the number of sick leave hours included in the calculation is not a retirement program and the State did not impair the officers' contractual rights.

I. BACKGROUND

The appellees are retired law enforcement officers of the Nebraska State Patrol (hereinafter the Officers) who were employed on or before January 4, 1979, and retired on or after July 1, 1993. When the Nebraska State Patrol hired the Officers, it provided them with information about the benefits they would

¹ *Halpin v. Nebraska State Patrolmen's Retirement System*, 211 Neb. 892, 898, 320 N.W.2d 910, 914 (1982).

receive upon retirement. The Officers received a schedule of paid sick leave which provided that beginning in the 19th year of employment, they would earn 240 hours, or 30 days, of sick leave each year—the same sick leave schedule as provided by Nebraska statute.² Nebraska State Patrol representatives told the Officers that upon retirement, they would receive a lump-sum payment for one-fourth of their unused sick leave balance for the last 3 years of their employment. In addition, the lump sum would be included in calculating their retirement annuity. With 240 sick leave hours per year, an officer could potentially accumulate 720 unused sick leave hours in his or her final 3 years of employment. One-fourth of 720 hours (180 hours) would then be multiplied by the officer's rate of pay to calculate his or her retirement annuity.

In 1987, the Legislature passed the State Employees Collective Bargaining Act.³ The act allows state employees in designated bargaining units to collectively bargain with the state. The act established as one of the bargaining units the Law Enforcement Bargaining Unit. That unit represents, among others, officers of the Nebraska State Patrol.⁴ Bargaining must take place over mandatory topics, except when specifically prohibited by law.⁵ The act prohibits the State and bargaining units from bargaining over retirement programs.⁶

In 1993, the Law Enforcement Bargaining Unit entered into a contract with the State of Nebraska that changed the sick leave provision. The contract provided that all employees would receive a flat 108 sick leave hours per year, instead of a graduated scale peaking at 240 hours per year in the 19th year of employment. Consequently, the Officers now earn only 324 hours of sick leave in their last 3 years of employment. The Nebraska State Patrol Retirement System uses 324 hours in calculating the Officers' retirement annuities. Under the new contract, then, officers can have, at most, 81 sick leave hours (one-fourth of 324 hours)

² See Neb. Rev. Stat. § 81-1320 (Reissue 1999).

³ Neb. Rev. Stat. §§ 81-1369 to 81-1390 (Reissue 1999).

⁴ § 81-1373(1)(g).

⁵ § 81-1371(9).

⁶ § 81-1377(2).

included for purposes of calculating their annuities compared to 180 hours under the previous sick leave provision.

The Officers sued the Nebraska State Patrol Retirement System, the Public Employees Retirement Board, the State of Nebraska, and Anna Sullivan, director of the Public Employees Retirement Board, in her official capacity (hereinafter collectively the Appellants). The Officers sought a declaration that their retirement annuities had been miscalculated. The district court determined that 240 sick leave hours per year included in the annuity, as first represented to the Officers, is an integral part of their retirement program. Therefore, the court found that the State and the Law Enforcement Bargaining Council violated § 81-1377(2) by bargaining a retirement program. The court entered a declaratory judgment against the Appellants, ordering the retirement benefits to be recalculated on 240 sick leave hours per year instead of 108 hours under the contract.

II. ASSIGNMENTS OF ERROR

The Appellants assign that the district court erred in (1) ruling that Neb. Rev. Stat. § 25-21,206 (Reissue 1995) authorizes the jurisdiction of the court over a declaratory action against the Appellants instituted directly in the district court, (2) finding the requirements of the Administrative Procedure Act inapplicable, (3) concluding that a representative suit may be brought in district court against the Appellants, (4) ruling that the Officers are not bound by the provisions of the State Law Enforcement Bargaining Council contracts limiting officers' accumulation of sick leave to 324 hours in the last 3 years of employment, and (5) granting affirmative relief against the Appellants.

On cross-appeal, the Officers assign that the district court erred in (1) limiting the class to members retiring after May 9, 2000, and (2) failing to award attorney fees under the common fund doctrine.

III. STANDARD OF REVIEW

[1] The question of jurisdiction is a question of law, which we resolve independently of the trial court.⁷

⁷ See *Metropolitan Util. Dist. v. Aquila, Inc.*, 271 Neb. 454, 712 N.W.2d 280 (2006).

[2] Statutory interpretation is a question of law, which we resolve independently of the trial court.⁸

IV. ANALYSIS

1. THE STATE WAIVED SOVEREIGN IMMUNITY; THE DISTRICT COURT HAD JURISDICTION

(a) Presuit Filing Procedure

The Appellants argue that the district court did not have jurisdiction. The court, however, found that it had jurisdiction under § 25-21,206, which waives immunity in this dispute.

[3-5] Under the Nebraska Constitution, “[t]he state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought.”⁹ This provision permits the State to lay its sovereignty aside and consent to be sued on such terms and conditions as the Legislature may prescribe.¹⁰ It is not self-executing, however, but instead requires legislative action for waiver of the State’s sovereign immunity.¹¹ Waiver of sovereign immunity will be found only where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.¹²

Under § 25-21,206, “[t]he state may be sued in the district court of the county wherein the capital is situated in any matter founded upon or growing out of a contract, express or implied, originally authorized or subsequently ratified by the Legislature, or founded upon any law of the state.” The Appellants concede that this is a contractual dispute and that § 25-21,206 waives immunity. But they contend that jurisdiction is lacking even though immunity is waived under § 25-21,206. They argue that

⁸ See *Young v. Midwest Fam. Mut. Ins. Co.*, 272 Neb. 385, 722 N.W.2d 13 (2006).

⁹ Neb. Const. art. V, § 22.

¹⁰ *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994).

¹¹ See *Riley v. State*, 244 Neb. 250, 506 N.W.2d 45 (1993).

¹² *Id.* Accord, *Johnson v. State*, 270 Neb. 316, 700 N.W.2d 620 (2005); *Concerned Citizens v. Department of Environ. Contr.*, 244 Neb. 152, 505 N.W.2d 654 (1993).

our case law requires that the Officers present their contract claims to legislatively designated state agencies or offices before judicial review.

*(i) The Officers Were Not Required to Present
Their Claims to the Board*

The Appellants argue that this lawsuit could not originate in district court but that instead, the Officers were required to initially present their claims to the Public Employees Retirement Board (hereinafter the Board). The claims would then be subject to judicial review under the Administrative Procedure Act.¹³ The Appellants refer us to Neb. Rev. Stat. § 84-1503 (Supp. 2001), which establishes the duties of the Board. Section 84-1503(2) provides:

[I]t shall be the duty of the board:

. . . .

(g) To adopt and promulgate rules and regulations to carry out the provisions of each retirement system

. . . .

(i) To adopt and promulgate rules and regulations for the adjustment of contributions or benefits, which shall include, but not be limited to: (i) The procedures for refunding contributions, adjusting future contributions or benefit payments, and requiring additional contributions or repayment of benefits; (ii) the process for a member, member's beneficiary, employee, or employer to dispute an adjustment to contributions or benefits; and (iii) notice provided to all affected persons.

Under this section, the Board has adopted regulations regarding the initiation of and procedure for contested cases before the Board. The Appellants emphasize that the regulations and the Administrative Procedure Act allow for judicial review of Board decisions.¹⁴ But neither § 84-1503 nor the regulations cited by the Appellants *mandate* that an aggrieved party present his or her claim to the Board before suing in court. We conclude that

¹³ Neb. Rev. Stat. §§ 84-901 to 84-917 (Reissue 1999).

¹⁴ See 303 Neb. Admin. Code, ch. 18, § 010.01, and ch. 12, §§ 008.01 to 008.03 (2001).

the Officers were not obligated to first present their claims to the Board.

(ii) *The Presuit Procedure Under § 81-1170.01
Does Not Apply to the Officers' Claims*

The Appellants also contend that the Officers' claims presented a request on the treasury subject to the requirements of Neb. Rev. Stat. § 81-1170.01 (Reissue 1999). That section provides in part, "All requests of whatever nature upon the treasury of this state, before any warrant is drawn for the payment of the same, shall be examined, adjusted, and approved by the Department of Administrative Services." This section would require that the Officers present their claims to the Department of Administrative Services (DAS) before suing in the district court. The Officers, however, argue that § 81-1170.01 is inapplicable to requests for retirement benefits under the statutory scheme of the Nebraska State Patrol Retirement Act.¹⁵ We agree.

It is true that our case law has long indicated that a claimant bringing suit under § 25-21,206 must comply with the procedure under § 81-1170.01 before an action can be pursued in court. This court first examined the relationship between the antecedents to §§ 81-1170.01 and 25-21,206 in *The State v. Stout*.¹⁶ In *Stout*, a case involving a dispute over a construction contract between the plaintiff and the State, we held:

[T]he right to bring an original action against the state is denied, and . . . the only mode of procedure by which the court can acquire jurisdiction is by an appeal from the decision of the auditor and secretary of state [now the Department of Administrative Services], whose joint action is now required in the approval of claims.¹⁷

We have consistently upheld this holding for over 100 years.¹⁸

¹⁵ Neb. Rev. Stat. §§ 81-2014 to 81-2040 (Reissue 1999 & Supp. 2001).

¹⁶ *The State v. Stout*, 7 Neb. 89 (1878).

¹⁷ *Id.* at 106.

¹⁸ See, *J.L. Healy Constr. Co. v. State*, 236 Neb. 759, 463 N.W.2d 813 (1990); *VisionQuest, Inc. v. State*, 222 Neb. 228, 383 N.W.2d 22 (1986); *Scotts Bluff County v. State*, 133 Neb. 508, 276 N.W. 185 (1937); *Pickus v. State*, 115 Neb. 869, 215 N.W. 129 (1927).

The Officers, however, argue that this presuit filing requirement does not apply in disputes over retirement benefits between the State and its employees. They point out that the *Stout* line of cases all involved contracts with outside parties, making them distinguishable from the present case. Instead, the Officers argue that in retirement benefit controversies, § 25-21,206 provides a waiver of immunity without this presuit filing requirement. In support of this argument, they point to *Halpin v. Nebraska State Patrolmen's Retirement System*,¹⁹ *Omer v. Tagg*,²⁰ and *Hoiengs v. County of Adams*.²¹ Those actions started in district court. *Halpin* and *Omer*, however, do not provide guidance. Although both cases involved retirement benefits disputes, *Halpin* did not discuss sovereign immunity.²² And *Omer* held that § 25-21,206 waived immunity, but did not address whether § 81-1170.01 required presuit procedures.²³

But in *Hoiengs*,²⁴ we did note the possibility that presuit procedures under § 81-1170.01 might apply. There, the plaintiffs had filed a class action suit against the Retirement System for Nebraska Counties under the County Employees Retirement Act, alleging that they were not receiving the appropriate contribution to their retirement accounts from the employer counties. We noted that under § 81-1170.01, presentation of a claim to the DAS was a “mandatory step” in contract actions.²⁵ However, in *Hoiengs*, we determined that state claims procedure did not apply because the plaintiffs sought contributions from the county, which would not be a direct claim on the State Treasury.²⁶ And “[f]or that

¹⁹ *Halpin v. Nebraska State Patrolmen's Retirement System*, *supra* note 1.

²⁰ *Omer v. Tagg*, 235 Neb. 527, 455 N.W.2d 815 (1990), *disapproved on other grounds*, *Livingston v. Metropolitan Util. Dist.*, 269 Neb. 301, 692 N.W.2d 475 (2005).

²¹ *Hoiengs v. County of Adams*, *supra* note 10.

²² See *Halpin v. Nebraska State Patrolmen's Retirement System*, *supra* note 1.

²³ See *Omer v. Tagg*, *supra* note 20.

²⁴ *Hoiengs v. County of Adams*, *supra* note 10.

²⁵ *Id.* at 891, 516 N.W.2d at 235, citing *J.L. Healy Constr. Co. v. State*, *supra* note 18.

²⁶ *Id.*

reason alone,” the claims procedure under § 81-1170.01 was not implicated in *Hoiengs*.²⁷

The Appellants attempt to distinguish *Hoiengs*, arguing that this case implicates § 81-1170.01 because the Officers’ claims are against the State. That conclusion, however, assumes that the only reason § 81-1170.01 did not apply in *Hoiengs* was because the case involved a county. We now recognize that the procedure at issue is also inapplicable for a different reason—§ 81-1170.01 does not apply to retirement disputes under our statutory scheme.

Our conclusion rests on the statutory provisions that govern the disbursement of money from the Nebraska State Patrol Retirement Fund, the fund from which the Officers’ retirement benefits are paid.²⁸ The Nebraska State Patrol Retirement Act provides: “The State Treasurer shall be the custodian of the funds and securities of the retirement system The State Treasurer shall disburse money from [the Nebraska State Patrol Retirement Fund] only on warrants issued by the Director of the [DAS] upon vouchers signed by a person authorized by the [Board].”²⁹ Under this statute, the DAS cannot grant the Officers’ request because it is not authorized to do so. Under § 81-2020, the Board must authorize disbursements from the Nebraska State Patrol Retirement Fund, so it would be futile for the Officers to present their claims to the DAS. Instead, this statute suggests that the Board, not the retirees, makes the request contemplated by § 81-1170.01 when retirement funds are involved.

[6,7] If the Officers were to present their claims to the DAS, the claims would be disallowed because the DAS has no authority to allow them without the Board’s approval. It would be illogical to require such a superfluous step. If possible, we will try to avoid a statutory construction which would lead to an absurd result.³⁰ Thus, we hold that the presuit filing requirement under

²⁷ *Id.* at 892, 516 N.W.2d at 236.

²⁸ See § 81-2018(1).

²⁹ § 81-2020 (emphasis supplied).

³⁰ *Curran v. Buser*, 271 Neb. 332, 711 N.W.2d 562 (2006).

§ 81-1170.01, as interpreted by *Stout*,³¹ is inapplicable in retirement benefits controversies. And, as discussed above, no other statute or regulation provides a mandatory presuit filing requirement applicable in this case. Therefore, the district court had jurisdiction.

(b) Class Action

[8] The Appellants argue that they are immune from class action suits. They rely on *Boersma v. Karnes*,³² in which this court held that “[i]n the absence of specific statutory authority waiving governmental immunity to permit representative suits, class actions cannot be maintained to recover taxes paid.” The Appellants contend that this rule—that there must be a specific waiver permitting class actions against the State—should apply here as well.

[9] *Boersma* involved a class action lawsuit brought by taxpayers seeking a refund of taxes they claim the State of Nebraska incorrectly collected.³³ The plaintiffs initially filed for a refund with the Nebraska Tax Commissioner as required under Nebraska statutes.³⁴ After the Tax Commissioner denied their claim, they sued under Neb. Rev. Stat. § 77-2798 (Reissue 2003). That statute provides, “[A]ny taxpayer who claims that the income tax he has paid under the Nebraska Revenue Act of 1967 is void in whole or in part, may bring an action, upon the grounds set forth in his claim for refund, against the Tax Commissioner.” In disallowing the class action, we recognized the established rule in this state that an action cannot be maintained by one taxpayer on behalf of himself or herself and others similarly situated to recover back taxes.³⁵ We further explained:

³¹ *The State v. Stout*, *supra* note 16.

³² *Boersma v. Karnes*, 227 Neb. 329, 332, 417 N.W.2d 341, 344 (1988).

³³ *Id.*

³⁴ See Neb. Rev. Stat. §§ 77-2793 and 77-2795 (Reissue 2003).

³⁵ *Boersma v. Karnes*, *supra* note 32. See, also, *Hansen v. County of Lincoln*, 188 Neb. 461, 197 N.W.2d 651 (1972); *State ex rel. Sampson v. Kenny*, 185 Neb. 230, 175 N.W.2d 5 (1970); *Monteith v. Alpha High School District*, 125 Neb. 665, 251 N.W. 661 (1933).

“It is clearly the policy of the Legislature in setting up a refund statute to require individual action. Taxes ordinarily paid under a mistake of law are not recoverable, and the refund statute gives special relief in this situation. . . .”

Neb. Rev. Stat. § 77-2793 (Reissue 1986) provides a procedure by which a taxpayer may obtain a refund of an overpayment of income taxes. This statutory procedure is exclusive and does not provide for class actions.³⁶

Other states have reached similar conclusions in tax cases because their statutes require that taxpayers bring refund claims individually using a specific procedure.³⁷ But in cases outside the tax refund context, courts have permitted class actions without an express waiver.³⁸

In *Oda v. State*,³⁹ the Washington Court of Appeals addressed whether the legislature had waived sovereign immunity in class actions against the state. There, the court recognized that class actions were not permitted in tax cases without express authorization.⁴⁰ The court contrasted the waiver provided in its tax refund statute with the waiver of immunity in tort actions, stating: “Neither [the statute waiving immunity in tort actions] nor any other statute dictates a specific format for a tort action against the State comparable to the limitations with which the Legislature has circumscribed the initiation of an excise tax refund appeal.”⁴¹ The court held that its waiver—which provided that the state was liable in tort actions to the same extent as private persons—was broad enough to permit class actions.⁴²

³⁶ *Boersma v. Karnes*, *supra* note 32, 227 Neb. at 331-32, 417 N.W.2d at 344, quoting *State ex rel. Sampson v. Kenny*, *supra* note 35.

³⁷ See, *Lick v. Dahl*, 285 N.W.2d 594 (S.D. 1979); *Charles v. Spradling*, 524 S.W.2d 820 (Mo. 1975).

³⁸ See, *Board of Regents, University System v. Rux*, 260 Ga. App. 760, 580 S.E.2d 559 (2003); *Oda v. State*, 111 Wash. App. 79, 44 P.3d 8 (2002).

³⁹ *Oda v. State*, *supra* note 38.

⁴⁰ *Id.*, citing *Lacey Nursing v. Dep't of Revenue*, 128 Wash. 2d 40, 905 P.2d 338 (1995).

⁴¹ *Oda v. State*, *supra* note 38, 111 Wash. App. at 85-86, 44 P.3d at 11.

⁴² *Id.*

Here, § 25-21,206 waives immunity over the Officers' claims, so we look to that statute to determine whether it also waives immunity in class actions. Section 25-21,206 waives the state's immunity in contract actions, providing:

The state may be sued in the district court of the county wherein the capital is situated in any matter founded upon or growing out of a contract [T]he rules of pleading and practice in regard to other civil actions in the district court shall be observed in all actions by or against the state, as far as applicable except as otherwise herein provided.

[10] While the waiver of sovereign immunity in § 25-21,206 does not specifically mention class actions, we conclude that it is broad enough to encompass class actions. Unlike the tax refund statutes,⁴³ § 25-21,206 does not limit the procedure for contract claims against the State so that only individual actions are permitted. We conclude that the holding in *Boersma*⁴⁴ is limited to tax refund cases. The district court did not err in permitting the Officers' lawsuit to proceed as a class action.

2. RETIREMENT COMPUTATION

The Officers assert two theories to support their argument that the Appellants improperly computed their retirement benefits: (1) the Appellants acted contrary to statute in entering the bargaining agreement reducing their sick leave and (2) the Appellants unconstitutionally impaired the Officers' contract rights.

(a) § 81-1377(2)

The Officers contend that the bargaining agreement entered on their behalf, which reduced the amount of sick leave they could earn each year, violates statutory authority. The State Employees Collective Bargaining Act permits bargaining between the State and bargaining units composed of state employees. Section 81-1371(9) provides that terms of employment may be bargained over "except when specifically prohibited by law from being a subject of bargaining." Section 81-1377(2) prohibits bargaining over retirement programs. The Officers argue that the amount of sick leave hours to which they are entitled is part of the retirement

⁴³ See Neb. Rev. Stat. §§ 77-2793 to 77-27,101 (Reissue 2003).

⁴⁴ *Boersma v. Karnes*, *supra* note 32.

program and is not bargainable under § 81-1377(2). The district court agreed with the Officers, finding that 240 hours of sick leave—as represented to the Officers when they were hired—is an integral part of the retirement program.

The Legislature has not defined the term “retirement program.” The Officers cite *Calabro v. City of Omaha*⁴⁵ in support of their contention that their retirement program includes a specific number of sick leave hours for calculating their annuities. In *Calabro*, we addressed whether a supplemental benefit plan that provided a cost-of-living increase to retirees’ pension payments constituted a constitutionally protected pension or a gratuity. We held that the supplemental plan was a pension because it was “directly related to the pension plan . . . since in order to receive the supplemental benefit, the employee had to qualify for the . . . plan.”⁴⁶ The Officers argue that the accrual of 240 hours of sick leave is “part and parcel” of the annuity calculation under their retirement program, as was the supplemental plan in *Calabro*.⁴⁷ The Officers also contend this demonstrates that “the Nebraska Supreme Court views ‘retirement benefits’ to encompass more than just pension annuities.”⁴⁸

Calabro is not helpful to the Officers’ case. In contrast to the supplemental benefit plan in *Calabro*, the sick leave provision is not directly related to the retirement program. The sick leave provisions have a purpose completely unrelated to the retirement plan. Sick leave permits employees to be absent from work for various reasons related to illness throughout the year.

[11] Although unused sick leave hours included in the retirement calculation do affect the annuity, the specific number of hours does not constitute a retirement program under § 81-1377(2). The number of hours is a variable used to calculate the annuity. Many factors similarly affect the amount of the annuity. Wages, for example, like sick leave hours, affect the retirement calculation. But common sense suggests that wages would not be considered as a retirement program, thus prohibiting bargaining over wages.

⁴⁵ *Calabro v. City of Omaha*, 247 Neb. 955, 531 N.W.2d 541 (1995).

⁴⁶ *Id.* at 963, 531 N.W.2d at 548.

⁴⁷ See *id.* at 964, 531 N.W.2d at 549.

⁴⁸ Brief for appellees at 11.

The specific number of sick leave hours is no more a part of the Officers' retirement program than their salaries.

Further, the Nebraska State Patrol Retirement Act does not make 240 hours a part of the Officers' retirement program. Instead, § 81-2026(1)(c) simply requires that unused sick leave be included, without specifying at what rate. The Nebraska State Patrol informed the Officers that they would receive 240 hours of sick leave per year and that their retirement calculations would include unused sick leave. But the record shows that these representations were independent and did not cause 240 hours of sick leave to become an integral part of the retirement program. We conclude that the Appellants did not bargain the Officers' retirement program by reducing the sick leave the Officers could receive.

(b) Contract Rights

The Officers contend that they have a contractual right to have up to 240 hours of sick leave included in their annuity calculation. The district court did not reach this issue because it resolved the Officers' claims under § 81-1377(2). But the Officers did raise the argument, and we address it on appeal. They argue that by reducing the unused sick leave included in their retirement calculation, the Appellants impaired their contract rights. The Appellants, however, contend that the Officers agreed to the change through the labor agreement entered into on their behalf.

[12] An employee who relies upon an offer of deferred benefits to his or her detriment, and to the benefit of the employer who gains the employee's valuable services and loyalty as a consequence thereof, has expectations protected by contract law.⁴⁹ In *Halpin v. Nebraska State Patrolmen's Retirement System*,⁵⁰ we determined that officers employed by the Nebraska State Patrol on or before January 4, 1979, have a contractual right to the inclusion of unused sick leave in their retirement calculations. Until January 4, Nebraska State Patrol representatives informed officers that their final monthly salary would be calculated by including unused leave payments. But thereafter, the retirement

⁴⁹ *Halpin v. Nebraska State Patrolmen's Retirement System*, *supra* note 1.

⁵⁰ *Id.*

system stopped including these payments.⁵¹ We noted that this was done “without an offsetting increase in benefits.”⁵² We held that the practice of including the leave payments “gave rise to legitimate expectations on the part of the plaintiffs and the plaintiffs [had] a vested right to have this practice continued as to them.”⁵³

Similarly, in *Omer v. Tagg*,⁵⁴ when the plaintiff was hired, he was promised that upon retirement, he could continue participating in the state’s group health insurance coverage. The Legislature later passed a statute which made the plaintiff ineligible for the group insurance program upon retirement. This court upheld the rule in *Halpin* and concluded that “the promises made at the time of employment were for compensation to be enjoyed at retirement and constituted a contract enforceable against the State.”⁵⁵

The Officers here likewise contend that they have a legitimate expectation in having 240 hours of sick leave, rather than 108 hours, included in the retirement calculation. Upon hiring, Nebraska State Patrol representatives informed the Officers that they would receive 240 hours of sick leave per year and that one-fourth of the unused sick leave they accumulated during their last 3 years of employment would be included in computing their retirement annuity. The Officers relied on these representations when accepting employment. The Officers believed that 240 hours of sick leave per year was the amount their retirement benefits would be based on.

Here, the Officers did have contractual rights to 240 hours of sick leave per year when they began their employment with the Nebraska State Patrol, as represented when they were hired. But, there is a critical distinction from *Halpin* and *Omer*. In those cases, the State unilaterally took away benefits it had promised to the plaintiffs. The reduction was part of a bargaining agreement. The provision for 108 hours of sick leave became part

⁵¹ *Id.*

⁵² *Id.* at 899, 320 N.W.2d at 914.

⁵³ *Id.* at 901, 320 N.W.2d at 915.

⁵⁴ *Omer v. Tagg*, *supra* note 20.

⁵⁵ *Id.* at 530, 455 N.W.2d at 817.

of a contract, bargained for on behalf of the Officers by the Law Enforcement Bargaining Council.

[13] Not every change in a contract constitutes an impairment under the Nebraska Constitution. The change must take something away and not work to the parties' benefit. Absent such a showing, no proof of any impairment exists.⁵⁶ The change to sick leave occurred in a bargained-for contract, agreed upon after negotiations took place—not a unilateral decision of the State or its agency. The contract entered on behalf of the Officers was valid and binding on them. We conclude that the Appellants did not unconstitutionally impair the Officers' contract.

V. CONCLUSION

The district court had jurisdiction to hear the Officers' claims. Section 25-21,206 permitted the Officers to file suit in this retirement benefits dispute in the district court without presuit filing requirements. And the Officers properly presented their lawsuit as a class action against the State.

But the district court erred in finding that 240 hours of unused sick leave was part of the Officers' retirement program. Further, the Appellants did not impair the Officers' contract when they changed the sick leave provision in the 1993 bargaining agreement. Accordingly, we reverse the decision of the district court ordering the Appellants to recalculate the Officers' retirement annuities. Because we reverse, we do not need to consider the Officers' arguments on cross-appeal.

REVERSED.

HEAVICAN, C.J., not participating.

⁵⁶ See *Bauers v. City of Lincoln*, 255 Neb. 572, 586 N.W.2d 452 (1998).

FARMLAND FOODS, INC., AND THE MEMBERS OF THE UNITARY GROUP,
APPELLANTS, V. STATE OF NEBRASKA ET AL., APPELLEES.

729 N.W.2d 73

Filed March 23, 2007. No. S-05-1148.

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

BACKGROUND

On May 24, 2000, Farmland submitted an application to the Department seeking incentives under L.B. 775 for the planned expansion of Farmland's production facility in Crete, Nebraska. The application stated that Farmland would invest at least \$10 million in qualified personal property as described by L.B. 775 and would be hiring at least 100 full-time equivalent employees. The Commissioner approved the application and, on behalf of the State of Nebraska, entered into an "Employment and Investment Growth Act Project Agreement" with Farmland (the Agreement). The Agreement provided that if Farmland met the required levels of employment and investment by the time specified, Farmland would be entitled to various incentives.

The description of the incentives in the Agreement generally mirrored the language of L.B. 775. But with regard to incentive credits used to obtain a refund of sales and use taxes on purchases and leases for use at the project that are not otherwise directly refundable under L.B. 775, the Agreement, in paragraph 5(b), added that "[t]he purchase or lease must have been made after the start of the taxable year following the year in which the required minimum levels of employment and investment were first met"

The Commissioner, on behalf of the Department, acknowledged that Farmland had met all the required targets for the project in the tax year ending August 31, 2001. On May 4, 2004, Farmland filed a claim for a "credit refund" of taxes paid between September 1, 2000, and October 31, 2003.

In a letter dated January 28, 2005, the Commissioner approved \$1,033,378.90 of the request, but denied the remainder. The Commissioner denied \$327,082.99 in taxes paid prior to April 1, 2001, on the basis that the refund was barred by the statute of limitations from the general tax code.² The Commissioner then determined that sums paid in taxes from April 1 to September 1, 2001, a total of \$211,489.32, were "not eligible for a credit refund under the project applied for." After quoting paragraph 5(b) of the Agreement, the Commissioner stated, "The use of credits for a project which qualifies as of the tax year ending August 31, 2001

² Neb. Rev. Stat. § 77-2708 (Reissue 1996).

is limited to sales and use tax paid on purchases made on or after September 1, 2001.”

Farmland appealed the Commissioner’s partial denial of its requested credit refund to the district court in accordance with the Administrative Procedure Act (APA). On appeal, the Department admitted that the Commissioner failed to apply a more specific limitations period for refund claims under L.B. 775³ and thus was incorrect in determining that any portion of the requested refund was time barred. However, the Department asserted that the decision should nonetheless be affirmed because the reason stated by the Commissioner for denying the \$211,489.32 amount applied equally to the \$327,082.99 amount. Both amounts reflected expenditures made before the start of the taxable year following the year in which the required minimum levels of employment and investment were first met.

The district court affirmed the Commissioner’s decision, concluding that L.B. 775 did not authorize carrying back of credits to periods before the credits were earned and established. Although the Commissioner was incorrect on the statute of limitations issue, the court explained that a proper result would not be reversed merely because it was reached for the wrong reason. Moreover, the court explained, “[t]he plaintiffs should not have been surprised or unaware of the secondary rationale applied to the denial of the \$327,032.99, as the same reasoning was used for the initial denial of \$211,489.32.” Farmland appealed the district court’s decision to the Nebraska Court of Appeals, and we moved the case to our docket on our own motion.⁴

ASSIGNMENTS OF ERROR

Farmland asserts that the district court erred in (1) affirming the decision of the Commissioner to partially deny Farmland’s refund claim, (2) affirming the decision of the Commissioner for a reason different than the reason articulated by the Commissioner, and (3) finding that L.B. 775 credits may not be used to obtain a refund of sales and use tax paid on purchases made before minimum investments levels were first met by the taxpayer.

³ See § 77-4106(d).

⁴ See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

STANDARD OF REVIEW

[1,2] A judgment or final order rendered by a district court in a judicial review pursuant to the APA may be reversed, vacated, or modified by an appellate court for errors appearing on the record.⁵ When reviewing an order of a district court under the APA for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.⁶

ANALYSIS

One of the incentives under L.B. 775 is credits, computed in accordance with § 77-4105(4), which can be used “to obtain a refund of sales and use taxes . . . which are not otherwise refundable that are paid on purchases, including rentals, for use at the project.”⁷ It is clear that under both L.B. 775 and the Agreement, credits are earned only during years that the required levels are met and that no refund claims may be filed until after meeting the required levels.⁸ The issue in this case concerns what the credits may be used for once they are earned and are redeemable. The Department argues that the credits can be used only to obtain a refund of project-related purchases that were made after the required levels were met. Farmland, in contrast, argues that the credits may be redeemed for project-related purchases made both before and after reaching required levels.

Farmland admits that the Agreement it signed with the Commissioner unambiguously stated that credits were only to be used for refunds of project-related purchases made after the required levels were met. Specifically, the Agreement stated that the purchase or lease “must have been made after the start of the taxable year following the year in which the required minimum levels of employment and investment were first met.”

Farmland argues, however, that this limitation in the Agreement is contrary to Farmland’s rights under the plain language of L.B.

⁵ *Tyson Fresh Meats v. State*, 270 Neb. 535, 704 N.W.2d 788 (2005).

⁶ *Id.*

⁷ § 77-4106(1)(a).

⁸ See §§ 77-4105(4) and 77-4106(2)(a).

775. Farmland points out that the Agreement explicitly states that L.B. 775 controls over the language of the Agreement as follows:

The parties intend that Farmland shall be entitled to all the incentives for which Farmland qualifies as set forth in the [Employment and Investment Growth] Act. To the extent that the language contained in this Agreement is incomplete or inconsistent with the Act, the language of the Act shall control and is hereby incorporated herein by this reference.

Also, § 77-4104(4) states that the Commissioner “shall . . . agree to allow the taxpayer to use the incentives contained in the Employment and Investment Growth Act.”

Farmland’s argument that the plain language of L.B. 775 provides for credit refunds of both pre- and post-required-level purchases rests entirely on the fact that § 77-4106(1)(a) places no stated limitation on the purchases to be refunded other than that they not otherwise be refundable and that they be “for use at the project.” Thus, Farmland argues:

There is no time limitation or restriction in the statute. Its plain language permits use of the credits to obtain a refund of sales and use taxes paid on purchases “for use at the project,” whether those purchases were made before or after the year in which minimum investment levels were first attained.⁹

Farmland is incorrect in stating that there is no time limitation or restriction in the statute. Section 77-4106(1)(c) states, “The credit may be carried over until fully utilized, except that such credit may not be carried over more than eight years after the end of the entitlement period.” It would be incongruous to read the phrase in § 77-4106(1)(a), “for use at the project,” as a positive expression that there is no limitation on when the purchases for use at the project were made, when another subsection of the same statutory provision explicitly discusses time limitations. Instead, it is clear that subsection (1)(a) sets forth the type of purchases which can be refunded, while subsection (1)(c) sets forth the period of time for which such purchases can be refunded. And subsection (1)(c) does not provide for the carrying back of

⁹ Brief for appellants at 19.

credits to obtain a refund of purchases made prior to obtaining required levels.

The most that can be said is that L.B. 775 is silent on the subject of whether credits can be used for refunds of purchases made prior to reaching required levels. Nothing in the language of L.B. 775 contradicts the provision in the Agreement between Farmland and the Department that the credit refund is limited to purchases “made after the start of the taxable year following the year in which the required minimum levels of employment and investment were first met.” Accordingly, we find no merit to Farmland’s first and third assignments of error.

Farmland next argues that even if we find that L.B. 775 does not contradict the language in the Agreement regarding credit refunds, we can affirm only the Commissioner’s denial of \$211,489.32 in credit refunds. Farmland asserts that we must reverse the Commissioner’s denial of the \$327,082.99 amount despite the fact that it also represents purchases made prior to reaching the required levels. To affirm the denial of \$327,082.99, according to Farmland, would violate the “cardinal principle of administrative law” that “[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based, and no others.”¹⁰ The Commissioner articulated only the statute of limitations as a reason for denying the \$327,082.99, and there is no dispute that the statute of limitations does not bar the refund.

We believe Farmland misconstrues the “cardinal principle” it invokes. The principle, as Farmland acknowledges, derives from *Securities Comm’n v. Chenery Corp.*¹¹ In *Chenery Corp.*, the U.S. Supreme Court reviewed an order by the Securities and Exchange Commission approving a reorganization plan which prevented certain officers and directors who had acquired preferred stock from participating on equal footing with other stockholders. The commission had reasoned that judge-made rules of equity mandated its decision, but the U.S. Supreme Court found that

¹⁰ *Id.* at 14.

¹¹ *Securities Comm’n v. Chenery Corp.*, 318 U.S. 80, 63 S. Ct. 454, 87 L. Ed. 626 (1943).

the judicial precedents upon which the commission relied were inapplicable. The Court then rejected the idea that it should affirm nonetheless because the commission could have approved the plan under its statutory authority to determine whether the proposal was fair and equitable or detrimental to the interests of the public, investors, or consumers. The Court explained that the commission's "action must be measured by what the Commission did, not by what it might have done."¹²

But this broad statement was immediately qualified: "It is not for us to determine independently what is 'detrimental to the public interest or the interest of investors or consumers' or 'fair or equitable' within the meaning of [the relevant act]."¹³ The Court likened the determinations of public interest and fairness which the Commission did not make to determinations of fact that only a jury could make, but which had not been made. In such circumstances, the appellate court cannot take the place of the agency just as it cannot take the place of the jury. The Court stated:

If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.¹⁴

The Court emphasized that as to issues other than those of policy or judgment by the agency, "[W]e do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason.'"¹⁵ The Court explained that "[i]t would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to

¹² *Id.*, 318 U.S. at 93-94.

¹³ *Id.*, 318 U.S. at 94.

¹⁴ *Id.*, 318 U.S. at 88.

¹⁵ *Id.*

formulate.”¹⁶ Subsequent decisions from other courts have held that an appellate body is without power to affirm on a different ground only when doing so would usurp the agency’s role as a finder of fact or as a maker of policy, or would otherwise intrude upon the domain entrusted to the administrative agency.¹⁷

We have not specifically addressed to what extent this court adopts the rule set forth in *Chenery Corp.* We have said that in the context of an appeal from an administrative agency decision under the APA, we will not consider an issue that was not presented to or passed upon by the agency.¹⁸ The Department urges that we affirm in accordance with our frequently stated principle that no judgment will be reversed merely because the court has given a wrong reason for it.¹⁹

[3] We need not decide whether we could affirm on grounds not decided by the agency because the decisive determination in this case was made by the agency. In denying the \$211,489.32, the Commissioner relied on the language of the Agreement limiting credit refunds to purchases made after reaching required levels. There is no dispute that the \$327,082.99 likewise represents purchases made before the required levels were met. No rule of law precludes this court from affirming an agency decision stating a correct reason and correct facts simply because a portion of those facts was not explicitly connected with the agency’s correct reason. It would indeed be wasteful to remand this cause for the perfunctory exercise of explicitly connecting the obvious, that the \$327,082.99, representing purchases

¹⁶ *Id.*

¹⁷ See, e.g., *Burlington Truck Lines v. U. S.*, 371 U.S. 156, 83 S. Ct. 239, 9 L. Ed. 2d 207 (1962); *Koyo Seiko Co., Ltd. v. U.S.*, 95 F.3d 1094 (Fed. Cir. 1996); *Harsco Corp. v. Segui*, 91 F.3d 337 (2d Cir. 1996); *Frederick v. Pickett*, 392 Md. 411, 897 A.2d 228 (2006); *Thorin v Bloomfield Hills Sch.*, 179 Mich. App. 1, 445 N.W.2d 448 (1989).

¹⁸ *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003). See, also, *Metropolitan Utilities Dist. v. Twin Platte NRD*, 250 Neb. 442, 550 N.W.2d 907 (1996).

¹⁹ See, e.g., *In re Trust Created by Cease*, 267 Neb. 753, 677 N.W.2d 495 (2004); *Thornton v. Grand Island Contract Carriers*, 262 Neb. 740, 634 N.W.2d 794 (2001); *McDonald v. DeCamp Legal Servs.*, 260 Neb. 729, 619 N.W.2d 583 (2000).

made before the required levels were met, also falls under the Commissioner's stated reasoning for the \$211,489.32 amount.

We find no merit to Farmland's argument that the plain language of L.B. 775 contradicts the limitation of the Agreement to purchases made after reaching required levels. We affirm the Commissioner's denial of that portion of the requested refund that represented purchases made before reaching required levels.

AFFIRMED.

CAROLE GEDDES, SOLE HEIR AT LAW OF JANE T. SCHIRMER, DECEASED,
APPELLANT, v. YORK COUNTY, NEBRASKA, APPELLEE.

729 N.W.2d 661

Filed March 23, 2007. No. S-05-1359.

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. **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. **Political Subdivisions Tort Claims Act: Waiver: Immunity.** The Political Subdivisions Tort Claims Act reflects a limited waiver of governmental immunity and prescribes the procedure for maintenance of a suit against a political subdivision.
5. **Political Subdivisions Tort Claims Act.** The Political Subdivisions Tort Claims Act is the exclusive means by which a tort claim may be maintained against a political subdivision or its employees.
6. **Statutes: Immunity: Waiver.** Statutes that purport to waive the protection of sovereign immunity of the State or its subdivisions are strictly construed in favor of the sovereign and against the waiver.
7. **Political Subdivisions Tort Claims Act: Notice: Time.** Because compliance with the statutory time limits set forth in Neb. Rev. Stat. § 13-906 (Reissue 1997) can be determined with precision, the doctrine of substantial compliance has no application.
8. **Statutes: Time: Words and Phrases.** Unless the context shows otherwise, the word "month" used in a Nebraska statute means "calendar month." A calendar month is a period terminating with the day of the succeeding month, numerically corresponding to the day of its beginning, less one.

9. **Statutes.** Absent anything to the contrary, statutory language is to be given its plain and ordinary meaning.

Appeal from the District Court for York County: ALAN G. GLESS, Judge. Affirmed.

Kelly M. Thomas, of Svehla, Thomas, Rauert & Grafton, P.C., for appellant.

Charles W. Campbell, of Angle, Murphy, Valentino & Campbell, P.C., for appellee.

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

STEPHAN, J.

Under the Political Subdivisions Tort Claims Act (PSTCA),¹ a claimant must file a tort claim with the governing body of the political subdivision before filing suit. If the governing body has not made final disposition of the claim within 6 months after it is filed, the claimant may withdraw the claim and file suit. Jane T. Schirmer filed a tort claim with York County, Nebraska, on April 21, 2003, and withdrew the claim no later than October 21. At the time of the withdrawal, the county had not made a disposition of the claim. The issue in this appeal is whether Schirmer met the statutory requirement for timely withdrawal of the claim before filing her suit. We conclude that she did not.

BACKGROUND

On April 18, 2003, Schirmer's attorney mailed her tort claim to the York County clerk. Schirmer's claim alleged that on or about July 10, 2002, she was injured due to the negligence of an agent of the county. The clerk's office received the claim on April 21 and, following its usual practice, affixed a file stamp bearing that date. A return receipt confirms that the notice was delivered to and received by the clerk's office on April 21. The county clerk submitted the claim to the York County Board of Commissioners for review at its next regular meeting and furnished a copy to the county attorney. At its meeting on April 29, the county board

¹ Neb. Rev. Stat. §§ 13-901 to 13-926 (Reissue 1997 & Cum. Supp. 2002).

reviewed the claim but took no action on it then or at any subsequent time.

In a notice dated October 20, 2003, directed to the county clerk, Schirmer's attorney stated in part: "You are hereby notified that more than six (6) months has [sic] expired from the date [Schirmer's] claim was filed with you, without final disposition by you, and accordingly, claimants [sic] herewith withdraw their [sic] claim and will file suit against you as provided by law." An employee of Schirmer's attorney swore by affidavit that this document was mailed on October 20 by certified mail, return receipt requested, and was not hand delivered to the clerk's office. Other evidence reflects that the notice of withdrawal was delivered to and received by the clerk's office on October 21. However, the notice was date stamped by the county clerk's office on October 20, which would ordinarily mean that it was received on that date. The county clerk did not recall whether the notice was hand delivered or received by mail.

On May 7, 2004, Schirmer initiated this action by filing a complaint in the district court for York County. She alleged that she was injured as the proximate result of negligent conduct by an employee of the county and sought compensatory damages. Schirmer also alleged that she met the notice and withdrawal requirements of the PSTCA. In its answer, the county affirmatively alleged that Schirmer failed to comply with the requirement of § 13-906 because she withdrew her claim from county consideration before 6 months had passed from the date of its filing.

Schirmer died on April 6, 2005, during the pendency of this case. By stipulation, the county consented to the revival of Schirmer's action by Carole Geddes, her sole heir. The district court subsequently ordered revivor of the action in Geddes' name.

On September 2, 2005, the county moved for summary judgment on the basis that Schirmer had failed to comply with the requirement of § 13-906 because she withdrew her claim filed with York County before 6 months had passed from the date of filing when the county had not yet made final disposition. The district court held an evidentiary hearing at which evidence was received from both parties. At a second evidentiary hearing, Geddes was allowed to withdraw her rest and offer a supplemental affidavit, which the court received.

On October 17, 2005, the district court entered an order granting summary judgment in favor of the county and dismissed the case with prejudice. Applying the language of § 13-906, the court determined that the county had until the close of October 21, 2003, “to render or not render a final disposition” of the claim. The court concluded that because Schirmer withdrew her claim before the end of that period, her action was not in compliance with the PSTCA and the statute of limitations barred refiling. Geddes timely appealed, and we moved the appeal to our docket on our own motion, in accordance with our authority to regulate the caseloads of the appellate courts of this state.²

ASSIGNMENT OF ERROR

Geddes assigns, restated and consolidated, that the district court erred in determining that she prematurely withdrew her tort claim from York County and therefore did not file her action in compliance with the procedural requirements of the PSTCA.

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.³ In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.⁴

[3] Statutory interpretation presents a question of law.⁵ When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.⁶

² See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

³ *Brodine v. Blue Cross Blue Shield*, 272 Neb. 713, 724 N.W.2d 321 (2006).

⁴ *Id.*

⁵ *State v. County of Lancaster*, 272 Neb. 376, 721 N.W.2d 644 (2006).

⁶ *Id.*

ANALYSIS

[4-6] York County is a political subdivision of the State of Nebraska.⁷ The PSTCA reflects a limited waiver of governmental immunity and prescribes the procedure for maintenance of a suit against a political subdivision.⁸ It is the exclusive means by which a tort claim may be maintained against a political subdivision or its employees.⁹ Statutes that purport to waive the protection of sovereign immunity of the State or its subdivisions are strictly construed in favor of the sovereign and against the waiver.¹⁰

[7] The PSTCA specifies various nonjudicial procedures which we have characterized as conditions precedent to the filing of a lawsuit, and a claimant's failure to follow these procedures may be asserted as an affirmative defense in an action brought under the PSTCA.¹¹ Here, it is undisputed that Schirmer filed a written tort claim with the county clerk pursuant to § 13-905. But York County asserted an affirmative defense of noncompliance with § 13-906, which provides:

No suit shall be permitted under the [PSTCA] and sections 16-727, 16-728, 23-175, 39-809, and 79-610 unless the governing body of the political subdivision has made final disposition of the claim, except that if the governing body does not make final disposition of a claim within six months after it is filed, the claimant may, by notice in writing, withdraw the claim from consideration of the governing body and begin suit under such act and sections.

Because compliance with the statutory time limits set forth in § 13-906 can be determined with precision, the doctrine of

⁷ See § 13-903(1). See, also, *Salts v. Lancaster Cty.*, 269 Neb. 948, 697 N.W.2d 289 (2005); *Guenzel-Handlos v. County of Lancaster*, 265 Neb. 125, 655 N.W.2d 384 (2003).

⁸ *Hatcher v. Bellevue Vol. Fire Dept.*, 262 Neb. 23, 628 N.W.2d 685 (2001).

⁹ *Jessen v. Malhotra*, 266 Neb. 393, 665 N.W.2d 586 (2003); *Keller v. Tavarone*, 265 Neb. 236, 655 N.W.2d 899 (2003). See § 13-902.

¹⁰ *Johnson v. State*, 270 Neb. 316, 700 N.W.2d 620 (2005); *Butler Cty. Sch. Dist. No. 502 v. Meysenburg*, 268 Neb. 347, 683 N.W.2d 367 (2004).

¹¹ See, *Weeder v. Central Comm. College*, 269 Neb. 114, 691 N.W.2d 508 (2005); *Big Crow v. City of Rushville*, 266 Neb. 750, 669 N.W.2d 63 (2003).

substantial compliance has no application.¹² It is undisputed that Schirmer's claim was filed on April 21, 2003, and that the county board never made a final disposition. The sole issue in this appeal is whether Schirmer withdrew her claim before expiration of the 6-month time period specified in § 13-906, resulting in the failure of a condition precedent to the filing of her lawsuit under the PSTCA.

COMPUTATION OF 6-MONTH PERIOD

Nebraska has a statutory rule for computing time. Neb. Rev. Stat. § 25-2221 (Cum. Supp. 2006) provides in relevant part:

Except as may be otherwise more specifically provided, the period of time within which an act is to be done in any action or proceeding shall be computed by excluding the day of the act, event, or default after which the designated period of time begins to run. The last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a day during which the offices of courts of record may be legally closed as provided in this section, in which event the period shall run until the end of the next day on which the office will be open.

This provision establishes a uniform rule applicable alike to the construction of statutes and to matters of practice.¹³ We have regularly applied § 25-2221 and its predecessors in computing time periods specified in other statutes.¹⁴

Based upon the initial clause of § 25-2221, Geddes argues that the statute does not apply to the calculation of the 6-month time period under § 13-906 because a different method of time computation is specified elsewhere in the PSTCA which governs all

¹² See *Big Crow v. City of Rushville*, *supra* note 11.

¹³ *Ruan Transport Corp. v. Peake, Inc.*, 163 Neb. 319, 79 N.W.2d 575 (1956); *State ex rel. Smith v. Nebraska Liquor Control Commission*, 152 Neb. 676, 42 N.W.2d 297 (1950).

¹⁴ See, *State ex rel. Wieland v. Beermann*, 246 Neb. 808, 523 N.W.2d 518 (1994); *Ruan Transport Corp. v. Peake, Inc.*, *supra* note 13; *State ex rel. Smith v. Nebraska Liquor Control Commission*, *supra* note 13; *Wilson & Co. v. Otoe County*, 140 Neb. 518, 300 N.W. 415 (1941); *McGinn v. State*, 46 Neb. 427, 65 N.W. 46 (1895).

time periods set forth in the act. Section 13-919(1) provides that suits permitted by the PSTCA must be commenced within 2 years after the claim accrued, subject to the following exception:

The time to begin a suit shall be extended for a period of six months from the date of mailing of notice to the claimant by the governing body as to the final disposition of the claim or from the date of withdrawal of the claim from the governing body under section 13-906 if the time to begin suit would otherwise expire before the end of such period.

Geddes argues that §§ 13-906 and 13-919(1) should be read in *pari materia* so that the 6-month period in which the governing body may consider the claim before it can be withdrawn would start to run on the day the claim was received, rather than on the following day under § 25-2221.

We are not persuaded by this argument. The language in § 13-919(1) quoted above describes a specific circumstance in which the limitations period for filing suit may be extended. The fact that the Legislature chose to use a date of mailing to denote the first date of that period does not suggest an intent to override § 25-2221 with respect to other time periods specified in the PSTCA. We decline to extend the language of § 13-919(1) beyond its limited context.

[8] Using the time computation method specified in § 25-2221, we exclude April 21, 2003, the date on which Schirber filed her claim, so that the 6-month period began on April 22, 2003. Unless the context shows otherwise, the word “month” used in a Nebraska statute means “calendar month.”¹⁵ A calendar month is a period terminating with the day of the succeeding month, numerically corresponding to the day of its beginning, less one.¹⁶ Applying §§ 25-2221 and 49-801(13), we conclude that the district court correctly determined October 21, 2003, to be the last day of the 6-month period which commenced when Schirmer filed her claim with the county clerk.

¹⁵ See *State ex rel. Wieland v. Beermann*, *supra* note 14. See, also, Neb. Rev. Stat. § 49-801(13) (Reissue 2004).

¹⁶ *State ex rel. Wieland v. Beermann*, *supra* note 14.

DATE CLAIM MAY BE WITHDRAWN

We must next determine whether Schirmer's withdrawal of the claim was premature. The evidence reflects that the claim was withdrawn on either October 20 or 21, 2003. Because we are reviewing a summary judgment, we give Geddes the favorable inference of the later date. Geddes contends that § 13-906 allows a claimant to withdraw a tort claim on the last day of the 6-month period after filing notice of the claim with the appropriate governing body. The district court, on the other hand, determined that a governing body has a full 6 months to render or not render a final disposition after which the claimant may then withdraw the claim. On the undisputed facts of this case, the difference between the two interpretations is a single day.

[9] Absent anything to the contrary, statutory language is to be given its plain and ordinary meaning.¹⁷ Section 13-906 states, in relevant part, that "if the governing body does not make final disposition of a claim within six months after it is filed, the claimant may, by notice in writing, withdraw the claim from consideration of the governing body and begin suit." The key phrase for purposes of this case is "within six months after it is filed," which designates the period in which the governing body may consider a tort claim before it can be withdrawn for purpose of filing suit. "Within" is defined as "not beyond in . . . time" or "before the end of."¹⁸ The plain and ordinary meaning of the phrase "within six months" includes the last day of the 6-month time period. As we have noted, the language of § 13-906 explicitly provides that "no suit can be brought in district court unless 6 months have passed without a resolution of a properly filed claim by the political subdivision."¹⁹ Similarly, we have construed an analogous provision in the State Tort Claims Act²⁰ as

¹⁷ *White v. White*, 271 Neb. 43, 709 N.W.2d 325 (2006).

¹⁸ Webster's New World College Dictionary 1535 (3d ed. 1996); Merriam-Webster's Collegiate Dictionary 1355 (10th ed. 2001).

¹⁹ *Big Crow v. City of Rushville*, *supra* note 11, 266 Neb. at 754, 669 N.W.2d at 66.

²⁰ Neb. Rev. Stat. §§ 81-8,209 to 81-8,235 (Reissue 2003).

requiring the State Claims Board be given at least 6 months to consider a claim before suit may be filed.²¹

There is some conflicting language in two of our cases arising under the State Tort Claims Act. In *Collins v. State*,²² we were presented with a statute of limitations issue where the claimant elected to leave her claim pending before the State Claims Board until it reached a final determination. In presenting the facts, we stated that the claimant “alleged that on November 1, 1999, she filed a claim with the State Claims Board May 1, 2000, was the date at which [claimant] could withdraw her claim.”²³ Likewise, in *Hullinger v. Board of Regents*,²⁴ another case presenting a statute of limitations issue under the State Tort Claims Act, we noted that the claimant “filed his claim with the claims board on March 24, 1992” and was thus prevented by § 81-8,213 from “withdrawing his claim until 6 months after he made his written claim to the claims board.” We noted that “the first day on which he could withdraw his claim would be September 24, 1992.”²⁵ However, the claim was not withdrawn until several months after that date.

The precise date on which the claim could be withdrawn was not determinative of the outcome in either *Collins* or *Hullinger*. A case is not authority for any point not necessary to be passed on to decide the case or not specifically raised as an issue addressed by the court.²⁶ To the extent that language in *Collins* and *Hullinger* conflicts with our analysis regarding computation of the 6-month period specified in § 13-906, that language is disapproved.

²¹ See *Coleman v. Chadron State College*, 237 Neb. 491, 466 N.W.2d 526 (1991), *overruled on other grounds*, *Collins v. State*, 264 Neb. 267, 646 N.W.2d 618 (2002). See, also, § 81-8,213.

²² *Collins v. State*, *supra* note 21.

²³ *Id.* at 269, 271, 646 N.W.2d at 619, 621.

²⁴ *Hullinger v. Board of Regents*, 249 Neb. 868, 872, 546 N.W.2d 779, 783 (1996), *overruled on other grounds*, *Collins v. State*, *supra* note 21.

²⁵ *Id.*

²⁶ *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004).

Based upon the foregoing, we conclude that Schirmer's claim was withdrawn prior to the expiration of the 6-month period specified in § 13-906, resulting in a failure to comply with a condition precedent to suit under the PSTCA. Accordingly, the district court did not err in dismissing the action. For the sake of completeness, we note that the district court further concluded that the statute of limitations on Geddes' claim had expired. Geddes does not specifically assign or argue this finding as error. In the absence of plain error, an appellate court considers only claimed errors which are both assigned and discussed.²⁷

We acknowledge the apparent harshness of our application of the timing requirement in § 13-906 to this case. But we also recognize our duty to strictly construe the PSTCA in favor of the political subdivision and against the waiver of sovereign immunity.²⁸ In discussing the counterpart to § 13-906 in the Federal Tort Claims Act, the U.S. Supreme Court stated:

The most natural reading of the statute indicates that Congress intended to require complete exhaustion of Executive remedies before invocation of the judicial process. Every premature filing of an action under the [Federal Tort Claims Act] imposes some burden on the judicial system and on the Department of Justice which must assume the defense of such actions. Although the burden may be slight in an individual case, the statute governs the processing of a vast multitude of claims. The interest in orderly administration of this body of litigation is best served by adherence to the straightforward statutory command.

Moreover, given the clarity of the statutory text, it is certainly not a "trap for the unwary." . . . As we have noted before, "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." . . .

²⁷ *In re Petition of SID No. 1*, 270 Neb. 856, 708 N.W.2d 809 (2006).

²⁸ See, *Johnson v. State*, *supra* note 10; *Big Crow v. City of Rushville*, *supra* note 11.

The [Federal Tort Claims Act] bars claimants from bringing suit in federal court until they have exhausted their administrative remedies.²⁹

Here, § 13-906 bars the filing of suit before a claimant has complied with the requirements of that statute. Because Schirmer withdrew her claim before it was pending for a full 6 months, the district court did not err in dismissing her suit.

CONCLUSION

For the reasons discussed, we conclude that the withdrawal of Schirmer’s claim was not in strict compliance with the requirements of § 13-906 and that this failure to comply with a condition precedent to suit under the PSTCA entitled the county to a judgment of dismissal on its properly asserted affirmative defense.

AFFIRMED.

²⁹ *McNeil v. United States*, 508 U.S. 106, 112-13, 113 S. Ct. 1980, 124 L. Ed. 2d 21 (1993) (citations omitted).

RUTH E. RICHTER, APPELLANT, v. CITY OF OMAHA,

A MUNICIPAL CORPORATION, APPELLEE.

729 N.W.2d 67

Filed March 23, 2007. No. S-05-1550.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of a trial court will not be disturbed on appeal unless they are clearly wrong.
2. ____: ____. In actions brought pursuant to the Political Subdivisions Tort Claims Act, when determining the sufficiency of the evidence to sustain the trial court’s judgment, it must be considered in the light most favorable to the successful party; every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
3. **Rules of Evidence: Proof: Words and Phrases.** The best evidence rule is a rule of preference for the production of the original of a writing, recording, or photograph when the contents of the item are sought to be proved.
4. **Evidence: Intent.** The intentional spoliation or destruction of evidence relevant to a case raises an inference that this evidence would have been unfavorable to the case of the spoliator. Such an inference arises only where the spoliation or destruction was intentional and indicates fraud and a desire to suppress the truth, and it does not arise where the destruction was a matter of routine with no fraudulent intent.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

John K. Green, of Pickens, Daubman & Green, L.L.P., for appellant.

Michelle Peters, Assistant Omaha City Attorney, for appellee.

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

GERRARD, J.

NATURE OF CASE

Ruth E. Richter sustained personal injuries when she stepped into a hole located on a public right-of-way in front of her home. Richter claims the City of Omaha (the City) was negligent in failing to warn the public of a dangerous condition, failing to provide safe passage of a right-of-way, and failing to exercise due care in the operation of its business. Following a bench trial, the court determined that the City was not negligent and dismissed Richter's petition. We affirm.

FACTS

On May 28, 1999, a city work crew was trimming overhanging branches from a tree located in front of Richter's home. Richter walked outside and asked the workers to stop trimming the trees. The workers refused and asked her to back away from them and their truck. As Richter backed away, she stepped into a hole with her right foot and fell to the ground, injuring her ankle and twisting her knee. Richter testified that as a result of her fall, she saw multiple doctors and incurred approximately \$11,422 in total medical expenses.

The hole in which Richter fell was located on a grassy area between the street and the sidewalk in front of Richter's residence. Although this section of land is a public right-of-way, Richter was responsible for maintaining the area.

The parties dispute how the hole was created. Richter testified that she believed the City created the hole when it removed a "No Parking" sign and failed to fill in the hole left behind. Richter testified that before she fell, there were three traffic signs posted

along this public right-of-way. She alleges, however, that at the time of her accident on May 28, 1999, there were only two traffic signs remaining because one of them had been removed, thus creating the hole that caused her to fall.

Shortly after her fall in 1999, Richter took pictures of the hole and the signs on the right-of-way, and she offered the pictures into evidence at trial. The pictures revealed that at that time, there were three signs posted on the public right-of-way. The southernmost sign is a “No Turn on Red” sign, the middle sign is a “No Trucks Over 6 Tons” sign, and the northernmost sign is a “No Parking” sign. Although the record does not provide exact measurements, the pictures show that the hole in which Richter fell was located a few feet to the south of the middle sign.

Richter testified that although the pictures establish that there are three signs posted on the public right-of-way, at the time of her accident, there were only two signs posted, the “No Turn on Red” sign and the “No Trucks Over 6 Tons” sign. In essence, Richter claimed that at some point before her fall, the City removed the “No Parking” sign, creating the hole that caused her to fall, and left the other two signs in place. She then claimed that at some point after she fell, the City reinstalled the “No Parking” sign and placed it north of where it had been previously located, as shown in the photographs she offered into evidence. On cross-examination, Richter admitted that she did not know when the City allegedly removed the “No Parking” sign.

The City presented evidence that it did not remove any sign from the location in question and, thus, did not create the hole that caused Richter to fall. The City offered the testimony of Leanne Zietlow, the acting traffic engineer who, at all times relevant to this case, was also the head of the traffic maintenance division. As part of her job, Zietlow maintained the records regarding the removal and replacement of traffic signs within city limits.

Zietlow testified that she reviewed the City’s work orders relating to the removal and replacement of traffic signs for the years 1998 and 1999 and did not find any record that would indicate that a sign had been removed or replaced in the public right-of-way in front of Richter’s home. Without objection, Zietlow explained that she was unable to review older work

orders because the older work orders are destroyed as time passes and the work orders prior to 1998 had already been destroyed.

Ziетtlow further testified that approximately 10 years before trial, the City stopped ordering nongalvanized posts for the signs. She explained that the “No Trucks Over 6 Tons” sign, located a few feet in front of the hole, was a nongalvanized post and thus had been in that location for at least 10 years. Ziетtlow testified that, assuming the “No Trucks Over 6 Tons” sign had been in place for at least 10 years, the City would not have originally placed a “No Parking” sign in the location claimed by Richter.

Richter filed a petition on July 31, 2000, under the Political Subdivisions Tort Claims Act,¹ alleging that the City was negligent in failing to warn the public of a dangerous condition, failing to provide safe passage of a right-of-way, and failing to exercise due care in the operation of its business. After a bench trial, the court found in favor of the City. The court explained that “[T]he evidence was insufficient as to how the hole came to be, when it came to be a hole, and whether the City knew of this hole prior to [Richter’s] injury.” The court continued, “there was insufficient evidence that the City caused the hole or that it knew it was there so it could be repaired in a timely manner” and “[t]o find that it was caused by the City or that the City knew of the hole and failed to repair it would be speculation.” Richter appealed.

ASSIGNMENT OF ERROR

Richter assigns, consolidated and restated, that the district court erred in finding that she failed to prove by a preponderance of the evidence that the City was negligent.

STANDARD OF REVIEW

[1,2] In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of a trial court will not be disturbed on appeal unless they are clearly wrong.² When determining the sufficiency of the evidence to sustain the trial court’s judgment, it must be considered in the light most favorable to the successful party; every controverted fact must be resolved in favor of such

¹ Neb. Rev. Stat. § 13-901 et seq. (Reissue 1997).

² *McGrath v. City of Omaha*, 271 Neb. 536, 713 N.W.2d 451 (2006).

party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence.³

ANALYSIS

BEST EVIDENCE RULE/SPOILIATION

On appeal, Richter argues that her “testimony is sufficient to prove by a preponderance of the evidence that the City . . . was negligent because the City . . . destroyed relevant work orders while this lawsuit was pending.”⁴ In support of her argument, Richter relies on Neb. Evid. R. 1004,⁵ which is an exception to Neb. Evid. R. 1002,⁶ commonly known as the best evidence rule or the original document rule.

[3] We have explained that the best evidence rule is, in reality, a rule of preference for the production of the original of a writing, recording, or photograph when the contents of the item are sought to be proved.⁷ As an exception to this rule, rule 1004 provides that under certain circumstances, such as upon a showing that the original has been lost or destroyed, the original is not required to be offered and other evidence of the contents of the document is admissible.

Richter contends that she was unable to produce records evidencing the City’s creation of the hole that caused her to fall because the City destroyed the work orders that would have documented it. Thus, Richter argues that

[t]he original work reports are not required and other evidence of the contents of writing, recording, or photograph is admissible since the work reports were under the control of the City . . . and the City . . . knew of the pending lawsuit. . . . The plain meaning of [rule 1004(3)] clearly highlights that Richter’s testimony was not insufficient given the

³ *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch.*, 267 Neb. 958, 679 N.W.2d 198 (2004).

⁴ Brief for appellant at 4.

⁵ Neb. Rev. Stat. § 27-1004 (Reissue 1995).

⁶ Neb. Rev. Stat. § 27-1002 (Reissue 1995).

⁷ *State v. Kula*, 260 Neb. 183, 616 N.W.2d 313 (2000).

actions taken by the City . . . to destroy evidence while this lawsuit was pending.⁸

But Richter misunderstands rule 1004. In the first place, Richter did not proffer other evidence of the contents of any work orders. On cross-examination of Zietlow, Richter adduced evidence that work orders had been destroyed, but no evidence of what those reports actually contained, beyond her speculation that they would have indicated that the City created the hole. Moreover, rules 1002 and 1004 address the admissibility of evidence, not the weight that evidence should be given. Rule 1004 simply addresses when other evidence of the contents of a document may be admitted. Richter does not claim on appeal that evidence was excluded which should have been admitted under the rule, nor did she proffer evidence at trial under rule 1004 that was excluded. In short, rule 1004 is irrelevant to the sufficiency of the evidence Richter adduced at trial.

Instead, to the extent that Richter's argument implicates any recognized legal doctrine, it is the rule of spoliation, or intentional destruction of evidence. Richter's lawyer made a brief reference to the destruction of work orders at the close of trial, after all evidence had been adduced. Now, on appeal, Richter seems to contend that because the City destroyed the work orders she claims would have proved her case, she was entitled to have that fact considered when the evidence was weighed by the trier of fact. But Richter has not established the foundation for such an inference.

[4] It is a general rule that the intentional spoliation or destruction of evidence relevant to a case raises a presumption, or, more properly, an inference, that this evidence would have been unfavorable to the case of the spoliator.⁹ Such a presumption or inference arises, however, only where the spoliation or destruction was intentional and indicates fraud and a desire to suppress the truth, and it does not arise where the destruction was a matter of routine with no fraudulent intent.¹⁰

⁸ Brief for appellant at 5.

⁹ *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002).

¹⁰ *Id.*

In the present case, Richter argues that the City destroyed the relevant work orders after she filed her petition. Richter offers nothing in the way of argument as to what, in the record, affirmatively demonstrates that the City destroyed the work orders intentionally or in bad faith. Instead, the record indicates that the work orders were destroyed in the ordinary course of the City's business. Zietlow testified that as time passes, the City destroys the older work orders. Zietlow explained that, while she could not give a specific date for when the work orders were destroyed, she "assume[d] it would have been January [2005]" because that was the City's "standard practice."

The City further asserts that at the time the records were destroyed, the City was unaware that Richter would claim that the hole in question had been created by the removal of a traffic sign. The City notes that neither Richter's original claim filed with the City nor her petition allege that the hole was created by the removal of a traffic sign. The City argues that until a few weeks before trial, it assumed that Richter was claiming that the hole was created by the city work crew who had worked on the trees.

In order for Richter to receive the adverse inference drawn from the destruction of evidence, she must show that the City's actions indicated fraud and a desire to suppress the truth.¹¹ She has failed to do so here. Accordingly, Richter was not entitled to the adverse inference allowed under the rule of spoliation.

SUFFICIENCY OF EVIDENCE

Richter argues that the district court erred in finding that she failed to prove by a preponderance of the evidence that the City was negligent. In order to be successful on her negligence claim, Richter must establish, among other things, that the City created the condition, knew of the condition, or by the exercise of reasonable care should have discovered or known of the condition.¹²

Although there is conflicting evidence relating to the original location of the traffic sign and the party responsible for the creation of the hole, the district court, as the finder of fact, was entitled to listen to the testimony and make a determination as to

¹¹ See *Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004).

¹² See *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 678 N.W.2d 82 (2004).

the credibility of the witnesses and the truth of their testimony. After doing so, the district court concluded that Richter failed to present sufficient evidence that “the City caused the hole or that it knew it was there so it could be repaired in a timely manner.”

In reviewing a judgment awarded in a bench trial under the Political Subdivisions Tort Claims Act, it is not the purview of this court to reweigh the evidence.¹³ We must consider the evidence in the light most favorable to the successful party.¹⁴ The only evidence offered by Richter was her own testimony that the City created the hole when it removed a traffic sign. She further claims that the City reinstalled the traffic sign at some point after her fall in 1999. Richter, however, was unable to specifically testify as to when the removal or reinstallation of this sign occurred.

The City, however, presented the testimony of Zietlow, the acting traffic engineer, who explained that there were no work orders for 1998 or 1999 relating to the removal or replacement of traffic signs in that area, as alleged by Richter. Furthermore, Zietlow testified that it would not have made sense for the City to have originally placed the “No Parking” sign where Richter claimed it had been, because an existing traffic sign was already posted within a few feet of that location. When considering the evidence in the light most favorable to the City, we conclude that the district court’s factual determination that Richter failed to present sufficient evidence that the City was negligent was not clearly wrong.

CONCLUSION

For the foregoing reasons, the judgment of the district court in favor of the City’s dismissing Richter’s petition is affirmed.

AFFIRMED.

¹³ *Staley v. City of Omaha*, 271 Neb. 543, 713 N.W.2d 457 (2006).

¹⁴ *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch.*, *supra* note 3.

STATE OF NEBRASKA, APPELLEE, v.
JERRY JACOBSON, APPELLANT.
728 N.W.2d 613

Filed March 23, 2007. No. S-06-195.

1. **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.
2. **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.
3. **Trial: Evidence: Motor Vehicles: Proof.** Before evidence of vehicular speed determined by use of a speed measurement device is admissible, the State must establish with reasonable proof that the equipment was accurate and functioning properly at the time the determination of the speed of the vehicle was made.
4. ____: ____: ____: _____. To present "reasonable proof" that a primary measuring instrument that measures the speed of a vehicle was operating correctly, one must show that such device was tested against a device whose instrumental integrity or reliability had been established.
5. **Trial: Evidence.** Whether there is sufficient foundation evidence for the admission of physical evidence must necessarily be determined on a case-by-case basis.
6. **Evidence: Proof.** A document is properly authenticated by evidence sufficient to support a finding that the matter in question is what its proponent claims.
7. ____: _____. Proper authentication may be attained by evidence of appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances, sufficient to support a finding that the matter in question is what it is claimed to be.
8. ____: _____. The authentication requirement does not demand that the proponent of a piece of evidence conclusively demonstrate the genuineness of his or her article, but only that he or she make a showing sufficient to support a finding that the matter in question is what its proponent claims.
9. **Constitutional Law: Hearsay.** An out-of-court statement by a witness that is testimonial may not be admitted, under the Confrontation Clause, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness.
10. ____: _____. Only testimonial statements cause a declarant to be a "witness" within the meaning of the Confrontation Clause.
11. ____: _____. 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.

Appeal from the District Court for Boone County, MICHAEL OWENS, Judge, on appeal thereto from the County Court for Boone County, LINDA S. CASTER-SENF, Judge. Judgment of District Court affirmed.

Bradley P. Roth, of McHenry, Haszard, Hansen, Roth & Hupp, 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.

WRIGHT, J.

NATURE OF CASE

Jerry Jacobson was convicted of speeding by the county court for Boone County, Nebraska. The district court affirmed his conviction, and on appeal to this court, Jacobson challenges the sufficiency of the evidence which established the accuracy of the radar equipment used to determine the speed of his vehicle. He claims the county court erred in admitting evidence regarding the accuracy of the radar unit.

Nebraska law requires reasonable proof that the radar unit was accurate and functioning properly. This standard necessitates at least some indication of accuracy in the instrument used to test the radar unit. The arresting officer used tuning forks to test the accuracy of his radar unit, and a document attesting to the tuning forks' accuracy was admitted into evidence. The issue is whether that document was properly admitted. We affirm.

SCOPE OF REVIEW

[1] A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for an abuse of discretion. *State v. Anglemeyer*, 269 Neb. 237, 691 N.W.2d 153 (2005).

[2] 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. Fischer*, 272 Neb. 963, 726 N.W.2d 176 (2007).

FACTS

Jacobson received a citation for speeding on April 9, 2005. He entered a plea of not guilty, and a bench trial was held in the county court for Boone County. Trooper Timothy Stopak of the Nebraska State Patrol testified that he had clocked Jacobson's

semi-trailer truck traveling 74 m.p.h. in a 55-m.p.h. zone. Stopak said he ran calibration checks on his radar unit to ensure its accuracy for measuring speed at the beginning and end of his shift.

An internal calibration check was conducted automatically when the radar unit was turned on. Additionally, Stopak conducted an external calibration check with two tuning forks. He described this check in the following manner: One tuning fork oscillates at a speed of 25 m.p.h., and the other, 40 m.p.h. Each tuning fork is struck and held in front of the radar unit while it is in the “stationary” mode of operation. If the unit is operating properly, it yields a reading of 25 m.p.h. with the 25-m.p.h. tuning fork and a reading of 40 m.p.h. with the 40-m.p.h. tuning fork. The operator then switches the radar unit to the “moving” mode of operation and holds both oscillating tuning forks in front of the unit simultaneously. If the radar unit is working properly, it will yield a reading of 25 m.p.h. in the patrol window and 15 m.p.h. in the target window. The acceptable degree of error is plus or minus 1 m.p.h. According to Stopak’s calibration checks, the radar unit was working properly on April 9, 2005.

Stopak stated that the tuning forks used to check the accuracy of his radar unit had themselves been certified for accuracy. Technicians for the State Patrol annually certify the accuracy of each radar unit and accompanying tuning forks. The corresponding paperwork is retained by the trooper to whom the equipment is assigned.

Jacobson objected to this testimony. He argued that the technician who conducted the certification should have testified and been available for cross-examination because such evidence was “testimonial” under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The certification document attesting to the accuracy of Stopak’s radar unit and tuning forks was admitted into evidence over Jacobson’s objection based on foundation.

Jacobson testified that he was not paying close attention to his speed on April 9, 2005, and thought he was traveling at 68 or 69 m.p.h. when he was stopped. He did not believe that he was traveling at 74 m.p.h.

The county court extended to Jacobson the benefit of the radar unit’s 1-m.p.h. margin of error and found him guilty of traveling

73 m.p.h. in a 55-m.p.h. zone. Jacobson was fined \$125 and was required to pay court costs of \$41.50.

Jacobson appealed to the district court, claiming the county court erred in allowing Stopak to testify regarding the certification and accuracy of the radar unit and tuning forks, in receiving into evidence the technician's certificate concerning calibration of the radar unit and tuning forks, and in finding sufficient evidence to support the conviction.

The district court affirmed, and Jacobson timely appealed to the Nebraska Court of Appeals. This court granted the State's petition to bypass review by the Court of Appeals, and the appeal was transferred to our docket.

ASSIGNMENTS OF ERROR

Jacobson asserts, restated, that the district court erred (1) in determining that sufficient evidence supported the conviction, because the State failed to prove all the elements under Neb. Rev. Stat. § 60-6,192(1) (Reissue 2004); (2) in determining that the county court properly allowed testimony and a document concerning the accuracy of the radar unit and tuning forks; and (3) in determining that Jacobson's right of confrontation was not violated by admission of the document certifying the accuracy of the tuning forks.

ANALYSIS

ESTABLISHMENT OF EQUIPMENT'S ACCURACY UNDER § 60-6,192(1)

Jacobson argues the evidence was insufficient to support his conviction because the State failed to establish the accuracy of the radar unit as required by statute. Section 60-6,192(1) provides as follows:

Determinations made regarding the speed of any motor vehicle based upon the visual observation of any peace officer, while being competent evidence for all other purposes, shall be corroborated by the use of a radio microwave, mechanical, or electronic speed measurement device. . . . Before the state may offer in evidence the results of such . . . speed measurement device . . . the state shall prove the following:

(a) The . . . device was in proper working order at the time of conducting the measurement;

(b) The . . . device was being operated in such a manner and under such conditions so as to allow a minimum possibility of distortion or outside interference;

(c) The person operating the . . . device and interpreting such measurement was qualified . . . to properly test and operate the . . . device; and

(d) The operator conducted external tests of accuracy upon the . . . device, within a reasonable time both prior to and subsequent to an arrest being made, and the device was found to be in proper working order.

[3,4] Before evidence of vehicular speed determined by use of a speed measurement device is admissible, the State must establish with reasonable proof that the equipment was accurate and functioning properly at the time the determination of the speed of the vehicle was made. See *State v. Lomack*, 239 Neb. 368, 476 N.W.2d 237 (1991). This court has recognized that “[w]ithout some proof of reliability in the device used to test for accuracy in a primary device, a test for accuracy of the primary device is a meaningless exercise.” *State v. Chambers*, 233 Neb. 235, 241, 444 N.W.2d 667, 671 (1989). Thus, we have held that to present “reasonable proof” that the primary measuring instrument that measures the speed of a vehicle was operating correctly, one must show that such device was tested against a device whose instrumental integrity or reliability had been established. See *id.*

In *State v. Kincaid*, 235 Neb. 89, 453 N.W.2d 738 (1990), the defendant contended that the foundational evidence was inadequate to establish that the radar unit was functioning adequately. The officer testified that he had performed an LED light-segment test, an internal circuitry test, and a tuning-fork test before and after using the radar unit to clock the defendant’s vehicle. The tuning forks were supplied by the manufacturer and had been tested at the factory. We concluded that this evidence provided sufficient foundation to establish that the radar unit was operating properly.

In *Lomack*, the officer stated that he had tested the radar unit with a tuning fork. Although this court recognized that a “tuning fork test may be sufficient to satisfy the ‘external test’

requirement of [§ 60-6,192(1)],” *Lomack*, 239 Neb. at 372, 476 N.W.2d at 240, we nevertheless determined that the radar-based evidence of speed was inadmissible because the record lacked sufficient “indicia of accuracy” concerning the officer’s radar unit, see *id.* at 376, 476 N.W.2d at 242. First, the record failed to establish a particular connection between the tuning fork and the officer’s radar unit; thus, evidence of the tuning fork was irrelevant. Second, no evidence had been presented to demonstrate that the tuning fork itself had been properly tested, calibrated, or certified as a reliable gauge of the radar unit’s accuracy. We concluded that the “reasonable proof” standard “necessitated at least some indication of accuracy in an instrument used to test a measuring device.” *Id.* at 375, 476 N.W.2d at 242.

In the case at bar, the State presented proof that the radar equipment was accurate and functioning properly when the speed of Jacobson’s vehicle was determined on April 9, 2005. Stopak, the arresting officer, testified that he had conducted internal and external calibration checks on his radar unit at the beginning and end of his shift and that the radar unit was operating properly. The tuning forks used in the external checks had been specifically assigned to his radar unit and had been certified for accuracy by State Patrol technicians. A “Certificate of Calibration and Accuracy,” signed by a State Patrol technician and dated October 6, 2004, was admitted into evidence. It certified that all applicable tests and measurements had been made on Stopak’s radar unit and tuning forks and that the tuning forks oscillated at the proper speeds.

In contrast to the facts in *State v. Lomack*, 239 Neb. 368, 476 N.W.2d 237 (1991), the record in this case establishes a particular connection between the tuning forks and Stopak’s radar unit. Evidence was presented that the tuning forks were properly tested, calibrated, or certified as a reliable gauge of a radar unit’s accuracy. Thus, evidence of Jacobson’s speed determined by the use of Stopak’s radar unit was admissible under § 60-6,192(1) because the equipment’s accuracy had been established.

AUTHENTICATION OF CERTIFICATION DOCUMENT

[5] Jacobson argues it was error to admit the “Certificate of Calibration and Accuracy” because it was not supported by

sufficient foundation. Preliminary questions concerning the admissibility of evidence shall be determined by the judge. Neb. Rev. Stat. § 27-104 (Reissue 1995). Whether there is sufficient foundation evidence for the admission of physical evidence must necessarily be determined on a case-by-case basis. *State v. Anglemeyer*, 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. *Id.*

Jacobson contends the certification document lacked proper foundation because it was neither notarized nor in the form of an affidavit. He also claims Stopak had no personal knowledge of the information on the document because he had not tested the tuning forks or witnessed the tuning forks being tested. Stopak did not know the person who signed the certificate or whether the date on the document (October 6, 2004) represented the date the equipment was tested, the date the certificate was signed, or both.

[6,7] A document is properly authenticated "by evidence sufficient to support a finding that the matter in question is what its proponent claims." See Neb. Rev. Stat. § 27-901(1) (Reissue 1995). An acknowledgment certified by a notary public may provide sufficient authentication, see Neb. Rev. Stat. § 27-902(8) (Reissue 1995), but it is not the only manner in which a document may be authenticated. Under § 27-901(2)(a), the requirement of authentication or identification as a condition precedent to admissibility may be satisfied by testimony that a matter is what it is claimed to be. Proper authentication may also be attained by evidence of appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances, sufficient to support a finding that the matter in question is what it is claimed to be. See, § 27-901(2)(d); *State v. Carter*, 255 Neb. 591, 586 N.W.2d 818 (1998).

[8] This court has observed:

The plain language of [Neb. Evid. R.] 901 is directory rather than mandatory. . . . We are also guided in our application of rule 901 by federal court decisions explaining Fed. R. Evid. 901, which is effectively identical to Nebraska's rule 901 and upon which it was based. . . .

It has been said that federal rule 901 “does not erect a particularly high hurdle.” . . . “[T]he proponent of the evidence is not required ‘to rule out all possibilities inconsistent with authenticity, or to prove beyond any doubt that the evidence is what it purports to be.’” . . . The authentication requirement does not demand that the proponent of a piece of evidence conclusively demonstrate the genuineness of his or her article, but only that he or she make a showing “‘sufficient to support a finding that the matter in question is what its proponent claims.’”

Anglemyer, 269 Neb. at 243, 691 N.W.2d at 160 (citations omitted).

Stopak testified that the “Certificate of Calibration and Accuracy” was made for his radar unit and tuning forks. He had sent the radar unit and tuning forks to the State Patrol technicians in Lincoln, Nebraska, for routine testing. Once the certification was completed, the equipment was returned to Stopak and he was given the certification document to retain. Although Stopak did not witness this testing, he stated that he had witnessed technicians performing similar accuracy tests and issuing similar documents on occasions when the technicians had set up their equipment in his troop area. In October 2003, Stopak was present when his radar unit and tuning forks were tested. He stated that the certification admitted into evidence was in the same form as paperwork regularly issued to officers to show that their instruments had been tested for accuracy. He further testified that testing is done annually. The certification admitted as evidence was dated October 6, 2004. It could be reasonably inferred from Stopak’s testimony that October 6, 2004, was the date the radar accuracy check was conducted.

A document may be authenticated under § 27-901(2)(a) by testimony by one with personal knowledge that it is what it is claimed to be, such as a person familiar with its contents. See *Hal Roach Studios v. Richard Feiner and Co.*, 896 F.2d 1542 (9th Cir. 1990) (corporate registration statement properly authenticated by testimony of board chairman who had personal knowledge of its contents). A showing of specific authorship is not always necessary. See *United States v. Helm*, 769 F.2d 1306 (8th Cir. 1985) (proper foundation laid for ledger with entries by unknown writer

where document's contents revealed that writer was familiar with particular transactions involved and there was other circumstantial evidence indicating that ledger was properly authenticated).

Stopak's testimony concerning his knowledge of the contents of the certification document and the circumstances surrounding its creation was sufficient evidence to prove that the tuning forks were independently tested for accuracy. The county court did not abuse its discretion in admitting the document.

ADMISSION OF NONTTESTIMONIAL STATEMENTS
UNDER CONFRONTATION CLAUSE

Jacobson contends that his constitutional right to confront the witnesses against him was violated because he could not cross-examine the person who signed the "Certificate of Calibration and Accuracy." The issue is whether the document certifying the accuracy of the tuning forks was testimonial in nature and, therefore, subject to a Confrontation Clause analysis. The Confrontation Clause, U.S. Const. amend. VI, guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"

[9,10] In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L. Ed. 2d 177 (2004), the Court held that an out-of-court statement by a witness that is testimonial may not be admitted, under the Confrontation Clause, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. In *Davis v. Washington*, 547 U.S. 813, 823, 126 S.Ct. 2266, 165 L. Ed. 2d 224 (2006), the Court reiterated that testimonial hearsay was the focus of the Confrontation Clause because it "applies to 'witnesses' against the accused—in other words, those who 'bear testimony.'" According to the Court, only testimonial statements "cause the declarant to be a 'witness' within the meaning of the Confrontation Clause." *Davis*, 547 U.S. at 821.

[11] 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. *State v. Fischer*, 272 Neb. 963, 726 N.W.2d 176 (2007). If the statements are nontestimonial, then no further Confrontation Clause analysis is required. *Id.*

Fischer addressed a similar question. The defendant was charged with driving while under the influence of alcohol. At trial, a police maintenance officer testified that he had conducted accuracy checks on the breath-testing devices used by the police department. As part of the routine check, the officer used a breath-simulator solution with a known concentration of alcohol. The officer testified that along with the solution, he received a document from the supplier certifying that the solution was accurately prepared and that the stated concentration was accurate. Over the defendant's Confrontation Clause objection, the document was admitted into evidence. The defendant was convicted, and on appeal, he argued that he had a right under the Confrontation Clause to cross-examine the person who signed the certificate regarding the preparation of the simulator solution.

Based on the framework of *Crawford* and *Davis*, this court concluded that the certification of the breath-simulator solution was nontestimonial and that therefore, the admission of the certificate was not subject to further analysis under the Confrontation Clause. We explained:

The statements in [the certification document] were limited to [the tester's] certifications regarding the concentration of the alcohol breath simulator solution. Unlike the statements found to be testimonial in *Crawford* and [*Davis*], 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 . . . in the sense that the certificate was in a form required by [state regulations], the primary purpose for which the statements in [the certification document] were generated and provided to the [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.

[The certification document] was prepared in a routine manner without regard to whether the certification related to any particular defendant. Indeed, the statements in [the

certification document] were made in February 2004, and the crime in this case did not occur until June 2004. The statements made in [the certification document] were too attenuated from the prosecution of the charges against [the defendant] for the statements to be “testimonial” in the sense required under *Crawford, Davis*, and the Confrontation Clause.

State v. Fischer, 272 Neb. 963, 971-72, 726 N.W.2d 176, 182-83 (2007).

The facts of *Fischer* are analogous to the present case. A police maintenance officer conducted accuracy checks on the breath-testing device (the primary measuring device) using the breath-simulator solution (the testing device). In the present case, Stopak conducted accuracy checks on his radar unit (the primary measuring device) using the tuning forks (the testing devices). The maintenance officer in *Fischer* testified that the solution had itself been independently tested for accuracy, and a certification of such testing was admitted into evidence. Similarly, Stopak testified that the tuning forks had themselves been independently tested, and a certification of such testing was admitted into evidence. In each appeal, the defendant argued that the statements in the certification document were testimonial in nature.

Applying the reasoning of *Fischer*, we conclude that the statements in the document certifying the accuracy of the tuning forks were nontestimonial. The “Certificate of Calibration and Accuracy” was prepared in the course of the State Patrol technician’s routine duties to ensure that the tuning forks used to calibrate and test the radar unit oscillated at the proper speeds. Certification was required annually, whether or not the certification document would eventually be used in a criminal prosecution. The statements contained in the certification document did not pertain to any particular defendant. They were made over 6 months before Jacobson was cited for speeding. Thus, the statements “were too attenuated from the prosecution of the [speeding charge] against [Jacobson] for the statements to be ‘testimonial.’” See *Fischer*, 272 Neb. at 972, 726 N.W.2d at 183. No further analysis under the Confrontation Clause is required. The statements in the document certifying the tuning forks as accurate were not testimonial in nature, and the county court did not err in

admitting the document into evidence over Jacobson's objection based on the Confrontation Clause.

CONCLUSION

The county court did not abuse its discretion in finding that sufficient foundation had been laid for the certification document's admission into evidence. The statements in the certification document were nontestimonial and, therefore, not subject to further analysis under the Confrontation Clause. Accordingly, the county court did not err in determining that the State had established the accuracy of the radar unit as required by § 60-6,192(1), and we affirm the judgment of the district court.

AFFIRMED.

LYLA F. BENNETT, APPELLANT, V. SAINT ELIZABETH HEALTH
SYSTEMS, DOING BUSINESS AS SAINT ELIZABETH
MEDICAL CENTER, APPELLEE.

729 N.W.2d 81

Filed March 30, 2007. No. S-05-1306.

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. **Workers' Compensation.** If an injury arises out of and in the course of employment, the Nebraska Workers' Compensation Act is the injured employee's exclusive remedy against his or her employer.
3. _____. If workers' compensation coverage exists because the injury arose out of and in the course of employment, then the provisions of the Nebraska Workers' Compensation Act provide the exclusive remedy as a matter of law.
4. _____. An injured worker may recover workers' compensation benefits for a new injury or an aggravation of a compensable injury resulting from medical or surgical treatment of a compensable injury, even though the new injury was not incurred while performing work duties.
5. **Torts: Employer and Employee.** According to the "dual capacity" doctrine, an employer may become liable to an employee in tort if, with respect to that tort, the employer occupies a position which places upon it obligations independent of and distinct from its role as an employer.

Appeal from the District Court for Lancaster County: JEFFRE
CHEUVRONT, Judge. Affirmed.

Jason G. Ausman, of Johnson, Welch & Ausman, P.C., for appellant.

Travis P. O’Gorman, of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Lyla F. Bennett, appellant, was employed by Saint Elizabeth Health Systems, doing business as Saint Elizabeth Medical Center (Saint Elizabeth), appellee, when she sustained an injury to her left shoulder that was compensable under the Nebraska Workers’ Compensation Act (Workers’ Compensation Act), Neb. Rev. Stat. § 48-101 et seq. (Reissue 1998, Cum. Supp. 2002 & Supp. 2003). Following surgery, Bennett underwent a course of physical therapy at Saint Elizabeth. Bennett alleges that the physical therapy was negligently performed and resulted in an additional injury to her left shoulder. Bennett received workers’ compensation benefits for the initial injury and the consequential injury. Bennett filed a medical malpractice action against Saint Elizabeth in the district court for Lancaster County, seeking damages attributable to the consequential injury. Saint Elizabeth moved for summary judgment, claiming that Bennett’s exclusive remedy for the consequential injury was under the Workers’ Compensation Act. The district court agreed, sustained Saint Elizabeth’s motion, and dismissed the case. Bennett appeals. We conclude that Bennett’s medical malpractice action is barred by the exclusivity provisions of the Workers’ Compensation Act, §§ 48-111 and 48-148, and, accordingly, we affirm.

STATEMENT OF FACTS

There is essentially no dispute as to the material facts in this case. Bennett was employed by Saint Elizabeth, a hospital located in Lancaster County, Nebraska, in the “Hospice Home Health” department. Saint Elizabeth maintains workers’ compensation insurance.

On September 16, 2003, Bennett injured her left shoulder at work while she was attempting to lift a patient out of a chair. On

October 31, Bennett underwent surgery to repair the injury to her left shoulder. After Bennett's surgery, her surgeon prescribed physical therapy treatment. On November 5, 6, 10, and 12, Bennett underwent physical therapy at Saint Elizabeth's physical therapy department. Bennett alleges that as a result of the physical therapy, her left shoulder was reinjured. On February 17, 2004, Bennett underwent a second surgery on her left shoulder.

Bennett's medical expenses relating to both injuries to her left shoulder were paid for by Saint Elizabeth's workers' compensation insurance. As of August 17, 2005, Bennett had received \$50,308.97 in workers' compensation medical benefits from Saint Elizabeth. Bennett also received disability income benefits following both incidents. The record shows that Bennett had received \$14,347.15 in temporary total disability payments and \$164.53 in temporary partial disability payments, as well as \$16,398.78 in unspecified benefits.

On February 10, 2005, Bennett filed a medical malpractice action against Saint Elizabeth in the district court for Lancaster County. Bennett alleged, in effect, that in November 2003, Saint Elizabeth negligently performed physical therapy on her left shoulder, causing her to reinjure her shoulder. Bennett sought damages for permanent disability, loss of quality of life, past and future pain and suffering, lost wages, future loss of earning, and "such other items of general damages which may have been caused by the acts of [Saint Elizabeth]."

Following discovery, Saint Elizabeth filed a motion for summary judgment. Saint Elizabeth claimed that because Bennett's initial injury was compensable under workers' compensation, all subsequent aggravations to that injury were also workers' compensation related, and thus, pursuant to §§ 48-111 and 48-148, Bennett was barred from pursuing her malpractice action.

An evidentiary hearing was conducted in the district court. In its order filed October 11, 2005, the district court determined that Bennett's medical malpractice action against Saint Elizabeth was barred by the exclusivity provisions of the Workers' Compensation Act. The district court sustained Saint Elizabeth's motion for summary judgment and dismissed the case. Bennett appeals.

ASSIGNMENT OF ERROR

On appeal, Bennett asserts a number of arguments, all essentially claiming that the district court erred in determining that the Workers' Compensation Act's "exclusivity doctrine" barred Bennett's medical malpractice action against Saint Elizabeth.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *City of Lincoln v. Hershberger*, 272 Neb. 839, 725 N.W.2d 787 (2007).

ANALYSIS

In its order of October 11, 2005, the district court agreed with Saint Elizabeth and stated that "all of Bennett's injuries arose out of her employment and, therefore, her exclusive remedy is workers' compensation." The district court sustained Saint Elizabeth's motion for summary judgment and dismissed Bennett's medical malpractice action. On appeal, Bennett claims that the district court erred. In urging this court to reverse the district court's decision, Bennett does not dispute that she is entitled to workers' compensation benefits for both the initial injury and the injury sustained during physical therapy, and she further acknowledges that she has received workers' compensation benefits covering the medical care for both injuries. Instead, Bennett argues that because the second injury to her shoulder occurred while she was a patient receiving medical treatment from Saint Elizabeth, she should be permitted to sue the hospital for additional damages in tort. Saint Elizabeth urges us to affirm, arguing that Bennett's injuries are covered by the Workers' Compensation Act and that therefore, Bennett's malpractice action is barred by the exclusivity provisions of the Workers' Compensation Act. We agree with Saint Elizabeth and conclude that the district court did not err when it concluded that Bennett's medical malpractice action was barred by the exclusivity provisions of the Workers' Compensation Act, granted summary judgment in favor of Saint Elizabeth, and dismissed the action. Accordingly, we affirm.

Our analysis is guided by the provisions of the Workers' Compensation Act and our jurisprudence thereunder. Section 48-112 provides that "all contracts of employment shall be presumed to have been made with reference and subject to the Nebraska Workers' Compensation Act. Every such employer and every employee is presumed to accept and come under such sections."

Section 48-111 provides as follows:

Such agreement or the election provided for in section 48-112 shall be a surrender by the parties thereto of their rights to any other method, form, or amount of compensation or determination thereof than as provided in the Nebraska Workers' Compensation Act, and an acceptance of all the provisions of such act, and shall bind the employee himself or herself, and for compensation for his or her death shall bind his or her legal representatives, his or her surviving spouse and next of kin, as well as the employer, and the legal representatives of a deceased employer, and those conducting the business of the employer during bankruptcy or insolvency. For the purpose of this section, if the employer carries a policy of workers' compensation insurance, the term employer shall also include the insurer. The exemption from liability given an employer and insurer by this section shall also extend to all employees, officers, or directors of such employer or insurer, but such exemption given an employee, officer, or director of an employer or insurer shall not apply in any case when the injury or death is proximately caused by the willful and unprovoked physical aggression of such employee, officer, or director.

Section 48-148 provides:

If any employee, or his or her dependents in case of death, of any employer subject to the Nebraska Workers' Compensation Act files any claim with, or accepts any payment from such employer, or from any insurance company carrying such risk, on account of personal injury, or makes any agreement, or submits any question to the Nebraska Workers' Compensation Court under such act, such action shall constitute a release to such employer of all claims or demands at law, if any, arising from such injury.

Sections 48-111 and 48-148 are routinely referred to by this court as the “exclusivity” provisions. See, e.g., *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 631 N.W.2d 510 (2001); *Muller v. Tri-State Ins. Co.*, 252 Neb. 1, 560 N.W.2d 130 (1997). We adopt the same nomenclature in this opinion.

[2,3] Given the provisions of §§ 48-112, 48-111, and 48-148 of the Workers’ Compensation Act, we have stated that if an injury arises out of and in the course of employment, the Workers’ Compensation Act is the injured employee’s exclusive remedy against his or her employer. See, *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, *supra*; *Muller v. Tri-State Ins. Co.*, *supra*. We have further observed that the Workers’ Compensation Act “provides the exclusive remedy by the employee against the employer for any injury arising out of and in the course of the employment.” *Harsh International v. Monfort Indus.*, 266 Neb. 82, 86-87, 662 N.W.2d 574, 579 (2003) (emphasis in original). Accord *Abbott v. Gould, Inc.*, 232 Neb. 907, 443 N.W.2d 591 (1989).

In *Tompkins v. Raines*, 247 Neb. 764, 768, 530 N.W.2d 244, 246 (1995), we stated that “workers’ compensation law covers only claims arising out of and in the course of employment. The issue is one of coverage If coverage exists because the injury arose out of and in the course of employment, then the Workers’ Compensation Act is the exclusive remedy.” Accord *Marlow v. Maple Manor Apartments*, 193 Neb. 654, 228 N.W.2d 303 (1975). Thus, if coverage exists because the injury arose out of and in the course of employment, then the provisions of the Workers’ Compensation Act provide the exclusive remedy against the employer as a matter of law. Given the foregoing principles, the operative issue in this case is one of coverage.

Section 48-101 describes the scope of and the circumstances that fall within workers’ compensation coverage. Section 48-101 provides that

[w]hen personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation therefor from his or her employer if the employee was not willfully negligent at the time of receiving such injury.

[4] In the instant case, there is no dispute that at the time Bennett allegedly reinjured her left shoulder, she was pursuing rehabilitation for her initial injury and was not performing any work duties. It has been recognized that an injured worker may recover workers' compensation benefits for a new injury or an aggravation of a compensable injury resulting from medical or surgical treatment of a compensable injury, even though the new injury was not incurred while performing work duties. See *Smith v. Goodyear Tire & Rubber Co.*, 10 Neb. App. 666, 636 N.W.2d 884 (2001). See, generally, 1 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 10.05 (2006). Professor Larson, in his treatise, describes these injuries as occurring in the "quasi-course of employment," explaining that

[s]ince, in the strict sense, none of the consequential injuries we are concerned with are in the course of employment, it becomes necessary to contrive a new concept, which we may for convenience call "quasi-course of employment." By this expression is meant activities undertaken by the employee following upon his or her injury which, although they take place outside the time and space limits of the employment, and would not be considered employment for usual purposes, are nevertheless related to the employment in the sense that they are necessary or reasonable activities that would not have been undertaken but for the compensable injury.

Id. at 10-12.

In *Smith v. Goodyear Tire & Rubber Co.*, *supra*, an employee appealed the dismissal of his petition for workers' compensation benefits. In reversing the decision of the compensation court, the Nebraska Court of Appeals concluded that the injured worker was entitled to workers' compensation benefits for an injury that he suffered while he received physical therapy as treatment for compensable injuries he had sustained while on the job. In determining that the worker's injury sustained during physical therapy was covered under the Workers' Compensation Act, the Court of Appeals reasoned that the injured worker's "physical therapy related to his employment in the sense that [his] therapy was a necessary or reasonable activity that [he] would not have undertaken but for his [initial compensable] injuries." 10 Neb.

App. at 673, 636 N.W.2d at 889. We agree with the Court of Appeals' reasoning in *Smith*, and applying it in the instant case, we conclude that Bennett's consequential injury to her left shoulder is covered under the Workers' Compensation Act and that her exclusive remedy for this injury is, therefore, under the Workers' Compensation Act and not in tort.

At the time Bennett allegedly reinjured her left shoulder, she was receiving physical therapy for her original injury, which was work related. There is no inference in the record that Bennett's physical therapy was an unnecessary or unreasonable treatment for her initial injury. Because Bennett would not have undertaken the physical therapy to her left shoulder but for the original compensable injury to that shoulder, the consequential injury to the left shoulder is related to her employment, and therefore, it is a covered injury under the Workers' Compensation Act. See *Smith v. Goodyear Tire & Rubber Co.*, *supra*. Saint Elizabeth is liable under the Workers' Compensation Act for both the initial injury and the consequential injury. As a matter of law, because the consequential injury is covered, Bennett's exclusive remedy for this injury is under the Workers' Compensation Act, and recovery is not available in a medical malpractice action against Saint Elizabeth.

Despite the "covered" nature of her injury, Bennett asks this court to ignore the exclusivity provisions of the Workers' Compensation Act and permit her to proceed in district court with an additional action against Saint Elizabeth. Bennett notes that Saint Elizabeth provided the physical therapy implicated in this case and acknowledges that Saint Elizabeth is her "employer." Nevertheless, Bennett suggests we ignore Saint Elizabeth's status as her employer and instead consider Saint Elizabeth as a third party against which a claim would be available under § 48-118 et seq.

[5] Bennett specifically urges this court to adopt either the "dual-capacity" or the "dual persona" doctrine. "According to the 'dual capacity' doctrine, an employer may become liable to an employee in tort if, with respect to that tort, the employer occupies a position which places upon it obligations independent of and distinct from its role as an employer." *Johnston v. State*, 219 Neb. 457, 461, 364 N.W.2d 1, 4 (1985). According

to some authorities, the “dual capacity” doctrine has generally been discredited. See 6 Arthur Larson & Lex K. Larson, *Larson’s Workers’ Compensation Law* § 113.01[2] at 113-3 (2000) (and cases cited therein) (stating that “the term ‘dual capacity’ has proved to be subject to . . . misapplication and abuse [and] the only effective remedy is to jettison it altogether”). Instead, Professor Larson proposes a different term, the “dual persona doctrine,” under which “[a]n employer may become a third person, vulnerable to tort suit by an employee, if—and only if—it possesses a second persona so completely independent from and unrelated to its status as employer that by established standards the law recognizes that persona as a separate legal person.” *Id.*, § 113.01[1] at 113-1.

Regardless of the term used, given the facts presented herein and the applicable law, neither doctrine would apply in the instant case. Bennett’s consequential injury to her left shoulder was related to her employment and therefore is a covered injury for which Saint Elizabeth, in its status as Bennett’s employer, is liable under the Workers’ Compensation Act. Once an employee’s injury is covered, and notwithstanding the availability of a claim against a third party, see § 48-118 et seq., an employee “surrender[s]” his or her “rights to any other method, form, or amount of compensation” from his or her employer, § 48-111. Given the facts surrounding her consequential injury and the conclusion that this injury is covered under the Workers’ Compensation Act, under the exclusivity provisions of the Workers’ Compensation Act, Bennett is precluded as a matter of law from litigating a separate tort claim against her employer for additional damages. Accordingly, we decline Bennett’s suggestion to adopt and apply either the “dual capacity” or the “dual persona” doctrine in this case.

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. *City of Lincoln v. Hershberger*, 272 Neb. 839, 725 N.W.2d 787 (2007). Giving Bennett all favorable inferences from the facts, Saint Elizabeth was entitled to judgment as a matter of law. The district court correctly concluded Bennett’s

medical malpractice suit is barred by the exclusivity provisions of the Workers' Compensation Act and properly granted Saint Elizabeth's motion for summary judgment.

CONCLUSION

The district court correctly concluded that Bennett's medical malpractice action was barred by the exclusivity provisions of the Workers' Compensation Act, thus entitling Saint Elizabeth to summary judgment. We, therefore, affirm the district court's order granting summary judgment in favor of Saint Elizabeth and dismissing Bennett's action.

AFFIRMED.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLANT, v.
JOHN P. GOZZOLA, APPELLEE.
729 N.W.2d 87

Filed March 30, 2007. No. S-06-965.

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. **Judgments: Pleadings: Appeal and Error.** Regarding questions of law presented by a motion to quash, an appellate court is obligated to reach a conclusion independent of the determinations reached by the trial court.
3. **Criminal Law: Statutes: Legislature.** In Nebraska, all crimes are statutory, and no act is criminal unless the Legislature has in express terms declared it to be so.
4. **Statutes: Words and Phrases.** Headings, captions, or catchlines supplied in the compilation of statutes do not constitute any part of the law.
5. **Criminal Law: Statutes.** It is a fundamental principle of statutory construction that penal statutes are to be strictly construed.
6. ____: _____. Possession of a knife by a convicted felon is not made unlawful by Neb. Rev. Stat. § 28-1206(1) (Reissue 1995).

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Exception overruled.

Stuart J. Dornan, Douglas County Attorney, John Alagaban, and Sara Hulac, Senior Certified Law Student, for appellant.

Thomas C. Riley, Douglas County Public Defender, and Kelly M. Steenbock for appellee.

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

STEPHAN, J.

In this appeal brought pursuant to Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2006), the State takes exception to an order of the district court for Douglas County sustaining John P. Gozzola's motion to quash that portion of an information which charged him with being a felon in possession of a deadly weapon in violation of Neb. Rev. Stat. § 28-1206(1) (Reissue 1995). The issue presented is whether possession of a knife by a convicted felon violates § 28-1206(1). We agree with the district court that under the plain language of the statute, it does not. Accordingly, we overrule the State's exception.

BACKGROUND

On March 21, 2006, Gozzola was charged by information with, among other things, violating § 28-1206(1). The information specifically charged that Gozzola, "being a person who has previously been convicted of a felony, did then and there possess a deadly weapon to wit: a knife, brass or iron knuckles, or any other deadly weapon." After withdrawing his plea of not guilty, Gozzola filed a motion to quash, alleging a material defect on the face of the information because § 28-1206(1) did not prohibit the possession of a knife by a felon. At a hearing on the motion to quash, the parties stipulated that Gozzola had a prior felony conviction and that the only weapon found in his possession was a "bowie knife."

The district court sustained the motion to quash. The State filed this timely appeal pursuant to § 29-2315.01, and we moved it to our docket pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.¹

¹ See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENT OF ERROR

The State's sole assignment of error is that the district court erred in finding that the term "deadly weapon" as used in § 28-1206(1) does not include a knife.

STANDARD OF REVIEW

[1,2] 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 Regarding questions of law presented by a motion to quash, an appellate court is obligated to reach a conclusion independent of the determinations reached by the trial court.³

ANALYSIS

[3] In Nebraska, all crimes are statutory, and no act is criminal unless the Legislature has in express terms declared it to be so.⁴ The statute under which Gozzola was charged is titled "**§ 28-1206. Possession of a deadly weapon by a felon or a fugitive from justice; penalty,**" and provides in pertinent part:

(1) 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.

.....

(3)(a) Possession of a deadly weapon other than a firearm by a felon or a fugitive from justice is a Class IV felony.

(b) Possession of a deadly weapon which is a firearm by a felon or a fugitive from justice is a Class III felony.

The State contends that Neb. Rev. Stat. § 28-109 (Cum. Supp. 2006) is also pertinent to our analysis. That statute provides:

² *State v. Marrs*, 272 Neb. 573, 723 N.W.2d 499 (2006); *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006).

³ *State v. Liston*, 271 Neb. 468, 712 N.W.2d 264 (2006); *State v. Al-Sayagh*, 268 Neb. 913, 689 N.W.2d 587 (2004).

⁴ *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002); *State v. Redmond*, 262 Neb. 411, 631 N.W.2d 501 (2001).

For purposes of the Nebraska Criminal Code, unless the context otherwise requires:

.....
 (7) Deadly weapon shall mean any firearm, knife, bludgeon, or other device, instrument, material, or substance, whether animate or inanimate, which in the manner it is used or intended to be used is capable of producing death or serious bodily injury.

The State argues that “because the statute at issue is titled ‘Possession of a deadly weapon by a felon’ and the definition of ‘deadly weapon’ includes a knife of the kind and character found in the possession of [Gozzola], [Gozzola] was in violation of Neb. Rev. Stat. 28-1206.”⁵

[4] Headings, captions, or catchlines supplied in the compilation of statutes do not constitute any part of the law.⁶ Thus, the presence of the phrase “deadly weapon” in the title of § 28-1206 is irrelevant to our analysis.

[5] The critical language is that of § 28-1206(1), which defines the elements of the offense. Section 28-1206(1) makes it unlawful for a felon to possess “any firearm or brass or iron knuckles” but says nothing about any type of knife. The general definition of “deadly weapon” in § 28-109 applies “unless the context otherwise requires.” Here, the Legislature could have made the possession of any deadly weapon by a convicted felon unlawful, but it chose to proscribe only the possession of “any firearm or brass or iron knuckles.”⁷ Thus, in the context of § 28-1206, the phrase “deadly weapon” includes only those weapons specifically described in subsection (1) of the statute. It is a fundamental

⁵ Brief for appellant at 8.

⁶ *State v. Conklin*, 249 Neb. 727, 545 N.W.2d 101 (1996); Neb. Rev. Stat. § 49-802(8) (Reissue 2004).

⁷ Cf. Neb. Rev. Stat. § 28-1205(1) (Reissue 1995) (“[a]ny person who uses a firearm, a knife, brass or iron knuckles, or any other deadly weapon to commit any felony which may be prosecuted in a court of this state or who unlawfully possesses a firearm, a knife, brass or iron knuckles, or any other deadly weapon during the commission of any felony which may be prosecuted in a court of this state commits the offense of using a deadly weapon to commit a felony”).

principle of statutory construction that penal statutes are to be strictly construed.⁸ The expansive construction of § 28-1206 urged by the State would violate this principle.

CONCLUSION

[6] The information broadly charged Gozzola with possession of “a deadly weapon to wit: a knife, brass or iron knuckles, or any other deadly weapon.” However, as noted above, the parties stipulated that Gozzola possessed only a knife. Because possession of a knife by a convicted felon is not made unlawful by the plain language of § 28-1206(1), the district court did not err in sustaining the motion to quash and dismissing the charge.

EXCEPTION OVERRULED.

⁸ *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000); *State v. Owens*, 257 Neb. 832, 601 N.W.2d 231 (1999).

JAMES MALOLEPSZY AND LYNN MALOLEPSZY, APPELLANTS,
v. STATE OF NEBRASKA, APPELLEE.

729 N.W.2d 669

Filed April 6, 2007. No. S-05-993.

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 judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Tort Claims Act: Proof.** In order to recover in a negligence action brought pursuant to the State Tort Claims Act, the plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.
4. **Governmental Subdivisions: Highways: Bridges.** It is the duty of the State to use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for the traveler using them while in the exercise of reasonable and ordinary care and prudence.
5. **Negligence: Proximate Cause: Proof.** To establish proximate cause, there are three basic requirements. First, the negligence must be such that without it, the injury would not have occurred, commonly known as the “but for” rule. Second, the injury must be the natural and probable result of the negligence. Third, there can be no efficient intervening cause.

6. **Negligence: Proximate Cause: Words and Phrases.** An efficient intervening cause is new and independent conduct of a third person, which itself is a proximate cause of the injury in question and breaks the causal connection between the original conduct and the injury.
7. **Motor Vehicles: Right-of-Way.** A motorist has the duty to look both to the right and to the left and to maintain a proper lookout for the motorist's safety and that of others.
8. **Negligence: Motor Vehicles: Right-of-Way.** As a general rule, a motorist's failure to look, when looking would have been effective in avoiding a collision, is negligence as a matter of law.
9. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.

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

James E. Schaefer and Jill A. Daley, of Gallup & Schaefer, for appellants.

Jon Bruning, Attorney General, and Matthew F. Gaffey for appellee.

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

WRIGHT, J.

NATURE OF CASE

James Malolepszy was injured as the result of a motor vehicle accident in a highway construction zone when another driver drove his vehicle from the shoulder into the lane in which James was driving. James and his wife, Lynn Malolepszy, sued the State of Nebraska. The district court granted the State's motion for summary judgment, finding that the other driver's negligence was the proximate cause of James' injuries. The Malolepszys appeal.

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. *City of Lincoln v. Hershberger*, 272 Neb. 839, 725 N.W.2d 787 (2007). In reviewing a summary

judgment, an appellate court views the evidence in a light most favorable to the party against whom judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

FACTS

In May 2001, the Nebraska Department of Roads (DOR) was expanding U.S. Highway 6 (also known as West Dodge Road) in Omaha, Nebraska, from a two-lane road to a four-lane divided highway between approximately 162d and 174th Streets. Highway 6 ran east and west, and it remained open for public travel in each direction during the construction project. Near 168th Street, an overpass was being built over West Dodge Road. The supporting pillars were in place on the south side of the highway, and the road had a slight “S curve” next to the overpass structure. The highway had a double yellow centerline and white lines along each side. On each side of the road, next to the paved shoulder, there was a flat area covered with dirt and gravel that was approximately wide enough for two vehicles to sit side-by-side. (A photograph in the record indicates there was sufficient room for two pickup trucks to be parked parallel to each other in the area next to the shoulder.) Orange barrels were placed along the side of the road in the vicinity of the accident.

At approximately 12:30 p.m. on May 23, 2001, James was driving east on Highway 6. In the vicinity of the planned overpass near 168th Street, Charles Atkins had stopped his pickup truck next to the south shoulder of the eastbound lane. Atkins’ truck was facing in a northwesterly direction. When James was approximately one-half to one car length from where Atkins’ truck was stopped, Atkins pulled out in front of James’ vehicle, and the collision occurred. James was seriously injured.

Lynn was traveling in a separate vehicle two cars behind James. Just prior to the collision, she observed a pickup truck sitting off the shoulder of the highway in the dirt. The truck pulled out in front of James’ vehicle as he was about half a car length away from it. An individual who witnessed the accident from a distance of 15 to 20 car lengths stated that the driver of the truck was on the side of the road and then “all of a sudden” came into the road and hit another vehicle. No evidence was

presented as to how or why Atkins' truck came to be next to the shoulder or as to the direction in which he was headed prior to the collision.

The Malolepszy's filed an action against the State pursuant to the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 2003), asserting three causes of action: negligence, negligent infliction of emotional distress, and loss of consortium. They claimed that (1) the State had a duty to warn of the dangerous and hazardous conditions existing on the roadway and to use fundamental safety principles when routing traffic through construction and maintenance sites, (2) the State breached its duty when it failed to provide adequate warnings and safe roadway conditions, and (3) the resulting injuries were directly and proximately caused by the negligence of the State. The State filed a third-party petition against Atkins and the construction company that was working on the highway project. Atkins and the construction company were subsequently dismissed as parties.

The State filed a motion for summary judgment and offered into evidence the affidavit of Joseph Baratta, DOR project manager. Baratta said that on the date of the accident, the State was reconstructing West Dodge Road from 162d to 174th Street and building an interchange at 168th Street. The construction zone roadway was configured as an undivided two-way road providing one lane for eastbound traffic and one lane for westbound traffic. The centerline of the road was marked with a double solid yellow line, and the edges of the lanes were delineated with solid white lines. The posted speed limit was 45 m.p.h., and the entire construction zone was designated as a no-passing zone.

Baratta went to the scene on the day of the accident and observed that the double solid yellow centerline was bright, clearly visible, and unbroken at the location of the accident and at all locations within sight distance of the accident. The solid white edge lines were also bright, clearly visible, and unbroken at the location of the accident and at all locations within sight distance of the accident. At the time of the accident, the weather conditions were dry and cloudy. The lighting conditions were good and did not limit or impair the visibility of the roadway or the vehicles traveling on it.

Baratta was able to determine the location where Atkins' truck was stopped along the side of the road immediately before it entered the eastbound lane and collided with James' vehicle. Baratta said he stood at various locations at or near the spot where Atkins was stopped, and at all such locations, he had an unobstructed view of the entire eastbound lane of West Dodge Road from the point of the collision to the crest of a small hill approximately one-third of a mile to the west of the accident scene.

The State also offered the affidavit of John Baker, a registered professional engineer who worked as a roadway design engineer for the DOR. He stated that he was able to determine the approximate location where Atkins' truck was stopped along the south side of West Dodge Road prior to the time it entered the eastbound lane. From this location, Baker determined that Atkins had at least 591 feet of unobstructed sight distance for observation of eastbound vehicles on West Dodge Road. The sight distance available to Atkins exceeded the sight distance guidelines set forth for permanent roadways with a posted speed limit of 45 m.p.h., even though the guidelines for permanent roadways do not apply in construction zones. The sight distance available to Atkins also exceeded the guidelines for permanent roadways with a posted speed limit of 60 m.p.h.

The Malolepszys offered an affidavit by George Lynch, an accident reconstructionist, who opined that the vehicles crashed because the State posted an unsafe speed limit at the location of the accident. He also stated that there was an inadequate width of driving lane at the crash site and that the State failed to maintain or post adequate warning signals or proper signage along the roadway. At 45 m.p.h., the perception and reaction time of James and Atkins did not provide for an adequate stopping distance, and the design of the roadway did not allow James or Atkins a chance to avoid the collision. Improper or inadequate barricades were also a factor because motorists were not properly warned of the impending hazard of the "S curve" in the construction zone. Lynch stated that the hazard was not eliminated by the State, which had a duty to adequately warn the motoring public, and that the failure to do so was a cause of the accident.

In an additional discovery document, Lynch listed a number of factors that contributed to the accident: (1) lack of adequate signage in good condition; (2) lack of “directional and/or speed advisories”; (3) placement of barricades too close to the traffic-way; (4) lack of pattern to the 36-inch drums located on the side of the roadway; (5) allowance of speed limit in violation of Neb. Rev. Stat. § 60-6,188 (Reissue 2004), which provides that the maximum speed limit through any construction zone on the state highway system shall be 35 m.p.h. in rural areas and 25 m.p.h. in urban areas; (6) lack of an adequate divider lane; (7) lack of “[c]enter lane tubular markers” to prevent crossover into opposing traffic; (8) insufficient width of the roadway for traffic flow and volume; (9) lack of warning signs about slight curve; and (10) lack of adequate shoulder.

The district court sustained the State’s motion for summary judgment, concluding as a matter of law that Atkins was negligent and that his negligence was the sole proximate cause of the collision. The State’s design and construction choices were superfluous to the collision because the State should not have been bound to anticipate that a driver in Atkins’ position would negligently enter an oncoming lane of traffic without yielding to traffic in that lane. The court dismissed the petition against the State with prejudice.

ASSIGNMENT OF ERROR

In summary, the Malolepszys assign as error the granting of the State’s motion for summary judgment.

ANALYSIS

The district court granted the State’s motion for summary judgment, finding that the negligence of Atkins was the sole proximate cause of the accident. 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. *City of Lincoln v. Hershberger*, 272 Neb. 839, 725 N.W.2d 787 (2007). 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.*

[3,4] In order to recover in a negligence action brought pursuant to the State Tort Claims Act, the plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages. *Fu v. State*, 263 Neb. 848, 643 N.W.2d 659 (2002). Generally, it is the duty of the State to use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for the traveler using them while in the exercise of reasonable and ordinary care and prudence. *Shepard v. State of Nebraska*, 214 Neb. 744, 336 N.W.2d 85 (1983); *Hammond v. Nemaha Cty.*, 7 Neb. App. 124, 581 N.W.2d 82 (1998).

The Malolepszys argue that the district court erred in finding that Atkins was negligent and that his negligence was the proximate cause of the collision. They assert that the collision resulted from the State's failure to provide adequate signage through the construction site, warnings concerning the speed and usage of the lanes, an appropriate speed limit, an adequate divider lane, and a reasonably safe roadway. We focus on the element of causation because it is decisive of the cause before us.

[5] To establish proximate cause, there are three basic requirements. "First, the negligence must be such that without it, the injury would not have occurred, commonly known as the 'but for' rule. Second, the injury must be the natural and probable result of the negligence. Third, there can be no efficient intervening cause." *Willet v. County of Lancaster*, 271 Neb. 570, 575, 713 N.W.2d 483, 487 (2006). In the case at bar, the district court determined that the proximate cause of the collision was the negligence of Atkins. But for Atkins' act of pulling out onto the roadway in front of James' vehicle, the injury to James would not have occurred. James' injury was the natural and probable result of Atkins' pulling his truck out in front of the vehicle James was driving.

The State argues that even if it was negligent in the construction of the roadway, we must consider whether there was an efficient intervening cause. While the district court did not specifically use the term "efficient intervening cause" in its order, the court determined that the design and construction choices

made by the State concerning the roadway were “superfluous to this collision” because the State was not bound to anticipate that a driver in Atkins’ position would negligently enter an oncoming lane of traffic without yielding to vehicles in that lane.

[6] “An efficient intervening cause is new and independent conduct of a third person, which itself is a proximate cause of the injury in question and breaks the causal connection between the original conduct and the injury.” *Id.* at 576, 713 N.W.2d at 488. The causal connection is severed when (1) the negligent actions of a third party intervene, (2) the third party had full control of the situation, (3) the third party’s negligence could not have been anticipated by the defendant, and (4) the third party’s negligence directly resulted in injury to the plaintiff. See *Willet v. County of Lancaster*, *supra*.

In *Willet*, Lancaster County was sued to recover for injuries sustained following a two-vehicle collision. The driver of one of the vehicles involved ran a stop sign and struck Todd Willet’s vehicle at an intersection where a private landowner had constructed a berm. Willet argued that the berm encroached into the right-of-way and obstructed the drivers’ views and that the county breached its duty by ignoring the risk created by the berm. The trial court granted summary judgment to the county, and this court affirmed the dismissal, finding that no genuine issue of material fact remained to show that the county’s actions proximately caused the collision.

We also found that even if the county breached its duty to Willet, the other driver’s negligence was an efficient intervening cause. We stated that the negligent driver could have prevented the collision by exercising reasonable care in obeying the stop sign or reducing his speed so that he could react appropriately. *Willet v. County of Lancaster*, 271 Neb. 570, 713 N.W.2d 483 (2006). This court found it undisputed that if the negligent driver had stopped at the stop sign and proceeded cautiously, he would have seen Willet’s vehicle approaching the intersection.

The County was not bound to anticipate—and could not have contemplated—that [the negligent driver] would disregard the obvious danger inherent in disobeying a stop sign and entering an obstructed intersection at high speed. Thus,

[the negligent driver's] negligent behavior was unforeseeable to the County and constituted an efficient intervening cause of the collision.

Id. at 578, 713 N.W.2d at 489.

[7,8] In evidence offered by the Malolepszys, they suggest a number of examples of ways in which the State was negligent, including failure to provide adequate signage throughout the construction site, an appropriate speed limit, and an adequate divider lane. However, it cannot be disputed that Atkins acted negligently by pulling out in front of James' vehicle. A motorist has the duty to look both to the right and to the left and to maintain a proper lookout for the motorist's safety and that of others. *Springer v. Bohling*, 263 Neb. 802, 643 N.W.2d 386 (2002). As a general rule, a motorist's failure to look, when looking would have been effective in avoiding a collision, is negligence as a matter of law. *Krul v. Harless*, 222 Neb. 313, 383 N.W.2d 744 (1986). We have limited the application of this general rule to situations where another vehicle is indisputably located in a favored position and situations where a driver charged with negligence as a matter of law executed a dangerous driving maneuver which, in part, led to a collision. *Id.* The question is whether the State should have foreseen the possibility that Atkins would fail to look and would execute a dangerous driving maneuver from the shoulder onto the roadway in front of James' vehicle.

We considered the foreseeability of another driver's negligence in *Delaware v. Valls*, 226 Neb. 140, 409 N.W.2d 621 (1987), in which a collision occurred between a dirt bike and an automobile at an intersection that was visually obstructed. A passenger on the dirt bike sued the private landowner who was responsible for the obstruction. This court held that the landowners

were not bound to anticipate and cannot be said to have contemplated that [the dirt bike driver] would negligently attempt to traverse the intersection when he could not see what he needed to see in order to do so safely or that [the automobile driver] would . . . fail to see [the dirt bike driver] in time to avoid the collision. Thus, [the dirt bike driver's] negligence and that alleged on the part of [the automobile driver] are efficient intervening causes.

Id. at 145, 409 N.W.2d at 624.

In *Zeller v. County of Howard*, 227 Neb. 667, 419 N.W.2d 654 (1988), this court also considered an efficient intervening cause. A passenger in a truck was injured after it was struck while driving at a low rate of speed through an unprotected and obstructed intersection. The passenger sued Howard County for failing to replace a stop sign at the intersection. We held that the truck's driver failed to take appropriate measures to avoid the collision and unreasonably disregarded the obvious danger of the intersection. The driver's conduct was an efficient intervening cause of the collision because his behavior was unforeseeable to the county. We stated:

[The driver] had complete control over the situation because he could have avoided the collision by exercising reasonable care while driving the pickup toward and into the intersection. Howard County, even if negligent regarding the absent stop sign in question, was not bound to anticipate, and could not have contemplated, that [the driver] would totally and unreasonably disregard the obvious danger inherent in vehicular travel into a visually obstructed intersection of public roads and fail to take appropriate measures to avoid the collision.

Id. at 675, 419 N.W.2d at 659.

The undisputed facts in this case show that (1) James was east-bound on West Dodge Road in the construction zone; (2) Atkins' truck was stopped along the south shoulder of the road, facing northwest; (3) Atkins, suddenly and without warning, drove his truck in front of James' vehicle; and (4) James had no time to stop before colliding with Atkins' truck. Evidence presented by the State indicated that there was adequate distance for Atkins to have seen James' vehicle approaching.

Whether the signage placed by the State in the construction zone was adequate is a disputed fact that is of no importance. Atkins could have prevented the collision by waiting for James' vehicle and other cars to pass before pulling his vehicle onto the roadway from the shoulder. The record shows that Atkins' vision was not obscured by any equipment in the construction zone and that the weather was not a factor on the day of the accident. The State was not bound to anticipate that a vehicle stopped along the

shoulder of the road would suddenly pull out in front of oncoming traffic.

The Malolepszys also argue that if the State had provided adequate barriers or channelizing devices to separate the two lanes of traffic, it would have been impossible for Atkins to end up on the south side of the highway with his vehicle facing in the wrong direction. Thus, Atkins would not have pulled out in front of oncoming traffic and collided with James. There is nothing in the record to establish how or why Atkins' vehicle was along the south shoulder of the highway. Atkins did not recall anything about the accident.

The Malolepszys theorized during oral argument that the accident occurred because Atkins was driving westbound, realized he was in the wrong lane, and pulled over on the south shoulder of the road. They hypothesized that Atkins pulled out in front of James' vehicle to resume his westbound trip. Their theory does not change the fact that Atkins' negligence was the proximate cause of James' injuries.

The Malolepszys argue in great detail concerning the various alleged negligent acts of the State. As noted above, even if the design of the construction zone was negligent, the evidence shows that the State's actions were not the proximate cause of the collision. Atkins' negligent behavior was unforeseeable to the State and constituted an efficient intervening cause of the collision.

[9] The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Dutton-Lainson Co. v. Continental Ins. Co.*, 271 Neb. 810, 716 N.W.2d 87 (2006). We have viewed the evidence in the light most favorable to the Malolepszys and given them the benefit of all reasonable inferences deducible from the evidence. We find no error in the order of the district court, which determined that Atkins' negligence was the sole proximate cause of the collision. The State's design for the construction zone did not cause the collision. The State could not have anticipated that a driver in Atkins' position would enter an oncoming lane of traffic without yielding to vehicles in that lane. Atkins' actions were not foreseeable to the State and

constituted an efficient intervening cause of the collision and James' resulting injuries.

CONCLUSION

The district court was correct in granting summary judgment in favor of the State because Atkins' negligence was the sole proximate cause of the injuries to James. The judgment is affirmed.

AFFIRMED.

ROBERT J. WILCZEWSKI II, APPELLANT, v. BEVERLY
NETH AND THE NEBRASKA DEPARTMENT OF
MOTOR VEHICLES, APPELLEES.

729 N.W.2d 678

Filed April 6, 2007. No. S-05-1378.

1. **Equity: Motor Vehicles: Licenses and Permits: Appeal and Error.** In an appeal of a denial of a motor vehicle operator's license, the district court hears the appeal as in equity without a jury and determines anew all questions raised before the director of the Department of Motor Vehicles.
2. **Administrative Law: Motor Vehicles: Appeal and Error.** An appellate court's review of a district court's review of a decision of the director of the Department of Motor Vehicles is de novo on the record.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court resolves the questions independently of the conclusions reached by the trial court.
4. **Motor Vehicles: Licenses and Permits: Revocation: States.** Under Nebraska law, no individual may be licensed to operate a motor vehicle in this state if he or she holds a license in this state or any other state that is currently suspended or revoked.

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

John C. Brownrigg, of Erickson & Sederstrom, P.C., for appellant.

Jon Bruning, Attorney General, and Milissa Johnson-Wiles for appellees.

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

McCORMACK, J.

NATURE OF CASE

Robert J. Wilczewski II was denied a license to drive in Nebraska based upon information contained in the National Driver Register's Problem Driver Pointer System (PDPS), which indicated he was "not eligible" for a driver's license in Missouri. At issue in this case is whether an individual who is "not eligible" for a driver's license in another state is prohibited by Nebraska law from obtaining a driver's license in Nebraska during the period of ineligibility.

BACKGROUND

On December 7, 2002, while holding a Missouri driver's license, Wilczewski was arrested in Omaha, Nebraska, for driving under the influence (DUI). Wilczewski was subsequently convicted of second-offense DUI. On September 26, 2003, Wilczewski was again arrested in Omaha for DUI while still holding a Missouri driver's license. Wilczewski was again convicted of second-offense DUI.

In his brief on appeal, Wilczewski states that because he had not been issued a Nebraska driver's license at the time of his arrests, his DUI convictions were reported to Missouri pursuant to the Driver License Compact (Compact).¹ For purposes of the Compact, Missouri was Wilczewski's home state for his driver's license.² Based on an accumulation of traffic convictions, including Wilczewski's two DUI convictions in Nebraska, Missouri revoked Wilczewski's driver's license for 1 year as of February 16, 2004. Additionally, Wilczewski was notified by Missouri that because he had two convictions for DUI, Missouri law³ prohibited the director of the Department of Revenue in Missouri from issuing him a driver's license for a period of 5 years from the date of the conviction of the second-offense DUI.

Wilczewski states that after complying with the sanctions imposed in Nebraska as a result of his DUI convictions, he paid

¹ 2A Neb. Rev. Stat. app. § 1-113 (Reissue 1995).

² *Id.*, art. I(b).

³ Mo. Ann. Stat. § 302.060(10) (West Cum. Supp. 2007).

a Nebraska driver's license reinstatement fee, completed a defensive driving course, and obtained the required automobile insurance policy. The Nebraska Department of Motor Vehicles (DMV) then provided Wilczewski with a letter stating that his privilege to operate a motor vehicle in Nebraska had been reinstated, but that in order to obtain a valid driver's license, he must pass the required examinations. The letter also stated that upon application for a driver's license, Wilczewski would be subject to a check of the PDPS, and that he would not be allowed to test for a license if he was currently under driving suspension in another state.

Wilczewski applied for a driver's license in Nebraska on January 19, 2005, but was not allowed to complete the licensing process because the PDPS indicated a possible match in Missouri. The PDPS report indicated that Wilczewski had a driver's license status of "not eligible" in Missouri.

In letters received by the DMV on March 25 and 30, 2005, Wilczewski's attorney requested a review of the denial of Wilczewski's application for a license. On May 18, the director of the DMV affirmed the decision to deny Wilczewski a Nebraska driver's license. The director found that the denial of a license was based on Neb. Rev. Stat. § 60-486 (Reissue 2004), which provides in part that no individual shall be licensed to operate a motor vehicle in Nebraska if he or she has a license currently under suspension or revocation in another state. The director found that "not eligible" constituted a suspension or revocation under § 60-486. The director further found that a Missouri driver record clearly indicated that Missouri considered Wilczewski to have a revoked status.

Wilczewski appealed the decision of the director to the district court, which affirmed. The district court concluded that although § 60-486 does not include language prohibiting the licensing of an individual who is "not eligible" to obtain a license in another state, it is clear in reading § 60-486 and Neb. Rev. Stat. § 60-4,116 (Reissue 2004) together that the disqualification language contained in § 60-4,116 was meant to be included in the suspension or revocation language contained in § 60-486. Section 60-4,116 provides in part that prior to the issuance or renewal of a driver's license, the DMV shall contact the National Driver Register to determine if an applicant has been disqualified from operating

any motor vehicle or has had an operator's license suspended, revoked, or canceled.

Wilczewski now appeals the decision of the district court affirming the decision to deny him a driver's license in Nebraska.

ASSIGNMENTS OF ERROR

Wilczewski assigns as error, restated, the district court's decision affirming the DMV's order denying the issuance of a Nebraska driver's license to him because (1) the DMV incorrectly interpreted § 60-486 and (2) even assuming Wilczewski's driver's license is currently under revocation, the Compact authorizes the issuance of a license to him 1 year from the date his Missouri license was revoked.

STANDARD OF REVIEW

[1,2] In an appeal of a denial of a motor vehicle operator's license, the district court hears the appeal as in equity without a jury and determines anew all questions raised before the director of the DMV.⁴ An appellate court's review of a district court's review of a decision of the director of the DMV is de novo on the record.⁵

[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.⁶

ANALYSIS

Wilczewski argues that the fact that he is currently "not eligible" for a Missouri driver's license does not preclude him under Nebraska law from obtaining a Nebraska driver's license.

[4] Nebraska is a signatory of the Compact. Other signatories of the Compact have stated that the policy behind the Compact is to promote compliance with the laws, ordinances, and administrative rules and regulations relating to the operation of motor vehicles by their operators in each of the jurisdictions where such

⁴ Neb. Rev. Stat. § 60-4,105 (Reissue 2004). See *Jacobson v. Higgins*, 243 Neb. 485, 500 N.W.2d 558 (1993).

⁵ *Strong v. Neth*, 267 Neb. 523, 676 N.W.2d 15 (2004).

⁶ *In re Adoption of Jaden M.*, 272 Neb. 789, 725 N.W.2d 410 (2006).

operators drive motor vehicles.⁷ Article IV of the Compact provides that if an applicant for a driver's license has held a driver's license that has been *suspended* by any other party state and that suspension period has not expired, the state where the application is made shall not issue a driver's license to the applicant.⁸ Article IV further provides that if the applicant has held a driver's license that has been *revoked* by any other party state, the state where the application is made shall not issue a driver's license to the applicant, except that after 1 year from the date the license was revoked, the applicant may apply for a new license if permitted by law.⁹ Section 60-486(1) provides that a party may not be licensed to operate a motor vehicle in Nebraska if he or she has a driver's license currently revoked or suspended by Nebraska or any other state or jurisdiction. Construing the statutes together, under Nebraska law, no individual may be licensed to operate a motor vehicle in this state if he or she holds a license in this state or any other state that is currently suspended or revoked.

Although the 1-year revocation of Wilczewski's Missouri driver's license has ended, the DMV takes the position that Wilczewski is nevertheless precluded from obtaining a driver's license in Nebraska because he is currently "not eligible" to be reissued a driver's license in Missouri. The DMV argues that Wilczewski's "not eligible" status should be interpreted as a suspension or revocation for purposes of § 60-486 and that Wilczewski may not be issued a Nebraska driver's license until the period of his ineligibility ends. We agree.

Wilczewski's Missouri driver's license was revoked by that state for a period of 1 year beginning February 2004. Missouri law¹⁰ provides that after an individual whose driver's license has been revoked under that statute receives notice of the termination

⁷ See, *Marshall v. Department of Transp.*, 137 Idaho 337, 48 P.3d 666 (Idaho App. 2002); *Girard v. White*, 356 Ill. App. 3d 11, 826 N.E.2d 517, 292 Ill. Dec. 376 (2005); *State v. Regan*, 209 N.J. Super. 596, 508 A.2d 1149 (1986); *Siekierda v. Com., Dept. of Transp.*, 580 Pa. 259, 860 A.2d 76 (2004).

⁸ § 1-113, art. IV(1), *supra* note 1.

⁹ *Id.*, art. IV(2).

¹⁰ Mo. Ann. Stat. § 302.304(7) (West Cum. Supp. 2007).

of the revocation period, he or she shall pass the complete driver examination and apply for a new license before operating a motor vehicle in Missouri. Wilczewski's revocation period ended in February 2005; however, he remains "not eligible" to hold a Missouri driver's license because he has received two DUI convictions in a 5-year period.¹¹

Revocation is defined by the Motor Vehicle Operator's License Act as "the termination . . . of a person's operator's license, which termination shall not be subject to renewal or restoration."¹² Section 60-476.01 further states, however, that a person may apply for reinstatement of his or her eligibility to obtain a new license after the expiration of the time period prescribed in the statute providing for revocation.¹³

Wilczewski's Missouri driver's license is not subject to renewal or restoration. Rather, when he is eligible to do so under Missouri law, he must pass the necessary examination and apply for a new license. Although Wilczewski's 1-year revocation has ended, he is still ineligible under Missouri law to renew or restore his prior Missouri driver's license. We conclude that for purposes of the Motor Vehicle Operator's License Act, Wilczewski's current period of ineligibility in Missouri constitutes a revocation as it is defined by § 60-476.01. Under Nebraska law, an individual may not be licensed to operate a motor vehicle in Nebraska if he has a driver's license that is currently revoked in another state. Because Wilczewski's Missouri driver's license is currently revoked for purposes of Nebraska law, Wilczewski may not be licensed to drive in this state until his 5-year period of ineligibility to drive in Missouri has ended.

CONCLUSION

For these reasons, we affirm the decision of the district court.

AFFIRMED.

¹¹ See § 302.060(10), *supra* note 3.

¹² Neb. Rev. Stat. § 60-476.01 (Reissue 2004).

¹³ *Id.*

STATE OF NEBRASKA, APPELLEE, V.
DONALD DOCKERY, APPELLANT.
729 N.W.2d 320

Filed April 6, 2007. No. S-06-526.

1. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Speedy Trial: Waiver.** Failure of a defendant to move for discharge prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to speedy trial.
3. **Speedy Trial.** Pursuant to Neb. Rev. Stat. § 29-1207(3) (Reissue 1995), if a defendant is to be tried again following a mistrial, an order for a new trial, or an appeal or collateral attack, the 6-month period shall commence to run from the date of the mistrial, order granting a new trial, or the mandate on remand.
4. **Speedy Trial: Mental Competency.** Pursuant to Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1995), the 6-month speedy trial clock excludes any period of delay resulting from other proceedings concerning the defendant, including but not limited to an examination and hearing on competency and the period during which he or she is incompetent to stand trial.
5. **Speedy Trial: Pretrial Procedure: Motions to Suppress.** Neb. Rev. Stat. § 29-1207(4)(a) (Reissue 1995) excludes from speedy trial calculations the time from filing until final disposition of pretrial motions by the defendant, including motions to suppress.
6. **Speedy Trial: Proof.** To avoid a defendant's absolute discharge from an offense charged, as dictated by Neb. Rev. Stat. § 29-1208 (Reissue 1995), the State must prove by a preponderance of the evidence the existence of a period of time which is authorized by Neb. Rev. Stat. § 29-1207(4) (Reissue 1995) to be excluded in computing the time for commencement of the defendant's trial.
7. **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.
8. _____. 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.

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

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

Jon Bruning, Attorney General, and Erin E. Leuenberger for appellee.

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

WRIGHT, J.

NATURE OF CASE

Donald Dockery filed a motion to discharge on speedy trial grounds. The Douglas County District Court overruled the motion, and Dockery appeals.

SCOPE OF REVIEW

[1] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005).

FACTS

On December 15, 2003, Dockery was charged by information in docket No. 161-506 with one count of criminal impersonation and one count of theft by deception. On March 29, 2004, Dockery filed a motion to suppress statements he had given to police. Dockery refused to appear for a hearing on the motion on April 2. The hearing was rescheduled twice and eventually held on July 22. Dockery again declined to participate in a hearing on September 23, and the matter was continued. Dockery's motion to suppress was still pending when the State moved to dismiss the case on October 5. The district court granted the motion and dismissed the case. On October 6, the State filed an information in docket No. 164-090, charging Dockery with one count of criminal impersonation, one count of theft by deception, and with being a habitual criminal. Dockery again filed a motion to suppress on November 2.

After a preliminary hearing on January 3, 2005, the district court determined that the State had met its burden of proof in establishing probable cause. Dockery's motion to suppress was overruled on March 15, and he filed a motion in limine on March 17. After a hearing on March 18, the court determined that issues involving evidentiary matters would be taken up at trial.

The district court granted the State's motion to continue the trial from March 24, 2005, to April 11. As the proceedings were about to begin on April 11, Dockery moved to continue because he needed medical attention. There was no supporting medical evidence, and the district court denied the motion. About an hour later, Dockery was escorted from the courthouse by paramedics

and taken to a hospital. The court rescheduled trial for 9 a.m. on April 12. However, during the afternoon of April 11, the court reconvened and was advised that Dockery had been hospitalized. The court determined that the next available date for trial was the week of July 18.

Dockery failed to appear for a hearing on June 2, 2005, and a *capias* was issued. Dockery was present at a hearing on July 7, and his bond was forfeited. When the case was called for trial on July 21, Dockery experienced medical problems during *voir dire*. His medical condition was assessed, and *voir dire* was adjourned until the next day. On July 22, the district court reported that Dockery had been admitted to the hospital, and a mistrial was declared. On July 27, the court ordered mental and physical examinations of Dockery to determine his competence to stand trial. A status hearing was held on August 26, and the matter was reset for October 11.

On December 1, 2005, a status hearing was held with Dockery present in order to advise him of the consequences of a refusal to submit to examinations. At a hearing on December 20, the district court discussed the trial schedule and Dockery's refusal to submit to a physical examination. The court told Dockery that trial would begin on January 23, 2006, and that Dockery could leave if he had medical problems. Dockery filed a *pro se* motion to dismiss on March 8, and his counsel filed a motion to discharge on March 15. The motions were argued and submitted on March 20. The motion to discharge was denied in an order filed on April 17.

ASSIGNMENT OF ERROR

Dockery assigns as error the district court's overruling his motion to discharge, asserting that the State did not bring him to trial within 6 months as required by Neb. Rev. Stat. § 29-1207 (Reissue 1995); Neb. Const. art. I, § 11; and U.S. Const. amend. VI.

ANALYSIS

Neb. Rev. Stat. § 29-1208 (Reissue 1995) requires discharge of a defendant whose case has not been tried before the running of the time for trial. Section 29-1207 provides that trial shall be commenced within 6 months after the filing of the information,

unless the 6 months are extended by any excludable period as set out in the statute.

Dockery's speedy trial calculation begins with the filing of the information in docket No. 161-506 on December 15, 2003. He then outlines the time during which the speedy trial period was tolled based on motions he filed. His calculations stop on July 22, 2005, the date the mistrial was declared. He argues that trial should not have started on July 21 because it was more than 180 days after the information was filed in docket No. 161-506.

[2] Dockery has waived any objection on the basis of a violation of the right to a speedy trial because he did not file a motion to discharge before trial started. Neb. Rev. Stat. § 29-1209 (Reissue 1995) provides that "[f]ailure of the defendant to move for discharge prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to speedy trial." Dockery did not file a motion to discharge until March 8, 2006; however, trial started on July 21, 2005. Therefore, Dockery has waived the right to argue that he is entitled to discharge based on speedy trial grounds with respect to the period ending July 21, 2005.

[3] Once a mistrial is granted, the speedy trial clock is restarted. Pursuant to § 29-1207(3), if a defendant "is to be tried again *following a mistrial*, an order for a new trial, or an appeal or collateral attack," the 6-month period "shall commence to run from the date of the mistrial, order granting a new trial, or the mandate on remand." (Emphasis supplied.) See, also, *State v. Bennett*, 219 Neb. 601, 365 N.W.2d 423 (1985) (6-month speedy trial period begins on date mistrial is ordered). Dockery makes no reference to this provision and includes periods of time after the mistrial was granted in his calculations.

To the extent that Dockery's argument can be interpreted to assert that his right to a speedy trial was violated by the passage of time between the mistrial and the filing of the motion to discharge, we find no error. After declaring a mistrial, the district court scheduled a status hearing for July 27, 2005, in order to have Dockery evaluated to determine his psychological competence to stand trial. The court also stated it would seek input regarding Dockery's medical condition and his physical ability to participate in a trial. In setting the schedule, the court stated

that the time between July 22 and the status hearing on July 27, as well as any time that passed before a determination was made about Dockery's medical and psychological competence, would be charged to Dockery and would not count against the speedy trial period.

The trial docket indicates that on July 27, 2005, a status hearing was held with counsel present and that a psychological examination was ordered. Another status hearing was held on August 26. On December 1, a status hearing was set for December 20, at which Dockery was to be present so he could be advised of the consequences of a refusal to be examined. At the hearing on December 20, the district court informed Dockery that if he continued to refuse medical attention and had medical problems during the proceedings, he should leave the courtroom and the trial would proceed in his absence.

[4] The time between the status hearings on July 27 and December 20, 2005, is not included in calculating the speedy trial period. Pursuant to § 29-1207(4)(a), the 6-month speedy trial clock excludes any "period of delay resulting from other proceedings concerning the defendant, including but not limited to an *examination and hearing on competency* and the period during which he is incompetent to stand trial." (Emphasis supplied.) See, also, *State v. Teater*, 217 Neb. 723, 351 N.W.2d 60 (1984) (delay due to proceedings to determine competency tolled defendant's right to speedy trial); *State v. Bolton*, 210 Neb. 694, 316 N.W.2d 619 (1982) (period of delay attributable to psychiatric evaluations and treatment properly excludable under § 29-1207(4)(a)). The period between July 27 and December 20 was attributable to a delay resulting from an attempt to have Dockery examined to determine his mental and physical competency to stand trial. Once he was advised at the December 20 status hearing of the consequences of refusal to take part in examinations, the speedy trial clock started running again.

[5] Dockery filed yet another motion to suppress on January 12, 2006. Section 29-1207(4)(a) excludes from speedy trial calculations the time from filing until final disposition of pre-trial motions by the defendant, including motions to suppress. Dockery's motion stopped the speedy trial clock. The period between the hearing on December 20, 2005, and the filing of the

motion to suppress on January 12, 2006, covered 23 days toward the 6 months allowed for trial. The motion to suppress had not yet been ruled on when Dockery filed a motion to discharge on March 8.

[6] To avoid a defendant's absolute discharge from an offense charged, as dictated by § 29-1208, the State must prove by a preponderance of the evidence the existence of a period of time which is authorized by § 29-1207(4) to be excluded in computing the time for commencement of the defendant's trial. *State v. Knudtson*, 262 Neb. 917, 636 N.W.2d 379 (2001). As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005).

The only error made by the district court was in excluding 5 days between July 22, 2005, when the mistrial was declared, and July 27, when the first status hearing was held. The court stated that Dockery would be charged with the period between the date of the mistrial and the date of a determination about Dockery's medical and psychological competence. The psychological examination was not ordered until July 27, and the 5 days between the court's statement and entry of the order should have been included in calculating the 6-month speedy trial period. Adding this 5 days to the 23 days mentioned earlier results in a finding that 28 days elapsed in the current 6-month speedy trial period, which began on the date the mistrial was granted. Thus, we find no statutory violation of Dockery's speedy trial rights.

[7,8] Dockery also asserts that his state and federal constitutional rights to a speedy trial have been violated. However, he does not specifically argue this claim in his brief. 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. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006). The question of whether Dockery's constitutional rights to a speedy trial were violated was not raised in a memorandum brief filed with the district court. Nor did the district court address the constitutional issue in its order denying the motion to discharge. 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. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006). We decline to consider the alleged violation of Dockery's constitutional rights because the issue has not been specifically assigned and argued on appeal and it was not raised in the court below.

CONCLUSION

The judgment of the district court overruling Dockery's motion to discharge is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. TIMOTHY J. STIVRINS, M.D.,
AND MICHAEL A. PACE, M.D., RELATORS, v. HONORABLE
KAREN B. FLOWERS, JUDGE, DISTRICT COURT FOR LANCASTER
COUNTY, NEBRASKA, RESPONDENT, AND DONALD R.
WINTER, PERSONAL REPRESENTATIVE OF THE ESTATE
OF CHARLOTTE WINTER, INTERVENOR.

729 N.W.2d 311

Filed April 6, 2007. No. S-06-1044.

1. **Attorney and Client: Appeal and Error.** When reviewing the applicability of the attorney-client privilege, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Mandamus.** Mandamus is appropriate when (1) the relator has a clear legal right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of the law.
3. **Mandamus: Proof.** In a mandamus action, the relator has the burden of proof and must show clearly and conclusively that such party is entitled to the particular remedy sought and that the respondent is legally obligated to act.
4. **Mandamus: Pretrial Procedure: Appeal and Error.** In determining whether mandamus applies to an issue of discovery, the Nebraska Supreme Court considers whether the trial court clearly abused its discretion in not limiting the scope of the discovery.
5. **Attorney and Client.** A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications between the client and his or her lawyer made for the purpose of facilitating the rendition of professional legal services to the client.
6. **Attorney and Client: Pretrial Procedure: Proof.** The party asserting attorney-client privilege has the burden of proving that the information sought is protected.

Cite as 273 Neb. 336

7. **Attorney and Client: Words and Phrases.** A client is a person who is rendered professional legal services by a lawyer or who consults a lawyer with a view to obtaining professional legal services from the lawyer.
8. **Attorneys at Law: Words and Phrases.** A lawyer is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.
9. **Attorney and Client.** An attorney-client relationship is created when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance.
10. _____. To be protected from disclosure, a communication between a client and his or her attorney must be one which is essentially confidential in character and which relates to the subject matter upon which the attorney's advice was given or sought.
11. _____. A communication is confidential if it is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.
12. **Courts: Attorney and Client.** Courts have a duty to maintain public confidence in the legal system and to protect and enhance the attorney-client relationship in all its dimensions.
13. **Attorney and Client.** Both the fiduciary relationship existing between attorney and client and the proper functioning of the legal system require preservation by the attorney of confidences and secrets of one who has employed or sought to employ him or her.
14. **Mandamus: Final Orders: Appeal and Error.** Generally, a discovery order can be reviewed on appeal from a final judgment in the case; however, when the remedy, though available, is inadequate, mandamus will lie.

Original action. Peremptory writ issued.

Patrick G. Vipond, Kyle Wallor, and Molly C. Moran, of Lamson, Dugan & Murray, L.L.P., for relators.

Jon Bruning, Attorney General, and Thomas E. Stine for respondent.

Sally A. Rasmussen, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for intervenor.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

I. NATURE OF CASE

During the course of a discovery deposition, the plaintiff sought to question a witness about a conversation with his attorney. Counsel for the witness objected, and the plaintiff filed a

motion to compel the witness to answer the deposition questions. The district court ordered disclosure of the conversation. The witness and the defendant filed in this court an original action seeking a writ of mandamus directing the district court to vacate its order compelling disclosure.

II. SCOPE OF REVIEW

[1] When reviewing the applicability of the attorney-client privilege, an appellate court reaches a conclusion independent of the lower court's ruling. See *Greenwalt v. Wal-Mart Stores*, 253 Neb. 32, 567 N.W.2d 560 (1997). In determining whether mandamus applies to an issue of discovery, we consider whether the trial court clearly abused its discretion in not limiting the scope of the discovery. See *State ex rel. Acme Rug Cleaner v. Likes*, 256 Neb. 34, 588 N.W.2d 783 (1999).

III. FACTS

In the underlying case, the plaintiff, as personal representative of his wife's estate and individually, brought an action for medical malpractice against Timothy J. Stivrins, M.D., in the district court for Lancaster County. The plaintiff alleged that Stivrins failed to identify early signs of cancer on the lungs of the plaintiff's wife. Stivrins was represented in the action by attorney Patrick G. Vipond.

While conducting discovery, the plaintiff sought to depose Michael A. Pace, M.D., who worked in the same medical office as Stivrins. During the week of December 12, 2005, Pace received notice that the plaintiff wanted to take his deposition. Pace knew that Vipond was representing Stivrins in the medical malpractice action, and in a telephone conversation, Pace and Vipond discussed whether Pace should have legal representation at his deposition. Vipond told Pace that Vipond could represent Pace and agreed to do so. Vipond also informed Pace that their conversations were privileged.

At the deposition, Pace told the plaintiff's counsel that Vipond was his attorney and was representing him. The following dialog occurred during the deposition:

Q [by plaintiff's attorney] Okay. When did you speak with [Vipond] about the fact this was a missed cancer case?

A On the phone yesterday.

Q And what — Tell me what you said and what he said[.]

[Vipond]: Wait. Don't.

[Pace]: Was that yesterday?

[Vipond]: He's not going to discuss our conversation. I'm his attorney here representing him. And when I discussed it with him as his attorney, attorney/client privilege. You're instructed not to answer any questions about what we discussed.

[Plaintiff's attorney]: Okay. Let me just clarify. I'll ask you to clarify that.

Q [by plaintiff's attorney] Dr. Pace, does Mr. Vipond represent you in some capacity?

A Yes.

Q What capacity?

A He's my lawyer.

Q For? For what?

A For this deposition.

Q Okay. And you understand that you are not a party to this lawsuit?

A Yes.

Q Okay. And you understand nobody is suing you over this; correct?

A Yes.

Q All right. I'm going to ask it again. Yesterday when you talked to Mr. Vipond about the deposition, I want to know what you said and what he said.

[Vipond]: Okay. Object and instruct him not to answer, attorney/client privilege. And you don't need to answer the question.

The plaintiff filed a motion to compel requesting the district court to order Pace to answer the deposition questions. A hearing on the motion was held on April 18, 2006. A transcript of the deposition was submitted to the court, along with the affidavits of Vipond and Pace. Each affidavit asserted that an attorney-client relationship existed between Vipond and Pace. After reviewing the evidence, the court stated it was not convinced that Vipond and Pace had sustained their burden to

establish that the attorney-client privilege protected the discussions they had prior to Pace's deposition. The court thus sustained the plaintiff's motion to compel.

On July 24, 2006, Stivrins and Pace, as relators, filed an application in this court for leave to file an original mandamus action against the district court. They sought a writ of mandamus directing the district court to vacate its order compelling disclosure of the communications between Pace and Vipond. This court granted the relators' request to file the mandamus action and granted the plaintiff permission to intervene. We issued an alternative writ of mandamus directing the court to either set aside the discovery order or show cause why a peremptory writ should not be issued.

In response, the district court filed a "show cause statement," which stated that the court was not convinced Vipond and Pace had sustained their burden to establish that the attorney-client privilege protected the conversation sought to be disclosed.

IV. ASSIGNMENTS OF ERROR

The relators contend that the district court erred in granting the plaintiff's motion to compel Pace to disclose communications protected by attorney-client privilege and in denying the relators' request to protect those communications.

V. ANALYSIS

[2-4] Mandamus is appropriate when (1) the relator has a clear legal right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of the law. See *State ex rel. Upper Republican NRD v. District Judges*, ante p. 148, 728 N.W.2d 275 (2007). In a mandamus action, the relator has the burden of proof and must show clearly and conclusively that such party is entitled to the particular remedy sought and that the respondent is legally obligated to act. See *id.* In determining whether mandamus applies to an issue of discovery, this court considers whether the trial court clearly abused its discretion in not limiting the scope of the discovery. See *State ex rel. Acme Rug Cleaner v. Likes*, 256 Neb. 34, 588 N.W.2d 783 (1999).

1. RELATORS' LEGAL RIGHT

[5,6] The relators must demonstrate clearly and conclusively that they are entitled to the particular remedy sought. See *State ex rel. Upper Republican NRD, supra*. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications between the client and his or her lawyer made for the purpose of facilitating the rendition of professional legal services to the client. See Neb. Rev. Stat. § 27-503(2) (Reissue 1995). Thus, whether the relators have a clear legal right to the relief they seek depends on whether an attorney-client relationship existed between Vipond and Pace and whether the information sought to be disclosed was a protected confidential communication. The party asserting attorney-client privilege has the burden of proving that the information sought is protected. See *Greenwalt v. Wal-Mart Stores*, 253 Neb. 32, 567 N.W.2d 560 (1997).

(a) Attorney-Client Relationship

[7] Under § 27-503(1), a client is a person who is rendered professional legal services by a lawyer or who consults a lawyer with a view to obtaining professional legal services from the lawyer. Pace's affidavit adequately sets forth such description. Pace consulted with Vipond 2 days before the deposition was taken, and they discussed whether Pace should have legal representation at his deposition. Vipond agreed to represent Pace at the deposition and told him their communications were privileged. Pace referred to Vipond as his attorney.

[8] A lawyer is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation. § 27-503(1)(b). Vipond is licensed to practice law in Nebraska. He agreed to represent Pace at the deposition and told him their communications were privileged. Vipond attended Pace's deposition as Pace's attorney. Thus, the relationship between Vipond and Pace falls under the statute setting forth the attorney-client privilege.

[9] An attorney-client relationship is created when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly

agrees to give or actually gives the desired advice or assistance. *McVaney v. Baird, Holm, McEachen*, 237 Neb. 451, 466 N.W.2d 499 (1991). Pace sought advice from Vipond on whether Pace should have legal representation at the deposition. The advice and assistance sought by Pace from Vipond was within Vipond's professional competence as a lawyer. And Vipond agreed to represent Pace at the deposition. Accordingly, an attorney-client relationship was formed between Vipond and Pace.

(b) Confidential Communications

[10,11] To be protected from disclosure, "a communication must be one which is essentially confidential in character and which relates to the subject matter upon which advice was given or sought." *State v. Hawes*, 251 Neb. 305, 309, 556 N.W.2d 634, 637 (1996). A communication is confidential if it is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. § 27-503(1)(d).

The exhibits before this court leave little doubt that the plaintiff's attorney was seeking communications between Vipond and Pace that were not intended to be disclosed to third persons. Pace's affidavit makes clear that Vipond told Pace all their conversations were privileged; thus, Pace had a reasonable expectation that his discussions with Vipond before the deposition were confidential. In the deposition, the plaintiff's attorney expressly (and generally) inquired into what was "said" between Vipond and Pace. The plaintiff's motion requested an order compelling Pace to respond to plaintiff's deposition questions regarding his conversations with Vipond. In further generalities, the plaintiff asserted that the information sought was relevant to the credibility and reliability of Pace as a witness and was needed to prepare for trial.

Following a hearing, the district court sustained the plaintiff's motion to compel. In a "show cause statement" submitted to this court in response to the alternative writ of mandamus, the district court declared:

After reviewing the evidence received during the Motion to Compel hearing, the court was not convinced that Pace and Vipond had sustained their burden to establish that the

attorney-client privilege protected the discussions they had had prior to Pace's deposition. See *Greenwalt v. Wal-Mart Stores, Inc.*, 253 Neb. 32, 567 N.W.2d 560 (1997).

The district court's reliance upon *Greenwalt v. Wal-Mart Stores*, 253 Neb. 32, 567 N.W.2d 560 (1997), is misplaced. An important distinction from *Greenwalt* is that the matters at issue in the case at bar were confidential communications between a client and his attorney. In *Greenwalt*, a party asserted that documents requested by the opposing party were attorney work product. It was not asserted that the information contained in the requested documents included confidential communications between attorney and client. We held that a party asserting the attorney-client privilege or the work-product doctrine had the burden of proving that the documents sought were protected. We proceeded to set forth procedural guidelines to be used when documents sought to be discovered were alleged to be privileged or work product.

The question in *Greenwalt* was how a court could verify whether the documents involved were in fact protected as privileged or work product. We stated that a court must balance one party's interest in not revealing protected material and the requesting party's interest in being precluded from discovery based solely upon the claim that the material is protected. In response to a motion to compel production of documents, the party asserting that the requested documents are protected must establish a prima facie claim that the privilege or doctrine applies. See *id.*

The case at bar does not involve documents but a conversation between attorney and client. The issue is whether the relators have met their burden to establish that the information sought by the plaintiff was privileged. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client between the client and his or her lawyer. See § 27-503(2).

The affidavits of Vipond and Pace clearly alleged that an attorney-client relationship existed and that their conversation before Pace's deposition was intended to be confidential. The plaintiff's deposition questions were directed at that conversation. Thus, the relators established a prima facie claim for privileged communication between attorney and client.

Once Pace established the attorney-client relationship, the plaintiff had the burden to establish that the inquiry related to or was an exception to this rule or that the communications were outside the scope of the privilege. The plaintiff did not show that the sought-after communications were not privileged or that an exception to the attorney-client privilege applied. Therefore, the first prerequisite for issuing a writ of mandamus has been met because the relators have demonstrated they have a clear legal right to protect the communications between the client and his attorney.

2. CORRESPONDING CLEAR DUTY

[12,13] For mandamus to lie, a corresponding clear duty must exist on the part of the respondent to perform the act in question. See *State ex rel. Upper Republican NRD v. District Judges*, ante p. 148, 728 N.W.2d 275 (2007). This court has declared that courts have a duty to maintain public confidence in the legal system and to protect and enhance the attorney-client relationship in all its dimensions. *State v. Hawes*, 251 Neb. 305, 556 N.W.2d 634 (1996). Both the fiduciary relationship existing between attorney and client and the proper functioning of the legal system require the preservation by the attorney of confidences and secrets of one who has employed or sought to employ him or her. *Id.* We conclude that the district court had a clear duty to protect the attorney-client privilege asserted.

3. NO OTHER REMEDY

[14] Finally, a writ of mandamus is appropriate if no other plain and adequate remedy is available to the relators in the ordinary course of the law. See *State ex rel. Upper Republican NRD*, supra. Generally, a discovery order can be reviewed on appeal from a final judgment in the case; however, when the remedy, though available, is inadequate, mandamus will lie. *State ex rel. FirstTier Bank v. Mullen*, 248 Neb. 384, 534 N.W.2d 575 (1995).

This court has found mandamus appropriate when it was necessary to prevent disclosure of privileged information. In the context of attorney-client confidences, we have considered whether issuance of a peremptory writ of mandamus was warranted to direct the trial court to disqualify a law firm. See *State ex rel. Freezer Servs., Inc. v. Mullen*, 235 Neb. 981, 458 N.W.2d 245

(1990) (decided under Code of Professional Responsibility). A lawyer in the firm had once represented the opposing party in the same litigation and had obtained confidential information pertinent to that litigation. We considered mandamus to be appropriate and found that an appeal would be an inadequate means to present the issue for review. We reasoned: “By the time the issue could be presented to an appellate court, any divulgence of confidences will have already occurred, and an appellate court cannot return the parties to the status quo ante.” *State ex rel. Freezer Servs., Inc.*, 235 Neb. at 996, 458 N.W.2d at 254.

Federal courts find mandamus proper when a trial court has abused its discretion in ordering the disclosure of privileged materials, “[b]ecause maintenance of the attorney-client privilege up to its proper limits has substantial importance to the administration of justice, and because an appeal after disclosure of the privileged communication is an inadequate remedy.” See *In re BankAmerica Corp. Securities Litigation*, 270 F.3d 639, 641 (8th Cir. 2001). See, also, *In re General Motors Corp.*, 153 F.3d 714, 715 (8th Cir. 1998) (finding “extraordinary remedy of mandamus” appropriate because “district court’s order would otherwise destroy the confidentiality of the communications at issue”).

The plaintiff, as intervenor, argues that mandamus is inappropriate in this case because the district court’s order compelling disclosure of communications between Pace and Vipond can be effectively reviewed on appeal from a final judgment. The plaintiff relies on *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006), in which this court held that an interlocutory discovery order compelling the production of documents for which a claim of attorney-client privilege was asserted could be adequately reviewed on appeal from a final judgment and, thus, was not appealable under the collateral order doctrine. However, that case provides little guidance in the present case. *Hallie Mgmt. Co.* came before this court as an attempt to appeal an interlocutory order. We did not address the appellees’ alternative assertion that the appellant should have sought review of the discovery order by seeking a writ of mandamus.

We conclude that an appeal after the disclosure of the privileged communications at issue would be an inadequate remedy in this case.

VI. CONCLUSION

Having determined that the three prerequisites for mandamus are met in this case, we conclude that a writ of mandamus is appropriate. Thus, we order that a peremptory writ of mandamus be issued directing the district court to vacate the order compelling the disclosure of the communications between Vipond and Pace and to enter an order sustaining Pace's objections to discovery by the plaintiff of such communications.

PEREMPTORY WRIT ISSUED.

GERRARD, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
LORA L. MCKINNEY, APPELLANT.
730 N.W.2d 74

Filed April 13, 2007. No. S-05-591.

1. **Statutes: Appeal and Error.** Interpretation of the identifying physical characteristics statutes, Neb. Rev. Stat. §§ 29-3301 to 29-3307 (Reissue 1995), presents a question of law, and an appellate court resolves questions of law independently of the trial court's conclusions.
2. **Probable Cause.** Probable cause to search requires that the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of a crime will be found.
3. **Search and Seizure: Probable Cause.** A search or seizure of a person must be supported by probable cause particularized to that person.
4. **Constitutional Law: DNA Testing: Search and Seizure.** DNA collection under the identifying physical characteristics statutes is unquestionably a search and seizure for Fourth Amendment purposes.
5. **Constitutional Law: Search and Seizure: Evidence.** The obtaining of physical evidence from a person involves a potential Fourth Amendment violation at two different levels—the seizure of the person necessary to bring him or her into contact with government agents and the subsequent search for and seizure of the evidence.
6. **Constitutional Law: Search and Seizure: Police Officers and Sheriffs: Probable Cause.** The Fourth Amendment prohibits seizure of nontestimonial identification evidence under the identifying physical characteristics statutes unless police have probable cause to believe that the person seized and compelled to provide physical characteristics evidence committed the crime under investigation.
7. **Probable Cause.** Probable cause must exist to believe that the person being compelled to provide identifying physical characteristics evidence under Neb. Rev. Stat. § 29-3303 (Reissue 1995) committed the crime under investigation.
8. **Statutes: Appeal and Error.** When faced with a statute which is susceptible of two constructions, one of which is valid and the other which would be unconstitutional

or of doubtful validity, an appellate court will adopt the construction which results in the statute's validity.

9. **Constitutional Law: Search and Seizure.** When determining whether a search and seizure is reasonable under the Fourth Amendment, a court balances the intrusion upon an individual's privacy with the need to promote legitimate governmental interests.
10. **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.
11. **Verdicts: Juries: Appeal and Error.** 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's verdict adversely to a defendant's substantial right.
12. ____: ____: _____. In a harmless error review, an appellate court looks at the evidence upon which the jury 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 guilty verdict rendered in the trial was surely unattributable to the error.
13. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, and an appellate court resolves such issues independently of the lower court's conclusions.
14. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
15. **Trial: Evidence: DNA Testing.** A DNA sample is not documentary in nature and is not discoverable under Neb. Rev. Stat. § 25-1224 (Reissue 1995).
16. **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 stemming from the custodial interrogation of a defendant unless the prosecution demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.
17. **Miranda Rights.** *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.
18. **Constitutional Law: Miranda Rights.** *Miranda* warnings are required only when there has been such a restriction on one's freedom as to render one in custody.
19. **Constitutional Law: Arrests: Miranda Rights: Words and Phrases.** One is in custody for purposes of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), when there is a formal arrest or a restraint on one's freedom of movement to the degree associated with such an arrest.
20. **Constitutional Law: Miranda Rights: Police Officers and Sheriffs.** Two inquiries are essential to the determination whether an individual is in custody for *Miranda* purposes: (1) an assessment of the circumstances surrounding the interrogation and (2) whether a reasonable person would have felt that he or she was not at liberty to terminate the interrogation and leave.
21. **Miranda Rights.** *Miranda* rights cannot be anticipatorily invoked prior to or outside the context of custodial interrogation.
22. **Probation and Parole.** Neb. Rev. Stat. § 29-2262.01 (Reissue 1995) prohibits those placed on probation by a court of this state and inmates who have been released on parole by any court from acting as undercover agents for, or employees of, law enforcement agencies.

23. _____. The exclusionary rule provided by Neb. Rev. Stat. § 29-2262.01 (Reissue 1995) does not apply unless the informant is both (1) in jail, on probation, or on parole and (2) acting as an undercover agent or employee of a law enforcement agency.
24. **Courts: Notice: Evidence.** Under Neb. Rev. Stat. § 29-1407.01(2) (Reissue 1995), upon application by the prosecutor, or by any witness after notice to the prosecutor, the court, for good cause, may enter an order to furnish to that witness a transcript of his or her own grand jury testimony, or minutes, reports, or exhibits relating thereto.
25. **Trial: Words and Phrases: Appeal and Error.** Structural errors are defined as those so affecting the framework within which the trial proceeds that they demand automatic reversal.
26. _____. Trial errors are defined as those which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.

Appeal from the District Court for Seward County: ALAN G. GLESS, Judge. Affirmed.

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

Jon Bruning, Attorney General, and Corey M. O'Brien for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ., and HANNON, Judge, Retired.

CONNOLLY, J.

On April 8, 2003, following an investigation that lasted over 5 years, a grand jury returned an indictment of Lora L. McKinney for the murder of Harold L. Kuenning. A jury convicted McKinney of first degree murder. The district court sentenced McKinney to life imprisonment.

I. STATE'S AND MCKINNEY'S THEORIES

The State advanced the theory that Kuenning picked up McKinney, his former girlfriend, from the home of a friend. From there, the couple drove to Kuenning's cabin in rural Seward County, Nebraska. Once at the cabin, McKinney shot Kuenning with his own revolver, stole several guns from him, and drove his van back to Lincoln, Nebraska. The State claimed that McKinney's motive was either money or a belief that Kuenning

was responsible for placing McKinney's 3-year-old daughter into foster care.

McKinney's theory focused on other suspects, including Terri Fort, who McKinney claims had an ongoing sexual relationship with Kuenning, and Joseph Walker, McKinney's former boyfriend. McKinney also points to evidence that showed Fort and Walker stayed in Lincoln in a hotel room registered to Fort within hours of the murder. In the hotel room, law enforcement officers later found a firearm registered to Kuenning; law enforcement could not exclude the firearm as the murder weapon.

II. THE INVESTIGATION: LAW ENFORCEMENT INTERVIEWS MCKINNEY AND COLLECTS HER DNA

On January 6, 1998, at around 5 p.m., a neighbor discovered Kuenning's body in Kuenning's cabin. Kuenning died from three gunshot wounds. The evidence established that Kuenning died sometime between 9:30 p.m. on January 5 and 5:30 a.m. on January 6. From the bullets retrieved from Kuenning's body, the Nebraska State Patrol determined that the perpetrator killed Kuenning with either a .38- or .357-caliber weapon.

On January 7, 1998, law enforcement discovered Kuenning's van parked about two blocks from Fort's home. The officers found McKinney's fingerprint near the door handle on the driver's side. They performed a fingerprint analysis on items found in Kuenning's cabin, including a Newport cigarette package and a purse found on Kuenning's bed; McKinney's fingerprints appeared on both those items. In addition, DNA testing performed on beer cans, soda cans, and cigarette butts found in the cabin revealed McKinney's DNA on a soda can. Law enforcement also found a mixture of Kuenning's and McKinney's DNA on three of the recovered cigarette butts.

Law enforcement also discovered unknown DNA present on a spent bullet recovered at the scene and an unidentified palm print on a Newport cigarette package. At trial, a fingerprint examiner's testimony excluded McKinney and other suspects as the source of that print, but did not exclude Kuenning.

Sometime before his death, someone stole from Kuenning a Ruger .44 Magnum revolver and a Colt .357 Magnum revolver. Law enforcement eventually recovered the guns, and

Kuenning picked them up from the Lincoln Police Department on January 5, 1998. Law enforcement did not find these weapons in either Kuenning's van or cabin following his death. Law enforcement recovered the .44 Magnum revolver after a traffic stop in Omaha, Nebraska, about 7 months after the murder, and law enforcement found the .357 Magnum in a room at a Holiday Inn Express located at 11th Street and Cornhusker Highway in Lincoln. A .38-caliber revolver registered to Kuenning was never recovered.

During the investigation in 1998, officers interviewed McKinney on January 8, 15, and 19. The court admitted these statements into evidence. In the January 8 interview, McKinney discussed her relationship with Kuenning. She stated that she had not seen Kuenning during the previous 2 to 3 weeks. In the January 15 statement, McKinney again stated she had not seen Kuenning since before Christmas.

On January 19, 1998, while in custody on a drug charge, officers again interviewed McKinney. During that interview, McKinney acknowledged that she had lied to officers on January 8 and 15 when she stated that she had not seen Kuenning since before Christmas. McKinney admitted that she saw Kuenning on January 5 at Fort's home, that she had a conversation with Kuenning in Kuenning's van in Fort's driveway, and that she and Kuenning later drove around a while in Kuenning's van. During that interview, she stated that she remembered being at a Save Mart grocery store with Walker "on Monday night," which was the night that Kuenning was last seen alive. McKinney also indicated that she had spent Tuesday night at a hotel with Walker. Finally, during that interview, she admitted to having stolen a .44 Magnum revolver from Kuenning on January 5, but stated that it was the only gun she took.

Both Fort and Walker testified. Fort testified that McKinney left with Kuenning on the evening of January 5, 1998, and did not return to Lincoln until the early morning hours of January 6. Fort also testified that she and Walker had been together at a Holiday Inn Express hotel located at 11th Street and Cornhusker Highway in Lincoln in the early morning hours of January 6.

Walker testified that he saw McKinney in either the late evening hours of January 5, 1998, or the early morning hours of January

6. Although some of the details varied, Walker's testimony was generally consistent with Fort's regarding the stay at the hotel. Walker also testified that at that time he saw McKinney either late January 5 or early January 6, McKinney told him that she had shot or killed Kuenning and that she needed help disposing of some guns.

Regarding the disposal of the guns, Fort's son testified that McKinney had tried to sell him a gun in exchange for some crack cocaine, but that he refused. And another individual testified that McKinney tried to sell him a gun, but that he had also refused. McKinney, however, was successful in exchanging, with James Cheatham, a .44 Magnum revolver for some crack cocaine. Cheatham testified he later sold the gun in Omaha.

III. ASSIGNMENTS OF ERROR

McKinney argues that the district court erred in (1) denying her motion to suppress her DNA sample taken under the identifying physical characteristics statutes (IPCS)¹; (2) denying her motion to obtain DNA from other suspects under a subpoena duces tecum; (3) denying her motion to suppress her statements made to law enforcement; (4) admitting Fort's testimony and other evidence obtained because of Fort's testimony; and (5) denying her motion to dismiss the indictment, motion for mistrial, and motion to strike certain testimony because of the release of grand jury testimony.

IV. ANALYSIS

1. THE DISTRICT COURT ERRED WHEN IT FAILED TO SUPPRESS MCKINNEY'S DNA

(a) Probable Cause Is Required for Searches Under § 29-3304

(i) Searches of Arrestees

McKinney argues that the district court erred in not suppressing her DNA evidence from the buccal swab and her pubic hair. She claims the search violated the IPCS and the Fourth Amendment.

¹ Neb. Rev. Stat. §§ 29-3301 to 29-3307 (Reissue 1995).

On June 9, 1998, the State obtained an order under § 29-3303 to collect evidence identifying McKinney's physical characteristics, including blood, hair, and buccal swab samples. When the State executed the order, McKinney was serving a sentence on a misdemeanor—second degree forgery. She moved to suppress that physical evidence, alleging that the seizure lacked probable cause. The district court determined that the order lacked probable cause. The court nevertheless refused to suppress the physical evidence. It concluded that under § 29-3304, law enforcement did not require a court order to collect McKinney's DNA. Section 29-3304 provides:

No order shall be required or necessary where the individual has been lawfully arrested, nor under any circumstances where peace officers may otherwise lawfully require or request the individual to provide evidence of identifying physical characteristics, and no order shall be required in the course of trials or other judicial proceedings.

[1] Interpretation of the IPCS presents a question of law, and we resolve questions of law independently of the trial court's conclusions.²

The State claims that under § 29-3304, law enforcement did not need a court order because McKinney had been arrested and convicted of attempted forgery. McKinney, however, argues that the court's interpretation of § 29-3304 sweeps too broadly because it would allow any arrest to negate the probable cause requirement for a search and seizure. McKinney argues that a showing of "probable cause" must relate to the offense under investigation. That is, only if the officers had arrested McKinney for murder—the crime for which the DNA is sought—would the exception in § 29-3304 apply. McKinney argues that to hold otherwise would "gut the other protections contained in the IPC[S] and make the Fourth Amendment irrelevant."³ McKinney does not assign as error that § 29-3304 is unconstitutional, so we do not address that issue. But she does argue that any seizure of her identifying information without a showing of probable cause violates the Fourth Amendment.

² See *State v. Marrs*, 272 Neb. 573, 723 N.W.2d 499 (2006).

³ Brief for appellant at 39.

[2,3] The Fourth Amendment to the U.S. Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Probable cause to search requires that the known facts and circumstances are sufficient to warrant a person of reasonable prudence in the belief that contraband or evidence of a crime will be found.⁴ And a search or seizure of a person must be supported by probable cause particularized to that person.

[4,5] DNA collection under the IPCS is unquestionably a search and seizure for Fourth Amendment purposes.⁵ As the U.S. Supreme Court stated in *United States v. Dionisio*,⁶ “the obtaining of physical evidence from a person involves a potential Fourth Amendment violation at two different levels—the ‘seizure’ of the ‘person’ necessary to bring him into contact with government agents . . . and the subsequent search for and seizure of the evidence.”

[6,7] The Fourth Amendment prohibits seizure of nontestimonial identification evidence under the IPCS unless police have probable cause to believe that the person seized and compelled to provide physical characteristics evidence committed the crime under investigation. In *State v. Evans*,⁷ we addressed the validity of § 29-3303 of the IPCS, which allows the collection of evidence identifying a person’s physical characteristics upon the issuance of an order. Under an older version of the IPCS,

⁴ See *State v. Voichahoske*, 271 Neb. 64, 709 N.W.2d 659 (2006).

⁵ See *Nicholas v. Goord*, 430 F.3d 652 (2d Cir. 2005) (buccal swab). See, also, *Board of Ed. of Independent School Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822, 122 S. Ct. 2559, 153 L. Ed. 2d 735 (2002) (urine); *Cupp v. Murphy*, 412 U.S. 291, 93 S. Ct. 2000, 36 L. Ed. 2d 900 (1973) (fingernail scrapings); *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966) (blood test).

⁶ *United States v. Dionisio*, 410 U.S. 1, 8, 93 S. Ct. 764, 35 L. Ed. 2d 67 (1973), citing *Schmerber v. California*, *supra* note 5.

⁷ *State v. Evans*, 215 Neb. 433, 338 N.W.2d 788 (1983).

§ 29-3303 required only probable cause that a crime had been committed. In *Evans*, we read into the act the additional requirement that probable cause must exist to believe that the person being compelled to submit to the order committed the crime under investigation. In 2005, the Legislature amended § 29-3303 to specifically set forth this probable cause requirement.⁸

[8] When faced with a statute which is susceptible of two constructions, one of which is valid and the other which would be unconstitutional or of doubtful validity, we will adopt the construction which results in the statute's validity.⁹ If we interpreted § 29-3304 to allow law enforcement to obtain identifying information under the IPCS whenever a person is lawfully arrested for any offense, it would snuff out probable cause—the oxygen for the Fourth Amendment. Such an expansive interpretation would permit the warrantless collection and profiling of DNA from any citizen including those arrested for misdemeanors and even traffic violations. Searches of arrestees would be permissible without requiring law enforcement to show any nexus between the arrestee and the crime for which his or her DNA is sought. The trial court's interpretation would require a citizen arrested for littering to submit to invasive bodily procedures in a search for evidence of any crime.

(ii) Searches When Otherwise Lawfully Required or Requested: Convictions and Incarcerations

But this does not end our inquiry because here, McKinney had been convicted and incarcerated—not merely arrested—when the officers took her DNA. McKinney's incarceration implicates the part of § 29-3304 that allows DNA to be taken when “peace officers may otherwise lawfully require or request the individual to provide evidence of identifying physical characteristics.” And we recognize that a person necessarily gives up some constitutional protection when a defendant is imprisoned. Thus, we consider whether probable cause is also required under § 29-3304 when a person is incarcerated.

⁸ See 2005 Neb. Laws, L.B. 361 (effective April 28, 2005).

⁹ See *State v. Rabourn*, 269 Neb. 499, 693 N.W.2d 291 (2005).

We find guidance in court decisions that have analyzed the constitutionality of the federal DNA Analysis Backlog Elimination Act of 2000 (Federal DNA Act)¹⁰ and similar state statutes.¹¹ These statutes provide for the collection and databasing of DNA samples from persons who have been convicted of certain offenses.¹² Courts have nearly unanimously upheld these statutes against Fourth Amendment challenges.¹³

[9] The majority of courts address whether the searches permitted by DNA statutes are reasonable, because the Fourth Amendment only applies to unreasonable searches.¹⁴ Under this approach, the court balances the intrusion upon an individual's privacy with the need to promote legitimate governmental interests.¹⁵ A minority of courts have analyzed the issue under a "special needs" approach, examining whether special needs justify the search and seizure.¹⁶

Regarding the Federal DNA Act, the Eighth Circuit Court of Appeals applied the reasonableness standard and concluded that the act was constitutional.¹⁷ In *U.S. v. Kraklio*, a convicted felon who was on probation challenged the Federal DNA Act under the Fourth Amendment. The court adopted the reasoning of the Third Circuit Court of Appeals in *U.S. v. Sczubelek*.¹⁸ In *Sczubelek*, the Third Circuit balanced the rights of a felon on supervised release with the government's interest in collecting his DNA. The court concluded that the government could collect DNA under the Federal DNA Act without probable cause.

¹⁰ 42 U.S.C. §§ 14135 to 14135e (2000 & Supp. III 2003).

¹¹ See, e.g., Maryland's DNA collection statutes, Md. Code Ann., Pub. Safety §§ 2-504 to 2-512 (LexisNexis 2003 & Supp. 2006).

¹² See, e.g., *id.*; 42 U.S.C. §§ 14135 to 14135e.

¹³ See *State v. Raines*, 383 Md. 1, 857 A.2d 19 (2004) (listing cases).

¹⁴ See *U.S. v. Kraklio*, 451 F.3d 922 (8th Cir. 2006).

¹⁵ *Id.*, citing *United States v. Knights*, 534 U.S. 112, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001).

¹⁶ See, e.g., *Nicholas v. Goord*, *supra* note 5.

¹⁷ *U.S. v. Kraklio*, *supra* note 14.

¹⁸ *U.S. v. Sczubelek*, 402 F.3d 175 (3d Cir. 2005).

The court found that the defendant had a reduced right to privacy because of his conviction. The court determined that DNA collection is only minimally intrusive.¹⁹ It further found that the government has “a compelling interest in the collection of identifying information of criminal offenders” and that a “DNA database promotes increased accuracy in the investigation and prosecution of criminal cases.”²⁰ This government interest outweighed convicts’ diminished rights. The court cited as an additional factor the Federal DNA Act’s specificity in delineating offenses for which a sample must be taken. Thus, officials do not have discretion to single out individuals for sampling. Further, the Federal DNA Act limits the permissible uses of DNA.²¹

In contrast to the DNA statutes requiring DNA collection for storage and profiling, § 29-3304 does not serve the important government interest of establishing a DNA database. Here, law enforcement did not take McKinney’s DNA for databasing. Instead, they took it solely for the investigation of a particular crime for which the district court found that the officers did not have probable cause to believe McKinney was involved. Further, a critical distinction exists between § 29-3304 and DNA databasing statutes: § 29-3304 does not limit the offenders to whom it applies. Without a probable cause requirement, § 29-3304 would permit law enforcement personnel, at their whim, to take DNA from any incarcerated person. In contrast, DNA databasing statutes do not allow law enforcement to single out any particular offender.

Although an imprisoned person has diminished rights to privacy, the cases that have addressed DNA collection acts have involved only felonies, or other serious crimes.²² In finding that felons have a lesser privacy interest, courts have concluded that

¹⁹ *Id.* See, also, *Green v. Berge*, 354 F.3d 675 (7th Cir. 2004); *Shaffer v. Saffle*, 148 F.3d 1180 (10th Cir. 1998); *Gaines v. State*, 116 Nev. 359, 998 P.2d 166 (2000).

²⁰ *U.S. v. Sczubelek*, *supra* note 18, 402 F.3d at 185.

²¹ *U.S. v. Sczubelek*, *supra* note 18. See, also, *Green v. Berge*, *supra* note 19.

²² See, e.g., *U.S. v. Sczubelek*, *supra* note 18; *Green v. Berge*, *supra* note 19; *U.S. v. Kraklio*, *supra* note 14.

once a person has been convicted of a felony, the government has a compelling interest in his or her identity to protect the public from recidivists and to solve past and future crimes.²³ We acknowledge that courts have found a diminished right to privacy under DNA collection statutes, even when the DNA is taken from felons released on probation.²⁴ But the district court applied § 29-3304 to a person convicted of a minor offense—misdemeanor forgery. The government’s interest in identifying misdemeanants is not as compelling as its interest in identifying convicted felons.

Applying the reasonableness test to § 29-3304, we conclude that the government interest in taking DNA for a particular crime—without individualized probable cause—does not outweigh McKinney’s privacy interest.

(b) Probable Cause Is Required Under
Nebraska’s DNA Act

Comparing § 29-3304 to Nebraska’s DNA Identification Information Act (DNA Act)²⁵ and Neb. Rev. Stat. § 29-4126 (Cum. Supp. 2006) further supports our decision. Nebraska’s DNA Act provides that DNA samples shall be collected for a state DNA databank from persons who have been convicted of certain enumerated offenses.²⁶ Offenses that subject a person to DNA collection include felony sex offenses, such as incest of a minor; first or second degree sexual assault; or first, second, or third degree sexual assault of a child, as well as other specified offenses. Specified offenses include first or second degree murder, manslaughter, stalking, burglary, or robbery.²⁷ But in § 29-4126, the Legislature provided limitations on obtaining and using DNA samples. Section 29-4126 provides: “Notwithstanding any other provision of law: (1) No DNA sample shall be obtained from any person for any law enforcement purpose in connection with an investigation of a crime without probable cause, a court order, or

²³ See *U.S. v. Sczubelek*, *supra* note 18.

²⁴ See *Green v. Berge*, *supra* note 19 (Easterbrook, Circuit Judge, concurring).

²⁵ Neb. Rev. Stat. §§ 29-4101 to 29-4115 (Cum. Supp. 2006).

²⁶ See §§ 29-4102 and 29-4106.

²⁷ § 29-4103(6) and (8).

voluntary consent” Thus, under this provision, even someone subject to DNA collection under the DNA Act cannot be forced to provide a sample *for an investigation* without probable cause, a court order, or voluntary consent.

Having been incarcerated for misdemeanor forgery, McKinney would not be subject to the DNA Act for databasing her DNA. And under § 29-4126, law enforcement could not have obtained DNA from her for an investigation. Although this provision was not in effect at the time the officers took McKinney’s DNA, it nevertheless bolsters our conclusion. Section 29-4126 mandates probable cause when collecting DNA, even when the person subject to DNA collection has been convicted of serious felonies. Interpreting § 29-3304 to permit DNA collection from a person convicted of a misdemeanor would be inconsistent with the protections of § 29-4126, which apply regardless of the offense a person has committed.

We conclude that under § 29-3304, law enforcement personnel must have probable cause to believe that the person whose DNA is sought—whether he or she has been arrested or may otherwise be subject to DNA testing—committed the crime for which the DNA is sought. Although McKinney had been arrested, convicted, and imprisoned for forgery, the district court found no probable cause to support the order for McKinney’s DNA in the murder investigation. The State does not challenge the district court’s finding that the order authorizing the DNA collection lacked probable cause, nor does it argue that some other ground supports the introduction of the physical evidence. Therefore, we conclude that the district court erred in admitting McKinney’s DNA.

2. THE ADMISSION OF MCKINNEY’S DNA WAS HARMLESS ERROR

[10-12] Having concluded that the district court erred in admitting McKinney’s DNA, we now determine whether that error was harmless. In a jury trial of a criminal case, an erroneous evidentiary ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.²⁸ Harmless error exists when there is some incorrect

²⁸ *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006).

conduct by the trial court which, on review of the entire record, did not materially influence the jury's verdict adversely to a defendant's substantial right.²⁹ In a harmless error review, we look at the evidence upon which the jury 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 guilty verdict rendered in the trial was surely unattributable to the error.³⁰

We recognize the potency of DNA evidence and its effect on jurors. We believe, however, that its significance was diminished because the presence of McKinney's purse and fingerprints also placed her at Kuenning's residence on the night of the murder. Further, other evidence properly admitted supported the jury's verdict. Fort testified that McKinney left Fort's Lincoln home with Kuenning the evening of January 5, 1998. Other testimony indicates that McKinney was not seen again in Lincoln until the late evening hours of January 5 or the early morning hours of January 6. Walker testified that at that time, McKinney told him that she had just shot or killed Kuenning.

The evidence also shows that McKinney requested that Walker help her dispose of some guns and that she tried to sell some guns to several individuals around the time of Kuenning's death. Cheatham testified that McKinney, in exchange for drugs, gave him a .44 Magnum revolver which he eventually sold in Omaha; law enforcement later recovered a .44 Magnum revolver registered to Kuenning in Omaha. This weapon was one of two that Kuenning had retrieved from the Lincoln Police Department the day of Kuenning's death. Although McKinney did admit to stealing the .44 Magnum from Kuenning, she denied taking any other gun. However, the other weapon, a .357 Magnum revolver, was found in the Holiday Inn Express hotel room in which Fort and Walker had stayed. Moreover, in one of her interviews with the officers, McKinney admitted that she had stayed with Walker in a hotel room; while it is not clear from the record which hotel, she does mention that she went with Walker to a Save Mart grocery store on the evening of Kuenning's death. According to the

²⁹ *Id.*

³⁰ *See id.*

record, a Save Mart grocery store is located across the street from the Holiday Inn Express. Law enforcement eventually recovered the .357 Magnum revolver.

McKinney also acknowledged in her interviews with the officers that she had lied about having seen Kuenning before his death. We conclude from the entire record that the jury's verdict was surely unattributable to the erroneous admission of McKinney's DNA, and that error was therefore harmless.

3. THE COURT DID NOT ERR IN DENYING MCKINNEY'S MOTION TO OBTAIN DNA FROM OTHER SUSPECTS

McKinney argues that the district court erred in not granting her motion for subpoena duces tecum for obtaining DNA samples from State witnesses. McKinney sought DNA from Fort, Walker, and three other individuals. The district court denied the motion. It stated that it had "found no statutory authority directly and clearly supporting an order of the type requested" and that "even though the motion came from the defense, the requested order would come from the court, a form of state action. This court cannot simply order people to submit to seizures without any factual basis to support such orders."

As authority for her right to obtain such samples, McKinney relies on Neb. Rev. Stat. § 29-1917 (Reissue 1995). Section 29-1917(1) provides that in certain criminal cases, "the defendant may request the court to allow the taking of a deposition of any person . . . who may be a witness in the trial of the offense." Section 29-1917 further provides that "[t]he court may order the taking of the deposition when it finds the testimony of the witness . . . [m]ay be material or relevant to the issue to be determined at the trial of the offense[.]" Also McKinney directs us to Neb. Rev. Stat. § 25-1224 (Reissue 1995), which provides for the issuing of the subpoena duces tecum to a witness, requiring him to appear to testify and further bring with him any "book, writing or other thing under his control." Essentially, McKinney contends that she has the right to depose the State's witnesses and, at that time, require them to provide a DNA sample, because the witnesses' DNA is a "thing under [their] control."

[13,14] Statutory interpretation presents a question of law, and we resolve such issues independently of the lower court's

conclusions.³¹ And we give statutory language its plain and ordinary meaning.³²

[15] We disagree that §§ 29-1917 and 25-1224 provide authority for the discovery sought by McKinney. Section 25-1224 provides that the person to whom the subpoena is issued may be required to provide “any book, writing or other thing.” Under the *eiusdem generis* canon of construction, when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed.³³ We read § 25-1224 to include only those “thing[s]” that are documentary in nature. DNA does not fit into such a list.³⁴

In addition to her statutory argument, McKinney asserts that “[a] criminal defendant has a Sixth and Fourteenth Amendment right to prepare and present a defense using the subpoena power where there is a plausible showing of materiality and relevance.”³⁵ McKinney relies upon the Compulsory Process Clause of the Sixth Amendment, which provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor.”³⁶ In support of this argument, McKinney directs this court to *In re Jansen*, where the court held that under the Massachusetts equivalent of a subpoena duces tecum, a third party could be compelled to produce a DNA sample upon the proper showing by a defendant. The court concluded that the Massachusetts Constitution, which provides a criminal defendant the right “‘to produce all proofs . . . that may be favorable to him,’” provides authority for such a request.³⁷ In doing so, the court dismissed claims that obtaining the third

³¹ See *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006).

³² *Id.*

³³ *Nebraska Liq. Distrib. v. Nebraska Liq. Cont. Comm.*, 269 Neb. 401, 693 N.W.2d 539 (2005).

³⁴ But see *In re Jansen*, 444 Mass. 112, 826 N.E.2d 186 (2005), *abrogated on other grounds*, *Com. v. Dwyer*, 448 Mass. 122, 859 N.E.2d 400 (2006).

³⁵ Brief for appellant at 29.

³⁶ U.S. Const. amend. VI.

³⁷ See *In re Jansen*, *supra* note 34, 444 Mass. at 115-16, 826 N.E.2d at 190.

party's DNA violated the third party's Fourth Amendment rights. We, however, find *In re Jansen* of limited applicability because the court relied on a right under the Massachusetts Constitution which is much broader than any rights provided under the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution.

More instructive is *Bartlett v. Hamwi*.³⁸ In *Bartlett*, the defendant sought discovery of hair samples from a witness for the prosecution. Though noting that prior case law indicated that there may be some instances when such discovery was permissible, the court held that it was not presented with such an instance. The court noted that Fourth Amendment protections extended to third parties.

[The case] involves a request by a defendant that evidence be extracted from the body of a witness. No criminal rule of procedure or statute specifically authorizes samples to be taken from witnesses or authorizes physical examinations of witnesses. . . .

. . . .

Certainly a witness, who is not a suspect, defendant or victim, should have no *less* protection against bodily intrusion than defendants or suspects in criminal cases. Although this case involves a defendant's request for evidence, nevertheless, a witness is still protected by the guarantees under . . . the Fourth Amendment to the United States Constitution, as well as constitutional rights to privacy guaranteed by . . . the United States Constitution.³⁹

As in *Bartlett*, Nebraska has no rule or statute authorizing the discovery sought by McKinney. Furthermore, we would have to balance the constitutional rights of those third parties from whom McKinney seeks to compel DNA samples. Those rights must be balanced against any rights McKinney might have in putting forth her defense. We conclude, as the court in *Bartlett* did, that "[t]he circumstances presented here do not constitute a 'rare instance' where justice may require an invasion of a witness' privacy rights or an invasion of [a third party's] Fourth

³⁸ *Bartlett v. Hamwi*, 626 So. 2d 1040 (Fla. App. 1993).

³⁹ *Id.* at 1042-43 (emphasis in original).

Amendment rights.”⁴⁰ We conclude that the district court did not err in denying McKinney’s motion to obtain DNA samples from certain witnesses.

4. THE COURT DID NOT ERR IN ADMITTING
MCKINNEY’S STATEMENTS

McKinney argues that the district court erred by not granting her motion to suppress statements made to the officers. McKinney directs us to two separate interviews on January 15 and 19, 1998, which she contends violated her Fifth and Sixth Amendment rights. We note that the first conversation between McKinney and law enforcement occurred on January 8. McKinney, however, does not argue on appeal that any statements from this interview should be suppressed.

Officers contacted McKinney on January 15, 1998. Two investigators drove McKinney to Nebraska State Patrol offices for an interview. During this interview, McKinney discussed her relationship with Kuenning and stated that she had not seen him since before Christmas.

Officers again contacted McKinney at the Seward County jail on January 19, 1998, while McKinney was in custody on a drug possession charge. Officers gave McKinney the *Miranda* warnings during this interview. McKinney acknowledged that she had lied to officers on January 15 when she stated that she had not seen Kuenning since before Christmas. McKinney admitted that she saw Kuenning on January 5 at Fort’s home, that she had a conversation with Kuenning in Kuenning’s van in Fort’s driveway, and that she and Kuenning later drove around a while in Kuenning’s van.

(a) January 15 Interview

[16-20] The State does not dispute that the officers did not give McKinney her *Miranda* warnings before the January 15, 1998, interview. McKinney argues that at several points throughout the interview, she indicated that she wanted to leave, but that the officers continued to question her. In her brief and again at oral argument, McKinney specifically referred this court to an exchange during this interview when one of the investigators told

⁴⁰ See *id.* at 1043.

her to “[s]it down.” McKinney now argues that the district court should have suppressed any statement made after she indicated that she wished to leave because she did not receive a *Miranda* warning. *Miranda v. Arizona*⁴¹ prohibits the use of statements stemming from the custodial interrogation of a defendant unless the prosecution demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.⁴² *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.⁴³ *Miranda* warnings, however, are required only when there has been such a restriction on one’s freedom as to render one “in custody.”⁴⁴ And one is in custody for purposes of *Miranda* when there is a formal arrest or a restraint on one’s freedom of movement to the degree associated with such an arrest.⁴⁵ Two inquiries are essential to the determination whether an individual is in custody for *Miranda* purposes: (1) an assessment of the circumstances surrounding the interrogation and (2) whether a reasonable person would have felt that he or she was not at liberty to terminate the interrogation and leave.⁴⁶

In *Mata*, this court, citing *U.S. v. Axsom*,⁴⁷ applied “‘six common indicia of custody which tend either to mitigate or aggravate the atmosphere of custodial interrogation.’”⁴⁸ We noted that in *Axsom*, the Eighth Circuit Court of Appeals described three indicia as mitigating against the existence of custody at the time of questioning: (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect

⁴¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

⁴² *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *U.S. v. Axsom*, 289 F.3d 496 (8th Cir. 2002).

⁴⁸ *Mata*, *supra* note 42, 266 Neb. at 682, 668 N.W.2d at 466.

possessed unrestrained freedom of movement during questioning; or (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions.⁴⁹ The Eighth Circuit described the remaining three indicia as aggravating the existence of custody if present: (1) whether strong-arm tactics or deceptive stratagems were used during questioning, (2) whether the atmosphere of the questioning was police dominated, or (3) whether the suspect was placed under arrest at the termination of the proceeding.⁵⁰

Having reviewed the tapes from McKinney's January 15, 1998, interview, a copy of the transcript, and the officer's testimony, we conclude all three mitigating indicia are present. From the start, the investigators told McKinney that she was not required to talk with them and that she could leave at any time. At several points during the interview, investigators again told McKinney she could leave at any time. The officers left the door to the interview room open; one of the officers testified that it probably was closed at some points during the interview, but that it was never locked. The record reveals no evidence that the investigators restricted McKinney's movement during the interview. Finally, the officers testified, and McKinney does not otherwise contend, that she voluntarily went to the Nebraska State Patrol offices for the interview. Regarding the allegation that an investigator told McKinney to "sit down," a review of the taped interview shows that when the investigator told McKinney to "sit down," she was getting upset and the investigator attempted to calm her.

Concerning the aggravating factors, the interview did take place at the offices of the Nebraska State Patrol and this would suggest that the atmosphere was "police dominated." But the officers did not use any strong-arm tactics or deception. Moreover, the officers permitted McKinney to leave at the end of questioning and, in fact, drove her home. The officers did not arrest her at the conclusion of that interview, or even on the day of the interview. Upon our de novo review of the record, we conclude, as did the district court, that a reasonable person would have been aware that she was free to leave. The district court correctly concluded

⁴⁹ *Id.*

⁵⁰ *Id.*

that McKinney was not in custody at the time of the January 15, 1998, interview.

[21] To the extent that McKinney argues that the officers should have given her *Miranda* warnings because it was clear that she wished to invoke her right to be silent, we note *Mata* presented a similar argument. In *Mata*, we concluded that the defendant could not anticipatorily invoke his *Miranda* rights prior to or outside the context of custodial interrogation.⁵¹ Because McKinney was not in custody, the officers were not required to give her *Miranda* warnings. McKinney's argument concerning the January 15, 1998, interview is without merit.

(b) January 19 Interview

McKinney also argues that the district court erred in not suppressing her entire statement with the Nebraska State Patrol officers on January 19, 1998. McKinney argues that because she invoked her right to counsel at the end of the January 15 interview, the officers could not initiate further contact with her. McKinney directs this court to *Edwards v. Arizona*,⁵² which rule governing subsequent waivers of an accused's invoked right to counsel we adopted in *State v. Smith*.⁵³ In *Edwards*, the U.S. Supreme Court held that

when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. . . . [A]n accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.⁵⁴

⁵¹ *Mata*, *supra* note 42.

⁵² *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981).

⁵³ *State v. Smith*, 242 Neb. 296, 494 N.W.2d 558 (1993).

⁵⁴ *Edwards*, *supra* note 52, 451 U.S. at 484-85.

We find *Edwards* and *Smith* to be inapplicable to the January 19, 1998, interview. The protections offered by *Edwards* are not available to McKinney, because at the time she allegedly requested counsel, she was not in custody.⁵⁵ Moreover, as previously stated, one cannot anticipatorily invoke *Miranda* rights.⁵⁶ Thus, McKinney could not have requested counsel during a *noncustodial* interview with the expectation that such a request would be honored if she were eventually placed in custody. McKinney's argument concerning the January 19 interview is also without merit.

We conclude that on January 15, 1998, McKinney was not in custody for purposes of *Miranda*. Thus, the district court did not err in admitting into evidence statements made by McKinney during her January 15 and 19 interviews.

5. FORT WAS NOT AN UNDERCOVER AGENT IN VIOLATION OF
NEB. REV. STAT. § 29-2262.01 (REISSUE 1995);
HER TESTIMONY WAS ADMISSIBLE

[22,23] McKinney argues that the district court erred in admitting Fort's testimony. McKinney contends that the State violated § 29-2262.01 by paying Fort a "salary" while Fort was an inmate in custody. Section 29-2262.01 provides:

A person placed on probation by a court of the State of Nebraska, an inmate of any jail or correctional or penal facility, or an inmate who has been released on parole, probation, or work release shall be prohibited from acting as an undercover agent or employee of any law enforcement agency of the state or any political subdivision. Any evidence derived in violation of this section shall not be admissible against any person in any proceeding whatsoever.

We have held that the plain and ordinary meaning of § 29-2262.01 prohibits those placed on probation by a court of this state and inmates who have been released on parole by any court from acting as undercover agents for, or employees of, law enforcement agencies. The exclusionary rule provided by this section does not

⁵⁵ See *U.S. v. Arrington*, 215 F.3d 855 (8th Cir. 2000), citing *Arizona v. Roberson*, 486 U.S. 675, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988).

⁵⁶ *Mata*, *supra* note 42.

apply unless the informant is both (1) in jail, on probation, or on parole and (2) acting as an undercover agent or employee of a law enforcement agency.⁵⁷

On August 17, 1998, while McKinney was incarcerated on a drug charge, Robert Frank, a criminal investigator, interviewed Fort. Frank testified that he sought to interview Fort because police found a gun owned by Kuenning in a hotel room registered to Fort within a few hours of Kuenning's death. The transcript of this interview shows that Frank and Fort discussed the events surrounding Kuenning's death. At the conclusion of the interview, Frank asked Fort whether she needed anything. Fort responded that she needed cigarettes, but that she could not get any money out of her account for a few days. At that point, Frank gave Fort \$20 for cigarettes. The record shows that Frank's supervisor advised Frank to seek reimbursement for the \$20 he gave to Fort. Eventually, reimbursement was obtained, and the \$20 was coded in law enforcement records as "salary."

Frank returned on August 18, 1998, to again interview Fort, as well as to approach her about becoming a paid informant for law enforcement following her release from custody. During that interview, Frank made it clear to Fort that she would be ineligible for paid status while she was in jail, and even upon release, if she was released on probation or parole. At that interview, there was a brief exchange between Frank and Fort to the effect that Fort should consider the \$20 from the previous day a "birthday gift." Three subsequent interviews were held between Frank and Fort. Fort was released from custody on September 17, and signed a cooperating individual agreement on September 22.

McKinney argues that because Frank gave Fort \$20, Fort was an undercover agent or employee of law enforcement from August 17 to September 17, 1998. It is correct that Fort was in custody; however, she was not an undercover agent or an employee.

Our review of the August 17, 1998, interview shows that Fort was forthright with Frank regarding the events of January 5 and 6. During that interview, Fort agreed to again meet with Frank to further discuss Kuenning's death. Frank did not give Fort the

⁵⁷ *State v. Tyma*, 264 Neb. 712, 651 N.W.2d 582 (2002).

\$20 until the conclusion of that interview, and there is nothing in the record to suggest that Fort provided the information to Frank in exchange for the funds. The record further shows that Frank emphasized that she could not obtain or develop any information for law enforcement until after her release date. In addition, there is no allegation that Fort obtained or developed information while still in custody. All Fort did was answer questions regarding the events surrounding Kuenning's death. McKinney does not argue that law enforcement may not question potential witnesses to crimes simply because those witnesses are in custody and thus are in a prohibited status, nor would a plain reading of the statute support such an interpretation.

Fort was not acting as an undercover agent or employee of law enforcement when she cooperated with Frank's requests for interviews between August 17 and September 17, 1998. Thus, § 29-2262.01 is inapplicable and the district court did not err in admitting into evidence Fort's testimony.

6. THE RELEASE OF GRAND JURY TESTIMONY WAS HARMLESS ERROR

McKinney assigns error relating to the State's disclosure of certain grand jury testimony. Without a district court order, the State provided trial witnesses a copy of that witness' testimony before the grand jury. At trial, McKinney argued that the State violated Neb. Rev. Stat. § 29-1407.01(2) (Reissue 1995) and that the district court should dismiss the indictment against her, grant her motion for mistrial, or give a jury instruction regarding the prosecutorial misconduct.

We note that although McKinney assigns that the district court erred by not dismissing the indictment, she does not argue it. Instead, she argues only that the district court should have either granted a mistrial or given a jury instruction regarding prosecutorial misconduct. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in a party's brief.⁵⁸ We will not address the question whether the district court erred by not dismissing the indictment against McKinney.

⁵⁸ *State ex rel. Lemon v. Gale*, 272 Neb. 295, 721 N.W.2d 347 (2006).

7. MCKINNEY WAS NOT ENTITLED TO A MISTRIAL OR INSTRUCTION
ON PROSECUTORIAL MISCONDUCT BECAUSE OF THE
RELEASE OF GRAND JURY TESTIMONY

[24] Section 29-1407.01(2) provides that “[u]pon application by the prosecutor, or by any witness after notice to the prosecutor, the court, for good cause, may enter an order to furnish to that witness a transcript of his or her own grand jury testimony, or minutes, reports, or exhibits relating thereto.”

The record establishes, and the State concedes, that it violated § 29-1407.01(2) when it provided witnesses copies of their grand jury testimony. Clearly, the violation occurred when the State failed to obtain an order from the district court. The issue is what consequences should flow from the violation. McKinney argues that the error was structural and that either a mistrial or a jury instruction with regard to prosecutorial misconduct was proper. The State, however, argues that McKinney suffered no prejudice from the violation.

[25,26] This court discussed structural error in *State v. Bjorklund*,⁵⁹ where we noted that

the U.S. Supreme Court defined structural errors as those so “affecting the framework within which the trial proceeds,” . . . that they demand automatic reversal and defined trial errors as those “which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.” . . . The Supreme Court limited structural errors to a few very specific categories—total deprivation of counsel, trial before a judge who is not impartial, unlawful exclusion of members of the defendant’s race from a grand jury, denial of the right to self-representation at trial, and denial of the right to a public trial.

McKinney contends that the error was structural because the release violated the confidentiality and secrecy of the grand jury process.

⁵⁹ *State v. Bjorklund*, 258 Neb. 432, 504, 604 N.W.2d 169, 225 (2000), quoting *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991).

Contrary to McKinney's assertions, the violation of § 29-1407.01(2) occurred at trial and did not affect the "framework within which the trial proceeds." Thus, the error was not structural. Instead, we conclude that because the error occurred in conjunction with a witness' ability to review his or her grand jury testimony without the express approval of the court, such an error was one which occurred during the presentation of the case to the jury and thus is trial error, subject to a harmless error analysis.

As noted previously, 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.⁶⁰ 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.⁶¹

The record shows that the State provided McKinney copies of the former testimony and statements of all witnesses and that McKinney had the opportunity to cross-examine each witness and impeach those witnesses on any inconsistencies between the witnesses' statements. The court allowed McKinney to inquire of those witnesses whether the witness had reviewed his or her statements before testifying. Moreover, we note there is no general prohibition to a grand jury witness' actually receiving and reviewing his or her grand jury testimony; in fact, § 29-1407.01(2) expressly provides for such disclosure with the court's permission. We conclude that the guilty verdict entered against McKinney was surely unattributable to the State's violation of § 29-1407.01 and that the violation was harmless error. The district court did not err by not granting a mistrial or refusing to instruct the jury on prosecutorial misconduct.

⁶⁰ *Iromuanya*, *supra* note 28.

⁶¹ *Id.*

V. CONCLUSION

We conclude that the district court erred in not suppressing identifying physical characteristics evidence obtained in violation of the IPCS. However, we conclude that such error was harmless. We further conclude that McKinney's remaining assignments of error are without merit.

AFFIRMED.

HEAVICAN, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, v.
SAUL L. BAKEWELL, APPELLANT.
730 N.W.2d 335

Filed April 13, 2007. No. S-06-765.

1. **Motions to Suppress: Constitutional Law: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress, determinations of whether the community caretaking exception to the Fourth Amendment to the U.S. Constitution is applicable are made de novo, but findings of historical fact to support that determination are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial court.
2. **Constitutional Law: Search and Seizure.** The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable search and seizure.
3. **Constitutional Law: Motor Vehicles.** A motorist on a public highway or street may have a legitimate expectation of privacy within a motor vehicle.
4. **Constitutional Law: Police Officers and Sheriffs: Investigative Stops: Probable Cause.** In determining whether the community caretaking exception to the Fourth Amendment to the U.S. Constitution applies, a court should assess the totality of the circumstances surrounding the stop of a person on a public street, including all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction.

Appeal from the District Court for Washington County, DARVID D. QUIST, Judge, on appeal thereto from the County Court for Washington County, C. MATTHEW SAMUELSON, Judge. Judgment of District Court affirmed.

Adam J. Sipple, of Johnson & Mock, for appellant.

Jon Bruning, Attorney General, and Erin E. Leuenberger for appellee.

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

HEAVICAN, C.J.

BACKGROUND

Saul L. Bakewell was charged with driving under the influence, a Class W misdemeanor. Prior to trial, Bakewell filed a motion to suppress “any observations of Sgt. Walter Groves, III, of the Washington County Sheriff’s Department, any admissions of Defendant, or any other evidence obtained subsequent to the stop of his vehicle.” Following a hearing, the county court denied the motion to suppress. Bakewell was convicted and sentenced to probation, and he appealed to the district court. The district court, acting as an intermediate court of appeals, affirmed. Bakewell appeals.

JULY 3, 2005, 3:15 A.M.

The testimony at the hearing on the motion to suppress and at trial reveals the following: On July 3, 2005, at approximately 3:15 a.m., Sgt. Walter Groves was on patrol in a marked sheriff’s cruiser driving northbound on U.S. Highway 75 in Washington County, Nebraska. Groves testified that while on patrol, he noticed a vehicle, which was later determined to be driven by Bakewell, headed southbound on Highway 75. After noting that the vehicle appeared to have crossed the centerline, Groves turned southbound and began to follow the vehicle. After following the vehicle for approximately 2 to 2½ miles, Groves noted that on several occasions, the vehicle slowed down, almost came to a complete stop in the middle of the road, and eventually pulled off onto the shoulder of the highway. We note that in his reply brief, Bakewell suggests “the officer’s tenacious trailing of Bakewell’s vehicle likely contributed to the manner in which [he] pulled to the side of the road.”¹ However, we have reviewed the video of this incident taken from a camera in Groves’ cruiser and, while it is not possible to precisely estimate the distance between Groves’ cruiser and Bakewell’s vehicle, our review shows nothing that would corroborate Bakewell’s contention.

¹ Reply brief for appellant at 3.

Groves testified that “[w]hen the vehicle pulled over to the side I pulled in behind the vehicle, activated my emergency lights for safety reasons and then exited my patrol car and made contact with the driver.” Groves indicated that he “pulled in behind the vehicle to conduct a safety check of the vehicle, make sure that everything was okay and there was [sic] no problems.” Groves testified that the first question he asked of Bakewell was whether “everything was okay.” In the video, Bakewell can be heard to respond that he was lost.

On cross-examination, Groves acknowledged that he had seen Bakewell’s arm extended out of his car window prior to Groves’ pulling off the highway and that this action “was consistent with an effort by [Bakewell] to waive [sic] [Groves] around.” A review of the video confirms Groves’ version of these events, except that Bakewell’s arm extended out of his car window is not visible on the video.

The county court denied Bakewell’s motion to suppress, finding that Groves’ actions fell within the community caretaking exception to the Fourth Amendment. The district court affirmed. Bakewell appealed. We moved this case to our docket pursuant to our authority to regulate the dockets of this court and that of the Nebraska Court of Appeals.²

ASSIGNMENT OF ERROR

Bakewell assigns that the district court erred in affirming the county court’s denial of his motion to suppress.

STANDARD OF REVIEW

As an initial matter, Bakewell contends that the district court erred in the standard of review it employed when reviewing the county court’s order denying suppression. A review of the district court’s order indicates it reviewed the county court’s order for clear error. Bakewell argues that the court should have employed the two-part standard which reviews historical facts for clear error and determinations of reasonable suspicion *de novo*.

[1] In this case, we are not reviewing the county court’s determination of reasonable suspicion, but instead are reviewing its determination that the community caretaking exception to the

² See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

Fourth Amendment applied. However, we agree with Bakewell that the proper standard is the two-part standard set forth by the U.S. Supreme Court in *Ornelas v. United States*.³ Accordingly, we will review de novo the county court's determination that the community caretaking exception applied, while the county court's findings of historical facts are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial court.⁴

ANALYSIS

On appeal, Bakewell argues that the county court erred in overruling his motion to suppress. Bakewell argues that Groves lacked an objectively reasonable basis to believe Bakewell was in need of assistance. The State contends that Groves did not seize Bakewell for purposes of the Fourth Amendment but, even if he did, that seizure was reasonable under the community caretaking exception to the Fourth Amendment. We agree with the State and conclude that even assuming Groves did seize Bakewell for purposes of the Fourth Amendment, such seizure was reasonable under the community caretaking exception.

COMMUNITY CARETAKING EXCEPTION TO FOURTH AMENDMENT

[2,3] The Fourth Amendment to the U.S. Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Nebraska Constitution provides similar protection.⁵ Moreover, this court and the U.S. Supreme Court have held that

³ See *Ornelas v. United States*, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996).

⁴ Cf., *U.S. v. Ball*, 90 F.3d 260 (8th Cir. 1996); *State v. Eberly*, 271 Neb. 893, 716 N.W.2d 671 (2006); *State v. Verling*, 269 Neb. 610, 694 N.W.2d 632 (2005).

⁵ See Neb. Const. art. I, § 7.

a motorist on a public highway or street may have a legitimate expectation of privacy within a motor vehicle.⁶

The State asks this court to apply the community caretaking exception to the Fourth Amendment to Groves' actions. This exception is rooted in *Cady v. Dombrowski*,⁷ where the U.S. Supreme Court noted that

[b]ecause of the extensive regulation of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office. Some such contacts will occur because the officer may believe the operator has violated a criminal statute, but many more will not be of that nature. Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.⁸

Most jurisdictions which have considered the question of whether to adopt this exception have done so. In a few instances, courts have declined the invitation to adopt the exception based on the circumstances presented, generally concluding that on the facts before the court, the exception would not apply.⁹ This court has never had the occasion to apply this exception, though the Court of Appeals has done so.¹⁰

⁶ See, *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979); *State v. Childs*, 242 Neb. 426, 495 N.W.2d 475 (1993).

⁷ *Cady v. Dombrowski*, 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973).

⁸ *Id.*, 413 U.S. at 441.

⁹ See, *United States v. Dunbar*, 470 F. Supp. 704 (D. Conn. 1979); *Rowe v. State*, 363 Md. 424, 769 A.2d 879 (2001); *Barrett v. Com.*, 250 Va. 243, 462 S.E.2d 109 (1995).

¹⁰ See *State v. Smith*, 4 Neb. App. 219, 540 N.W.2d 374 (1995).

In accordance with these other jurisdictions and the Court of Appeals, we hereby adopt the community caretaking exception to the Fourth Amendment. In so doing, we emphasize the narrow applicability of this exception. We agree with the other courts which have held that this exception should be narrowly and carefully applied in order to prevent its abuse.¹¹

APPLICATION OF COMMUNITY CARETAKING EXCEPTION

[4] Having adopted the exception and in keeping with its narrow applicability, we next consider under what circumstances the exception should apply. In *Smith*, the Court of Appeals “assess[ed] the totality of the circumstances surrounding the stop, including ‘all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction’”¹² Other jurisdictions recognizing and applying the community caretaking exception have adopted similar standards.¹³ We likewise adopt this standard.

In considering the totality of the circumstances surrounding the stop, including Groves’ objective observations and considerations based upon his training, as well as our de novo review, we conclude Groves’ stop of Bakewell was reasonable under the community caretaking exception to the Fourth Amendment.

The record indicates the incident in question occurred at 3:15 a.m. There was little or no traffic present on this stretch of highway at the time of the incident. Bakewell’s vehicle stopped or slowed considerably five times within approximately 90 seconds while traveling down the highway, with the vehicle eventually pulling off onto the shoulder of the road. Considering the totality of the circumstances, it was reasonable for Groves to conclude that Bakewell was lost or that something was wrong with

¹¹ See, *State v. Rinehart*, 617 N.W.2d 842 (S.D. 2000); *Wright v. State*, 7 S.W.3d 148 (Tex. Crim. App. 1999).

¹² *State v. Smith*, *supra* note 10, 4 Neb. App. at 225, 540 N.W.2d at 379 (quoting *State v. Ebberson*, 209 Neb. 41, 305 N.W.2d 904 (1981)).

¹³ *Wright v. State*, *supra* note 11; *State v. Washington*, 296 N.J. Super. 569, 687 A.2d 343 (1997). Cf., *Poe v. Com.*, 169 S.W.3d 54 (Ky. App. 2005); *State v. Vistuba*, 251 Kan. 821, 840 P.2d 511 (1992), *overruled on other grounds*, *State v. Field*, 252 Kan. 657, 847 P.2d 1280 (1993); *State v. Marcello*, 157 Vt. 657, 599 A.2d 357 (1991); *State v. Pinkham*, 565 A.2d 318 (Me. 1989).

Bakewell, his vehicle, or inside his vehicle. Further, particularly given the early hour of the morning, it was reasonable for Groves to assume that his assistance might be welcomed. In fact, after approaching Bakewell's vehicle, the first question posed by Groves was whether Bakewell was all right, to which Bakewell responded that he was lost.

Our conclusion that Groves' actions were reasonable is consistent with decisions applying the exception in other jurisdictions. The court in *State v. Martinez*¹⁴ held that the community caretaking function was implicated where a driver was stopped at 2 a.m. for traveling at a rate of speed less than 10 miles per hour. In *State v. Rinehart*,¹⁵ the community caretaking function was found applicable where a vehicle was traveling at an estimated speed of 20 to 25 miles per hour in a 40-mile-per-hour zone.

Upon our de novo review of the record, we conclude that under the community caretaking exception to the Fourth Amendment, it was reasonable for Groves to approach Bakewell's vehicle. Bakewell's assignment of error is without merit.

CONCLUSION

The judgment of the district court is affirmed.

AFFIRMED.

GERRARD, J., not participating.

¹⁴ *State v. Martinez*, 260 N.J. Super. 75, 615 A.2d 279 (1992).

¹⁵ *State v. Rinehart*, *supra* note 11.

Cite as 273 Neb. 379

CORAL PRODUCTION CORPORATION, A COLORADO CORPORATION,
AND KJJ CORP., A WYOMING CORPORATION, PLAINTIFFS AND
THIRD-PARTY DEFENDANTS, APPELLANTS, V. CENTRAL RESOURCES,
INC., DEFENDANT AND THIRD-PARTY PLAINTIFF, EXCO RESOURCES,
INC., A TEXAS CORPORATION, AND PAUL ZECCHI, AN INDIVIDUAL
PERSON, DEFENDANTS, AND JAMES P. CHONKA, INC.,
A DISSOLVED COLORADO CORPORATION, ET AL.,
THIRD-PARTY DEFENDANTS, APPELLEES.

730 N.W.2d 357

Filed April 20, 2007. No. S-05-564.

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. **Contracts.** The meaning of a contract and whether a contract is ambiguous are questions of law.
3. **Jurisdiction: States.** Which state's law governs an issue 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 conclusions reached by the trial court.
5. **Rules of the Supreme Court: Pretrial Procedure: Appeal and Error.** The determination of an appropriate sanction under Neb. Ct. R. of Discovery 37 (rev. 2000) rests within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.
6. **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.
7. **Mines and Minerals: Leases.** An interest in an oil and gas lease is an interest in real property to the extent that it grants the lessee the right to remove minerals from the land.
8. **Mines and Minerals: Contracts.** An operating agreement is the standard contract used in the oil and gas industry to govern the rights and duties between the operator and nonoperator interest owners of oil and gas tracts or leaseholds in the development and operation of mineral properties.
9. ____: _____. An operating agreement normally is not intended to affect the ownership of the minerals or the rights to produce.
10. **Property: Contracts: Jurisdiction: States.** Because a preferential purchase right in an operating agreement involves a contractual claim to purchase property interests, rather than directly affecting title to real property, parties to an operating agreement are free to choose which state's law will govern their disputes arising out of the provision.
11. **Contracts.** Both a printed provision that is clearly a part of the body of a contract and a handwritten or typewritten provision that has been inserted into a contract are subject to the same rules of interpretation as are other provisions of a contract.

12. **Property: Contracts.** Traditional contract principles ensure that the owner of property subject to a preferential right to purchase remains master of the conditions under which the owner will relinquish his or her interest, as long as those conditions are commercially reasonable, imposed in good faith, and not specifically designed to defeat the right.
13. **Mines and Minerals: Leases.** An overriding royalty interest is a fractional interest in the production of oil and gas, which is free of the costs of production and over and above any royalty interest payable to the lessor of an oil and gas lease. It is an interest retained by the lessee of an oil and gas lease when the lessee assigns all or part of its lease or allows another party to drill on a site covered by its lease.
14. **Property: Contracts: Sales.** When a party to an operating agreement decides to sell his or her interests to a third party, a preferential right to purchase serves to give the remaining owners the ability to exclude undesirable participants and the opportunity to acquire additional interests in the property.
15. **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.
16. _____. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.
17. **Attorney Fees.** To determine proper and reasonable fees, it is necessary for the court to consider the nature of the proceeding, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services.
18. _____. In calculating attorney fees for discovery violations, a court may also use its discretion to exclude excessive or unnecessary work on given tasks.

Appeal from the District Court for Cheyenne County:
KRISTINE R. CECAVA, Judge. Affirmed in part, and in part reversed
and remanded for further proceedings.

R.K. O'Donnell, of McGinley, O'Donnell, Reynolds &
Edwards, P.C., L.L.O., and Steven F. Mattoon, of Matzke,
Mattoon & Miller, for appellants.

Scot W. Anderson and Andrea Wang, of Davis, Graham &
Stubbs, L.L.P., for appellees Central Resources, Inc., and Paul
Zecchi.

Richard P. Marshall, Jr., of Scott, Douglass & McConnico, L.L.P.,
for appellee EXCO Resources, Inc.

Donald J. Tedesco for appellees Central Resources, Inc., Paul
Zecchi, and EXCO Resources, Inc.

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

HEAVICAN, C.J.

NATURE OF CASE

This action arises out of disputes between oil and gas companies that were or are fractional working interest owners of oil and gas assets in Nebraska under a joint operating agreement (JOA). When Central Resources, Inc. (Central), the operator under the JOA, put all of its oil and gas assets up for sale, Coral Production Corporation (Coral) claimed it had a preferential right under the JOA to purchase Central's Nebraska assets. Central disputed this claim and sold 70 percent of its total assets, including its Nebraska assets, to EXCO Resources, Inc. (EXCO), without offering Coral an opportunity to purchase the Nebraska assets. All of Central's remaining assets had been sold 18 days earlier to a different company. EXCO later transferred overriding royalty interests in the Nebraska assets to Paul Zecchi, Central's chief executive officer.

Coral and KJJ Corp. (KJJ), which owned one-third of Coral's interests in the JOA, filed an action against Central, EXCO, and Zecchi to quiet title to Coral and KJJ's interests. Coral and KJJ alleged claims of breach of contract, fraud, and tortious interference, and claimed that their disputes were governed by Nebraska law.

The district court determined the parties agreed in the JOA that Texas law would govern their disputes and granted summary judgment to Central, EXCO, and Zecchi on Coral and KJJ's claims of fraud, breach of contract, and tortious interference. It also determined that the JOA did not apply to EXCO's transfer of overriding royalty interests to Zecchi.

We determine that Central's sale of all of its oil and gas assets fell within the parties' typewritten exception to the preferential-right-to-purchase provision of the preprinted JOA. However, we conclude that the district court erred in determining Coral's preferential right to purchase did not apply to overriding royalty interests. We reverse on that sole issue and affirm the district court's order of summary judgment in all other respects.

FACTUAL BACKGROUND

Zecchi was president and chief executive officer of Central. Coral was formed by James P. Chonka, Lawrence B. Conyers, and James R. Weber. In 1993 or 1994, Conyers left Coral, and his one-third interest in Coral was transferred to another corporation, KJJ, that Conyers had started.

JOINT OPERATING AGREEMENT

In 1988, Central and Coral entered into a joint venture agreement to purchase Nebraska oil and gas interests from Marathon Oil Company (Marathon). Coral agreed to furnish engineering and economic data to Central to arrive at a competitive bid, and Central agreed to use its resources to obtain partners and financing for the purchase.

In April 1989, Central closed on its purchase from Marathon. On the same day, Central entered into the JOA with Coral and two other corporate parties.

The JOA was the 1977 version of the model form 610 operating agreement developed by the American Association of Petroleum Landmen.¹ Form 610 has been used widely in the oil and gas industry since 1956.² The JOA designated Central as the operator of the properties with full control of all operations at properties covered by the JOA. Coral and the other two parties were designated as nonoperators. Central held a 30-percent “before payout” interest, and the other two parties held 45-percent and 25-percent “before payout” interests. Coral held a 10-percent “after payout” interest, which percentage was taken from Central’s 30-percent interest.

An interlineation to the JOA provided that “where the interests of the Operator in the joint properties are sold, transferred, merged or consolidated into a non-affiliated third party, then the selection of a successor operator” was to be made by two or more nonoperators with a 65-percent interest in the assets covered by the JOA.

Article VIII, paragraph G, of the model form provided a preferential purchase right and exceptions to the right:

¹ See 2 Eugene Kuntz, *A Treatise on the Law of Oil and Gas* § 19A.6 (1989).

² *Armstrong v. Tri-Valley*, 116 Cal. App. 4th 1375, 11 Cal. Rptr. 3d 412 (2004).

Should any party desire to sell all or any part of its interests under this agreement, or its rights and interests in the Contract Area, it shall promptly give written notice to the other parties, with full information concerning its proposed sale, which shall include the name and address of the prospective purchaser (who must be ready, willing and able to purchase), the purchase price, and all other terms of the offer. The other parties shall then have an optional prior right, for a period of ten (10) days after receipt of the notice, to purchase on the same terms and conditions the interest which the other party proposes to sell However, there shall be no preferential right to purchase in those cases where any party wishes to mortgage its interests, or to dispose of its interests by merger, reorganization, consolidation, or sale of all or substantially all of its assets to a subsidiary or parent company or to a subsidiary of a parent company, or to any company in which any one party owns a majority of the stock, *or substantially all of the assets and/or stock of the selling party is sold to a non-affiliated third party. Refer to Article XV G. for additional provisions.*

The italicized language is the parties' typewritten interlineation to the model form. The exception to the preferential right to purchase in article XV, paragraph G, is not relevant to the arguments raised by the parties in this appeal.

Article I of the model form defines terms, and this portion of the form was not altered. Article I ends with this statement: "Unless the context otherwise clearly indicates, words used in the singular include the plural, the plural includes the singular" The model form portion of the JOA also provided that the governing law for any disputes under the JOA would be "the law of the state in which the Contract Area is located." However, article XV, paragraph E, of the added provisions provided that Texas law would govern any disputes between the parties.

In July 1989, Central and Coral entered into a "Purchase and Sale Agreement" that was intended to clarify the rights and obligations of both parties. The sale agreement stated facts leading up to the JOA and was retroactive to the date the JOA was executed. The sale agreement provided that Coral had assisted in the acquisition of the Nebraska properties and that Central desired to

sell approximately 70 percent of its interests in the Nebraska properties to third parties. Central promised that its remaining 30-percent interest would be divided with Coral under one of two plans.

Under "Plan A," Coral could pay Central \$515,755 for 15 percent of Central's remaining interests. If Coral had not elected plan A by August 15, 1989, then Coral elected, by default, to exercise "Plan B." Under plan B, Central would assign 10 percent of its remaining interests to Coral and provide the collateral and security necessary to finance its entire interest until "payout." Payout was defined as the date that Central repaid its principal loan obligations and obligations to third parties. Central's assignment to Coral was effective within 120 days of the agreement but was conditioned upon the release of bank loans and the repayment of fees.

Central agreed to apply proceeds from the assets to its obligations in accordance with a prioritized list. The parties agreed that Central would be the operator of record and that Coral would be the contract pumper and field supervisor. Central also agreed that if Coral elected plan B, it would make good faith efforts to assist Coral to become the successor operator of specified properties within 60 days of payout and to cast its vote affirmatively for Coral.

At least by April 1990, the parties began having disputes. Coral questioned Central's low production and performance of operator duties, while Central questioned Coral's performance of field operations. In October 1990, Central removed Coral as the contract operator.

AMENDMENT

In November 1990, the parties executed an instrument entitled "Amendment to Agreements." It provided that Central had acquired "oil and gas interests including (but not limited to working interests, *overriding royalty interests*, and mineral interests) from Marathon." It also specifically listed the property rights Central had acquired, including: "1. Producing oil and gas leases [and] 2. Mineral, royalty and overriding royalty interests."

Central agreed in the amendment that although payout had not occurred, it would immediately assign to Coral 10 percent of its remaining 30-percent interest in the Marathon properties for a

purchase price of \$162,842.66. The parties confirmed that they intended to be bound by the JOA and that the JOA was amended only to the extent that Central agreed to convey 10 percent of its interests to Coral before “payout” in exchange for the purchase price.

Coral exercised its option to purchase 10 percent of Central’s interests. Over the next several years, Coral continued to question or express dissatisfaction with Central’s performance of its operator and accounting duties.

CENTRAL’S SALE OF ASSETS

In May 2000, Central issued a “Property Sale Memorandum” that offered for sale all of its oil and gas assets in five major packages: four regional packages and a separate package offering its royalty and overriding royalty interests in four states, including Nebraska. Some of the Nebraska assets were also sold in a subpackage of the “Mid-Continent” package. Bids were due by June 30.

Around May 23, 2000, Coral received a copy of Central’s sale memorandum and was aware that Central intended to sell all of its oil and gas assets. On May 26, Coral sent a letter to Energy Spectrum, Central’s agent in the sale of its assets. Coral asserted its preferential right to purchase some properties listed in the memorandum. In June, Coral submitted a bid on the subpackage with assets covered by the JOA and repeated its preferential purchase right regarding some of the assets in the subpackage and in the royalties package.

On August 13, 2000, Central sold its “Four Corners” regional package to Elmridge Resources, Inc., for \$20 million. Central sold all of its remaining assets, including its Nebraska assets, to EXCO on August 31 for \$48 million. The EXCO transaction closed on September 22, and the Elmridge transaction closed on September 29. The effective date for both sales was June 1, 2000. Also on September 22, Central paid off its loan for its Nebraska assets and had no remaining interests in Nebraska.

Before entering into the sale agreement with EXCO, Central and EXCO discussed whether Coral’s preferential purchase right applied and determined that no parties to the JOA had a preferential purchase right because Central was selling substantially all

of its assets in its sale agreement with EXCO. Central did not notify any of the parties to the JOA of their preferential purchase right or notify them that the sale to EXCO had occurred until September 22, 2000. Coral had no knowledge that Central had closed on the sale of its assets until afterward. On September 26, Coral wrote to both EXCO and Central to demand notice of the value of all sold assets that Coral claimed were covered by its preferential purchase right.

The record indicates that on December 7, 2000, a notary public certified the parties' signatures on EXCO's transfer of overriding royalty interests to Zecchi. The transfer was effective June 1, 2000, and included overriding royalty interests in several oil and gas leases in Nebraska.

PROCEDURAL HISTORY

COMPLAINT AND ANSWER

Coral and KJJ filed their operative complaint against Central, EXCO, and Zecchi in October 2003. Coral and KJJ sought to quiet title to their interests under the JOA. They alleged that all the defendants had conspired to defraud Coral of its preferential purchase right under the JOA. Coral and KJJ alleged that Central had breached the JOA by failing to comply with the preferential-right-to-purchase provision and had breached the amendment to the agreements by failing to assist Coral to become the successor operator within 60 days of payout. Coral and KJJ alleged that before EXCO was a party to the JOA, it tortiously interfered with Coral's contract rights by intentionally procuring Central's breach.

Coral and KJJ alleged that after EXCO assumed Central's duties under the JOA, EXCO breached the preferential-right-to-purchase provision by transferring overriding royalty interests to Zecchi without first offering those interests to Coral. Finally, Coral and KJJ alleged that all the defendants conspired to defraud Coral of its preferential right to purchase the overriding royalty interests.

In March 2004, Central, EXCO, and Zecchi filed an answer, which included affirmative defenses and Central's counterclaim based on Coral and KJJ's alleged breach of the JOA.

CHOICE OF LAW AND DISCOVERY SANCTIONS

In August 2004, upon Central, EXCO, and Zecchi's motion, the district court determined that the parties intended through the JOA's choice-of-law provision to have Texas law control substantive issues arising from the JOA. In the same order, the court granted Central, EXCO, and Zecchi's motion to compel the production of documents and ordered Coral and KJJ, as a sanction, to bear the costs and attorney fees for the retaking of a corporate deposition after the documents were produced.

MOTIONS FOR PARTIAL SUMMARY JUDGMENT
AND DISTRICT COURT'S ORDERS

From August 2004 to April 2005, the parties filed a series of motions for partial summary judgment. This case was decided by two separate orders of the district court ruling on these motions without comment. The orders were filed on April 8 and 20, 2005.

Central, EXCO, and Zecchi moved for partial summary judgment on Coral and KJJ's (1) fraud claims, (2) quiet title claim, (3) claims that Central had breached the JOA, (4) claim that Central had breached the amendment, and (5) claim that EXCO had tortiously interfered with Coral's contract rights. In addition, Zecchi and EXCO moved for partial summary judgment on their claim that the JOA did not cover EXCO's transfer of overriding royalty interests to Zecchi. The district court sustained all of these motions.

Coral and KJJ moved for summary judgment on Central's counterclaim that Coral and KJJ had breached the JOA, which motion was sustained. Coral and KJJ also sought an order that five pages of the JOA, which included both the printed and type-written preferential right provisions, were unambiguous. This motion was also sustained; the court found the contract was unambiguous.

Coral and KJJ also sought rulings on these specific issues: (1) that a sale of substantially all of a party's assets or stock to "a non-affiliated third party" in the exception to the preferential-right-to-purchase provision included only single entities, (2) that Central's sale to EXCO was not a sale of "substantially all" of Central's assets, and (3) that EXCO's transfer of overriding

royalty interests to Zecchi was subject to the preferential-right-to-purchase provision. All of these motions were overruled. Finally, the court ordered Coral and KJJ to pay \$6,000 in costs and fees in connection with its earlier discovery sanction for their failure to produce documents before a corporate deposition.

ASSIGNMENTS OF ERROR

Coral and KJJ assign that the district court erred in (1) dismissing its quiet title action, (2) failing to find that Central breached the JOA by not offering Coral a preferential right to purchase assets sold to EXCO, (3) failing to find that Central committed fraud by deliberately concealing information regarding the sale of Central's assets to EXCO and EXCO's subsequent sale of overriding royalty interests to Zecchi, (4) finding that EXCO did not tortiously interfere with Coral's contract rights under the JOA, (5) finding that Central did not breach the amendment to the sale and purchase agreement, (6) failing to find that EXCO breached the JOA by not offering Coral a preferential right to purchase overriding royalty interests sold to Zecchi, (7) finding that Texas law governed disputes under the contract, (8) finding that the phrase "a non-affiliated third party" in the preferential-right-to-purchase exception of the JOA included "parties," (10) finding that Central's sale to EXCO constituted a sale of "substantially all" of Central's assets, and (11) failing to grant Coral and KJJ's motions for summary judgment.

STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.³

[2-4] The meaning of a contract and whether a contract is ambiguous are questions of law.⁴ Which state's law governs an issue is a question of law.⁵ When reviewing questions of law, an

³ *City of Lincoln v. Hershberger*, 272 Neb. 839, 725 N.W.2d 787 (2007).

⁴ *Kluver v. Deaver*, 271 Neb. 595, 714 N.W.2d 1 (2006).

⁵ *Mertz v. Pharmacists Mut. Ins. Co.*, 261 Neb. 704, 625 N.W.2d 197 (2001).

appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.⁶

[5,6] The determination of an appropriate sanction under Neb. Ct. R. of Discovery 37 (rev. 2000) rests within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.⁷ 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.⁸

ANALYSIS

GOVERNING STATE LAW

[7] Coral and KJJ argue that “this contract involves the *eventual* ownership of real estate interests in Nebraska and, therefore, it should be governed by Nebraska law.”⁹ We agree that this court has implicitly recognized that oil and gas leases have many of the same components as real estate interests.¹⁰ Moreover, this court, like many states, has explicitly recognized that an interest in an oil and gas lease is an interest in real property to the extent that it grants the lessee the right to remove minerals from the land.¹¹

[8,9] This action, however, arises out of a dispute over the meaning of the parties' executory promises in a joint operating agreement. An operating agreement is the standard contract used in the oil and gas industry to govern the rights and duties between the operator and nonoperator interest owners of oil and gas tracts or leaseholds in the development and operation of mineral

⁶ *Didier v. Ash Grove Cement Co.*, 272 Neb. 28, 718 N.W.2d 484 (2006).

⁷ *Salazar v. Scotts Bluff Cty.*, 266 Neb. 444, 665 N.W.2d 659 (2003).

⁸ *State v. Floyd*, 272 Neb. 898, 725 N.W.2d 817 (2007).

⁹ Brief for appellant at 23 (emphasis supplied).

¹⁰ *Long v. Magnolia Petroleum Co.*, 166 Neb. 410, 89 N.W.2d 245 (1958).

¹¹ See *Fawn Lake Ranch Co. v. Cumbow*, 102 Neb. 288, 167 N.W. 75 (1918). Accord, *Kelly Oil Co. Inc. v. Svetlik*, 975 S.W.2d 762 (Tex. App. 1998); *Thomas v. Steuernol*, 185 Mich. App. 148, 460 N.W.2d 577 (1990). See, also, 1A W.L. Summers, *The Law of Oil and Gas* § 152 (1954).

properties.¹² “[T]he agreement normally is not intended to affect the ownership of the minerals or the rights to produce.”¹³ Other courts have implicitly recognized that operating agreements create contractual rights, not property rights.¹⁴

Although Coral and KJJ sought a judgment establishing title to the interests covered by the JOA, it concedes that the “key issue in this lawsuit . . . which affects all of [Coral’s] causes of action, is the proper construction of Article VIII(G) entitled ‘Preferential Right to Purchase.’”¹⁵ Even if successful, Coral’s claim would have obligated Central to sell Coral and KJJ the interest sold to EXCO on the same terms.¹⁶ But that determination would not have directly affected title to real property in Nebraska.

[10] The Restatement (Second) of Conflict of Laws § 187(1) at 561 (1971) provides that “[t]he law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue” Because the dispute over Coral and KJJ’s preferential purchase right involves a contractual claim to purchase property interests, rather than directly affecting title to Nebraska real property, the parties were free to choose Texas law to govern this claim, and the district court did not err in so determining.

PREFERENTIAL-RIGHT-TO-PURCHASE EXCEPTION

Coral and KJJ contend that Central’s sale of its oil and gas assets did not fall within the exception to the preferential right to

¹² See, *Akandas, Inc. v. Klippel*, 250 Kan. 458, 827 P.2d 37 (1992); Gary B. Conine, *Property Provisions of the Operating Agreement—Interpretation, Validity, and Enforceability*, 19 Tex. Tech. L. Rev. 1263 (1988); 2 Kuntz, *supra* note 1.

¹³ *Akandas, Inc.*, *supra* note 12, 250 Kan. at 466, 827 P.2d at 45.

¹⁴ See, e.g., *Armstrong*, *supra* note 2; *IMCO Oil & Gas Co. v. Mitchell Energy Corp.*, 911 S.W.2d 916 (Tex. App. 1995). Compare *McMillan v. Dooley*, 144 S.W.3d 159 (Tex. App. 2004). But see *Producers Oil Co. v. Gore*, 610 P.2d 772 (Okla. 1980).

¹⁵ Brief for appellant at 25.

¹⁶ See *Winberg v. Cimfel*, 248 Neb. 71, 532 N.W.2d 35 (1995); *McMillan*, *supra* note 14.

purchase because the plain language of the exception shows a sale of a party's assets or stock to "a non-affiliated third party" does not include a sale to more than one nonaffiliated third party. Central, EXCO, and Zecchi contend that Coral and KJJ's interpretation of the exception clause conflicts with the rule of construction in article I of the JOA, which provides: "Unless the context otherwise clearly indicates, words used in the singular include the plural, the plural includes the singular, and the neuter gender includes the masculine and the feminine."

Coral and KJJ counter that this court should decline to apply the rule of construction to the typewritten interlineation in the exception clause because (1) the rule of construction was only intended to apply to the definitions that were listed in article I; (2) interpreting "a non-affiliated third party" to include the plural would create an ambiguity; (3) other sections of the JOA show that the parties used the term "party" in the singular, plural, or in combination, to indicate their intent; and (4) interpreting the phrase to include the plural of "party" would render the preferential-right-to-purchase provision meaningless.

The construction of an unambiguous contract presents a question of law for an appellate court.¹⁷ A court's primary concern in interpreting a contract is ascertaining the true intent of the parties.¹⁸ If a written instrument can be given a certain or definite legal meaning or interpretation, then it is not ambiguous, and the court will construe it as a matter of law.¹⁹

An appellate court must examine and consider the writing as a whole in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless.²⁰ A court presumes the parties to a contract intend every clause to have some effect.²¹ No single provision taken alone will be given

¹⁷ *MCI Corp. v. Texas Utilities Elec. Co.*, 995 S.W.2d 647 (Tex. 1999).

¹⁸ *XCO Production Co. v. Jamison*, 194 S.W.3d 622 (Tex. App. 2006).

¹⁹ *McMillan*, *supra* note 14.

²⁰ *XCO Production Co.*, *supra* note 18.

²¹ *Id.*

controlling effect; rather, all provisions must be considered with reference to the whole instrument.²²

Applying Texas' rules of construction, we disagree with Coral and KJJ's arguments. First, Coral and KJJ argue that under the rule of "ejusdem generis," because the definitions of terms in article I precede the rule of construction, the rule was intended to apply only to those definitions. Coral and KJJ misapply this canon of construction. "'[T]he rule of *ejusdem generis* . . . provides that when words of a general nature are used in connection with the designation of particular objects or classes of persons or things, the meaning of the general words will be restricted to the particular designation.'"²³ In other words, general terms must be construed consistent with specific terms when they are used in a sequence.²⁴

That rule has no application here because the rule of construction is not an undefined term and the terms defined in article I are unrelated to the rule. There are no other sections of the JOA providing rules of construction, so article I was the logical place to insert a rule directed at interpreting terms in the instrument. Moreover, the reference to "neuter gender" could have no application to the definitions listed in article I, supporting a conclusion that the rule of construction was intended to be global rather than limited to the listed definitions.

Second, we reject Coral and KJJ's contention that interpreting the exception clause to include the plural form of "party" renders the JOA ambiguous. The cases relied on by Coral and KJJ are distinguishable. For example, in a Texas case, the owners of adjacent commercial lots recorded an agreement to allow reciprocal parking on either lot, which would be binding on them and future owners "unless rescinded by the then *owner's* of said property."²⁵

²² *First Permian, L.L.C. v. Graham*, 212 S.W.3d 368 (Tex. App. 2006).

²³ *HILCO Elec. Co-op. v. Midlothian Butane Gas*, 111 S.W.3d 75, 81 (Tex. 2003).

²⁴ See *id.* See, also, *Dykes v. Scotts Bluff Cty. Ag. Socy.*, 260 Neb. 375, 617 N.W.2d 817 (2000).

²⁵ See *Harrison v. Bentley Express Ltd., Inc.*, No. 05-00-01794-CV, 2001 WL 1360206 at *1 (Tex. App. Nov. 7, 2001) (unpublished opinion) (emphasis supplied).

The court determined that the word “owner’s” in this phrase created an ambiguity as to whether the parties had intended to allow one owner to unilaterally terminate the agreement or to require mutual consent.

In a Maryland case cited by Coral, the court reversed a defendant’s conviction for threatening a prosecutor because, although a threat against a “State official” could include “‘a State’s Attorney’” under the statute, the singular reference unambiguously precluded its application to a state attorney’s appointed assistants.²⁶

The reasoning in these cases is not applicable. First, Maryland courts, like most courts, strictly construe penal statutes.²⁷ Further, when a statutory scheme does include a rule of construction that allows a term’s meaning to include its plural form, or vice versa, the opposite result has been reached.²⁸

As in the statutory construction cases, no ambiguity results from applying the parties’ rule of construction to the terms in the JOA. A contract is not ambiguous if it can be given a certain or definite meaning as a matter of law.²⁹ The rule of construction simply shows that the parties unambiguously intended the term “a non-affiliated third party” to have both a singular and plural meaning.

[11] It is true that to the extent a conflict exists between type-written and printed provisions, the typewritten matter in a contract must be given effect over the printed matter.³⁰ But “[b]oth a printed provision that is clearly a part of the body of a contract and a handwritten or typewritten provision that has been inserted into a contract are subject to the same rules of interpretation as are other provisions of a contract.”³¹

²⁶ *Gillespie v. State*, 370 Md. 219, 224, 804 A.2d 426, 428 (2002).

²⁷ *Moore v. State*, 388 Md. 623, 882 A.2d 256 (2005).

²⁸ See, e.g., *Holley v. Grigg*, 65 S.W.3d 289 (Tex. App. 2001). See, also, *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001); *Peterson v. Cook*, 175 Neb. 296, 121 N.W.2d 399 (1963).

²⁹ *XCO Production Co.*, *supra* note 18.

³⁰ *Friedrich v. Amoco Production Co.*, 698 S.W.2d 748 (Tex. App. 1985).

³¹ 5 Margaret N. Kniffin, *Corbin on Contracts* § 24.24 at 262 (1998).

In order to harmonize provisions that appear to be in conflict, Texas courts will apply printed provisions to typewritten provisions unless specific language in the typewritten provision precludes that result.³² For example, a proportionate reduction clause in an oil and gas lease allows the lessee to reduce royalties or other moneys owed the lessor under specified circumstances.³³ In Texas, whether a printed proportionate reduction clause applies to a typewritten rider or addendum reserving an overriding royalty interest depends upon whether the typewritten provision includes specific language showing that the parties did not intend for the overriding royalty interest to be reduced.³⁴

Here, the interlineation in the exception clause shows the parties intended to narrow the preferential right to purchase and did not want the right to be triggered if one of them decided to exit the oil and gas business and sell its assets to a nonaffiliated third party. Nothing in the interlineation would preclude interpreting the phrase “a non-affiliated third party” to include its plural form. For instance, the parties did not state that the preferential right to purchase would not apply to a sale of a party’s assets to “a *single* third party.”³⁵ Texas courts will not rewrite agreements to insert provisions parties could have included or to imply restraints for which they have not bargained.³⁶

[12] Coral and KJJ counter that construing the exception as allowing a party to sell its assets to more than one outside party would permit a JOA party to sell a portion of its assets to an outside party and avoid the preferential right to purchase if the selling party intended to completely dissolve at some later point in time. There is no merit to this contention. Traditional contract principles would ensure that the owner of property subject to a preferential right to purchase “remains master of the conditions

³² See *Horizon Resources, Inc. v. Putnam*, 976 S.W.2d 268 (Tex. App. 1998).

³³ See *Santa Fe Energy Oper. Partners v. Carrillo*, 948 S.W.2d 780 (Tex. App. 1997).

³⁴ *Horizon Resources, Inc.*, *supra* note 32.

³⁵ See *El Paso Prod. Co. v. Geomet, Inc.*, No. 05-05-01085-CV, 2007 WL 80581 at *3 (Tex. App. Jan. 12, 2007) (emphasis supplied).

³⁶ *Tenneco Inc. v. Enterprise Products Co.*, 925 S.W.2d 640 (Tex. 1996).

under which he will relinquish his interest, as long as those conditions are commercially reasonable, imposed in good faith, and not specifically designed to defeat the preemptive rights.”³⁷

However, we need not decide that issue here because Central clearly intended to exit the oil and gas business when it placed all of its assets for sale at the same time. Although it sold the assets in packages, the property sale memorandum specifically provided that it would give preference to “offers for the entire company and/or multiple package offers.”

As one commentator has noted:

[R]arely will any party, particularly a corporation of substantial size and with diverse assets, be able to sell all of . . . its assets to a single purchaser, and . . . therefore, the parties may very well not have intended to use the phrase “sale of all assets” in the singular sense of a sale to one purchaser but rather in the plural sense indicating a mode or means by which titles are passed.³⁸

Interpreting the JOA as a whole and giving effect to every provision, we conclude that the parties unambiguously intended that the preferential right to purchase would not be triggered by a party’s sale of all or substantially all of its assets to one or more nonaffiliated third parties. The evidence shows that Central offered all of its oil and gas assets in one sale and that it had no remaining oil and gas assets after two sales agreements that resulted from that offer. Thus, the district court did not err in determining that Central had not breached the JOA.

Because we conclude that Central did not breach the JOA, we need not consider Coral and KJJ’s claim that EXCO tortiously interfered with their contract rights by procuring Central’s breach. Further, because the parties do not dispute that Central had no remaining assets covered by the JOA after these two sales, we need not consider whether Central’s single sale to EXCO constituted a sale of all or substantially all of its oil and gas assets.

³⁷ *West Texas Transmission, L.P. v. Enron Corp.*, 907 F.2d 1554, 1563 (5th Cir. 1990).

³⁸ John S. Sellingsloh, *Nature and Purpose of Preferential Purchase Rights*, 11 *Rocky Mtn. Min. L. Inst.* 35, 40-41 (1966).

OVERRIDING ROYALTY INTERESTS

The district court overruled Coral and KJJ's summary judgment motion that claimed the preferential right to purchase applied to the transfer of overriding royalty interests to Zecchi. It also sustained EXCO and Zecchi's motion for summary judgment on this claim but did not specify its reasoning.

Coral and KJJ assign that the district court erred in failing to find that after Central had sold its Nebraska assets to EXCO, EXCO's transfer of overriding royalty interests in the Nebraska assets to Zecchi triggered Coral and KJJ's preferential right to purchase those interests. This claim is not directed at Central. EXCO and Zecchi argue that because overriding royalties are nonoperating interests carved out of the working interests, they are not subject to the JOA.

Initially, we note that the agreement was made binding upon the parties' successors and assigns and required a JOA party to make any sales or transfers subject to the JOA. Thus, EXCO was bound by the JOA's preferential right to purchase, and it does not dispute this point.³⁹

[13] An overriding royalty interest is a fractional interest in the production of oil and gas, which is free of the costs of production and over and above any royalty interest payable to the lessor of an oil and gas lease. It is an interest retained by the lessee of an oil and gas lease, such as a speculator or oil and gas production company, when the lessee assigns all or part of its lease or allows another party to drill on a site covered by its lease.⁴⁰

A working interest is an operating interest under an oil and gas lease that provides its owner with the exclusive right to drill, produce, and exploit the minerals.⁴¹ Under Texas law, an overriding royalty interest "'is carved out of, and constitutes a part of, the working interest created by an oil and gas lease.'"⁴²

³⁹ See *IMCO Oil & Gas Co.*, *supra* note 14.

⁴⁰ See, 3 W.L. Summers, *The Law of Oil and Gas* § 554 (1958); 8 Howard R. Williams & Charles J. Meyers, *Oil and Gas Law* 748 (2000).

⁴¹ *H.G. Sledge v. Prospective Inv. & Trading*, 36 S.W.3d 597 (Tex. App. 2000), citing 8 Williams & Meyers, *supra* note 40.

⁴² *Matter of GHR Energy Corp.*, 972 F.2d 96, 99 (5th Cir. 1992), quoting *Gruss v. Cummins*, 329 S.W.2d 496 (Tex. App. 1959).

EXCO and Zecchi rely on law review articles for their proposition that because the owner of an overriding royalty interest has no right to develop the oil or gas, construing preferential rights provisions as applying to these interests does not serve the purpose of preferential rights—namely, the power to exclude undesirable operators or participants.

[14] Implicit in EXCO and Zecchi's argument is the presumption that a preferential right to purchase serves only one purpose. It is correct that

a preferential right to purchase ensures that the owners retaining their interest in the contract area have some degree of control in excluding undesirable participants who may not have the necessary financial ability to bear their share of expenditures or who might frustrate development with management and engineering philosophies which current owners oppose.⁴³

However, this is not the only purpose of a preferential right to purchase:

In joint operating agreements, each owner believes that the other interests in the subject property are of some value. The preferential right, therefore, assures each owner the opportunity to purchase those valuable rights should a co-owner of an interest decide to sell his interest to a third party. It thus allows those owners, who may have been at risk in exploratory efforts which contributed to the development of the property, to have an opportunity to acquire an additional interest in the property before a third party who did not participate in such risks.⁴⁴

Neither the JOA nor Texas law limits the opportunity to purchase "valuable rights" in the subject property to operating rights. The preferential-right-to-purchase provision in the JOA broadly applies to a party's sale of "its rights and interest in the Contract Area." The parties' amendment showed that the interests Central acquired in the Nebraska properties included overriding royalty interests. Texas Courts of Appeals have held that overriding

⁴³ *Questa Energy Corp. v. Vantage Point Energy, Inc.*, 887 S.W.2d 217, 222 (Tex. App. 1994).

⁴⁴ *Id.*

royalty interests are interests in the contract area and that a preferential right to purchase applies to a sale of these interests.⁴⁵

Thus, the only issue here is whether a “sale” of overriding royalty interests occurred. In the context of oil and gas lease interests, Texas courts require an arms-length’s transaction between a willing seller and buyer in order to trigger a preferential right to purchase.⁴⁶ Because the district court concluded that a preferential right to purchase does not apply to overriding royalty interests, however, it did not determine whether EXCO’s transfer of overriding royalty interests to Zecchi constituted an arms-length transaction. Nor did the parties raise this issue to the court in their motions for summary judgment. Thus, we conclude that the matter must be remanded for further proceedings to determine whether the transfer triggered Coral’s preferential right to purchase.

ALLEGATIONS OF FRAUD AND BREACH OF AMENDMENT

In their fifth assignment of error, Coral and KJJ contend that the district court erred in failing to find that Central breached the amendment. This assignment corresponds to Coral and KJJ’s claim in their complaint that Central breached the amendment by failing to assist Coral to become the successor operator. Coral and KJJ do not argue, however, how Central failed to assist Coral to become the successor operator. Instead, they argue that the court erred in failing to find that Central breached the JOA by failing to conduct an election for a successor operator. This claim was not presented to the district court.

Similarly, Coral and KJJ make no argument in their brief regarding their third assignment of error: that the district court erred in failing to find that Central, EXCO, and Zecchi committed fraud.

[15,16] To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued

⁴⁵ *El Paso Prod. Co.*, *supra* note 35; *IMCO Oil & Gas Co.*, *supra* note 14. See, also, Terry I. Cross, *The Ties That Bind: Preemptive Rights and Restraints on Alienation That Commonly Burden Oil and Gas Properties*, 5 Tex. Wesleyan L. Rev. 193 (1999) (discussing Texas law on this issue).

⁴⁶ See *Perritt Co. v. Mitchell*, 663 S.W.2d 696 (Tex. App. 1983).

in the brief of the party asserting the error.⁴⁷ An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.⁴⁸ Thus, we do not reach these assignments of error.

DISCOVERY SANCTIONS

Finally, Coral and KJJ assign that the district court abused its discretion in ordering Coral and KJJ to pay \$6,000 in costs and fees for the retaking of a corporate deposition for their failure to produce requested documents before an earlier deposition. The requested documents were relevant to Coral's contention that it was capable of purchasing Central's assets at the time they were sold to EXCO, a requirement under the preferential-right-to-purchase provision.

After a hearing on Central, EXCO, and Zecchi's motion to compel discovery and impose sanctions, including dismissal of the case, the district court found that Coral and KJJ had failed to produce the requested documents until after Central, EXCO, and Zecchi had conducted a deposition of Coral and KJJ pursuant to Neb. Ct. R. of Discovery 30(b)(6) (rev. 2001). The court found the failure was a serious violation of discovery rules but did not warrant dismissal. It therefore ordered a new deposition and costs as a sanction for Coral and KJJ's failure to respond to Central, EXCO, and Zecchi's discovery request before the first deposition.

In December 2004, in connection with the court's order imposing this sanction, Central, EXCO, and Zecchi submitted a motion for payment of costs and fees for the four attorneys representing the defendants at the new deposition. They sought a total of \$10,301.53. At a hearing in January, the parties did not submit affidavits detailing their time and rates, but defense counsel for Central, EXCO, and Zecchi submitted invoices from the attorneys' three firms. Counsel for Central stated that his firm had offered to take the deposition in Denver, Colorado, where the deponent resided and the firm was located, and that travel

⁴⁷ *Worth v. Kolbeck*, ante p. 163, 728 N.W.2d 282 (2007).

⁴⁸ *Pohlmann v. Nebraska Dept. of Health & Human Servs.*, 271 Neb. 272, 710 N.W.2d 639 (2006).

expenses were incurred only because Coral preferred to have the deposition taken in Nebraska.

Central's counsel also stated that the actual expense total for the four defense attorneys, based on their hourly rates, was \$19,983.53. However, counsel stated that they reduced their collective hourly fee to \$125, which they believed to be the prevailing rate for Sidney, Nebraska, to arrive at a total of \$8,962.50 plus travel expenses. Counsel also stated that all four attorneys needed to attend in order to effectively represent their respective clients at trial. Central, EXCO, and Zecchi state in their brief that after the hearing, each defense attorney submitted affidavits to the court regarding their fees, but this evidence is not in the record.

Coral and KJJ contend that the order is unsupported because there was no expert testimony regarding local rates and practices or the reasonableness of the time spent in procuring the deposition, and no opportunity to cross-examine witnesses. Central, EXCO, and Zecchi argue that because every defense attorney was present at the hearing on the sanctions, Coral and KJJ had an opportunity to question them, but chose not to do so. Coral and KJJ do not dispute that attorney fees were a permissible sanction for its discovery violation.

[17,18] To determine proper and reasonable fees, it is necessary for the court to consider the nature of the proceeding, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services.⁴⁹ In calculating attorney fees for discovery violations, a court may also use its discretion to exclude excessive or unnecessary work on given tasks.⁵⁰

The invoices submitted by the defense attorneys show that they collectively spent approximately 73 hours preparing or traveling

⁴⁹ *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005); *In re Guardianship & Conservatorship of Donley*, 262 Neb. 282, 631 N.W.2d 839 (2001).

⁵⁰ *Gray v. Lockheed Aeronautical Systems Co.*, 125 F.3d 1387 (11th Cir. 1997).

for the retaking of the Coral and KJJ deposition, at rates ranging from \$125 to \$310 per hour. Although their affidavits are not in the record, the record does show that Coral and KJJ had the opportunity to present evidence opposing the amount of the award and did not do so.⁵¹

In *Greenwalt v. Wal-Mart Stores*,⁵² this court affirmed a sanction of attorney fees for two attorneys representing one plaintiff in the amount of \$5,000 for discovery violations necessitating the moving party to twice file a motion to compel discovery. Here, the district court reduced the requested fees of four attorneys representing three defendants to \$6,000 for the retaking of a deposition. The court also denied Central, EXCO, and Zecchi's motion to dismiss the action with prejudice. We conclude that the court did not abuse its discretion.

CONCLUSION

We conclude that the district court did not err in determining that Central's sale of all of its oil and gas assets fell within the parties' typewritten exception to the preprinted preferential-right-to-purchase provision of their joint operating agreement. We also conclude that the district court did not abuse its discretion in ordering Coral and KJJ to pay attorney fees in the amount of \$6,000 as a sanction for failing to produce documents that necessitated the retaking of a corporate deposition. However, we conclude that the district court erred in determining that Coral's preferential right to purchase did not apply to overriding royalty interests and remand the cause for further proceedings on that single issue. The district court's orders of summary judgment are affirmed in all other respects.

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

⁵¹ See *Winter v. Department of Motor Vehicles*, 257 Neb. 28, 594 N.W.2d 642 (1999).

⁵² *Greenwalt v. Wal-Mart Stores*, 253 Neb. 32, 567 N.W.2d 560 (1997).

CITY OF GORDON, NEBRASKA, APPELLEE, V.
MONTANA FEEDERS, CORP., APPELLANT.
730 N.W.2d 387

Filed April 20, 2007. No. S-05-1214.

1. **Rules of the Supreme Court: Appeal and Error.** Neb. Ct. R. of Prac. 9D(1)e (rev. 2001) provides that briefs shall include a separate, concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error. Each assignment of error shall be separately numbered and paragraphed, bearing in mind that consideration of the case will be limited to errors assigned and discussed.
2. **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.
3. **Rules of the Supreme Court: Appeal and Error.** The failure of a party to submit a brief which complies with the Supreme Court's rules may result in the case's being treated as one in which no brief has been filed by that party.
4. **Rules of the Supreme Court: Records: Appeal and Error.** Failure to cause proper preparation of the record or the failure to properly document the brief with appropriate references to the record carries substantial risks and may have grave consequences.

Appeal from the District Court for Sheridan County: PAUL D. EMPSON, Judge. Affirmed.

Roger I. Roots and David L. Nich, Jr., for appellant.

John F. Simmons and Howard P. Olsen, Jr., of Simmons Olsen Law Firm, P.C., for appellee.

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

McCORMACK, J.

NATURE OF CASE

Montana Feeders, Corp., appeals from the order of the Sheridan County District Court which found Montana Feeders in willful contempt of court and entered judgment against the company in the amount of \$10,000.

ANALYSIS

The Nebraska Constitution provides that the Supreme Court may promulgate rules of practice and procedure “[f]or the effectual administration of justice and the prompt disposition of judicial

proceedings”¹ The rules adopted by this court address, among other topics, the procedure for appealing decisions of the district court. The Supreme Court has established rules to ensure that all parties have an opportunity to have their arguments heard.

In the case at bar, the appellant, Montana Feeders, has provided the court with a brief which is not in compliance with this court’s rules.² As such, Montana Feeders has limited the opportunity for the appellee, the City of Gordon, and this court to consider and understand its view.

[1] The primary problem with Montana Feeders’ brief is that it does not contain any assignments of error.³ Rather, it lists four “Issues on Appeal.” Court rules provide that briefs shall include:

A separate, concise statement of each error a party contends was made by the *trial court*, together with the issues pertaining to the assignments of error. Each assignment of error shall be separately numbered and paragraphed, bearing in mind that consideration of the case will be limited to errors assigned and discussed.⁴

[2] It has also long been this court’s policy that to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.⁵ In the case at bar, Montana Feeders does not specifically assign as error, or even refer to, any decision of the district court. None of the “issues on appeal” in Montana Feeders’ brief assert that the district court erred in any way.

[3] In addition to court rules, state law provides that an appellant’s brief “shall set out particularly each error asserted and intended to be urged for the reversal, vacation, or modification of the judgment.”⁶ Montana Feeders’ brief does not set out any errors, but instead identifies issues it asks this court to consider.

¹ Neb. Const. art. V, § 25.

² See Neb. Ct. R. of Prac. 9 (rev. 2001).

³ See rule 9D(1)e.

⁴ *Id.* (emphasis supplied).

⁵ *State ex rel. Lemon v. Gale*, 272 Neb. 295, 721 N.W.2d 347 (2006).

⁶ Neb. Rev. Stat. § 25-1919 (Reissue 1995).

This court has “caution[ed] that the failure of a party to submit a brief which complies with our rules may result in our treating the case as one in which no brief has been filed by that party.”⁷

[4] Montana Feeders’ brief also does not comply with this court’s rules concerning annotations to the record.⁸ Montana Feeders was directed to supply a replacement brief to include annotations. However, the replacement brief does not comply with court rules. The statement of facts contains only a few annotations to the transcript and no annotations to the bill of exceptions. This court has stated: “We caution that failure to cause proper preparation of the record or the failure to properly document the brief with appropriate references to the record carries substantial risks and may have grave consequences.”⁹ The replacement brief did not cure the defects and still does not comply with court rules and § 25-1919.

The Supreme Court has noted that court rules require an appellant to support its arguments by citing to the bill of exceptions. The court stated:

This rule is not for the purpose of relieving the court of the duty of examining the entire record, but to enable a better understanding of appellant’s argument and to make more certain that “essential matters” are not overlooked in determining the questions presented in the appeal. Counsel should observe these rules in presenting appeals.¹⁰

We also note that Montana Feeders’ brief does not contain a statement of the case as required by court rules.¹¹ Court rules also require a statement of the basis of jurisdiction of the appellate court.¹² The jurisdictional statement in this brief merely identifies a case which is believed to confer jurisdiction on the Supreme Court, but it does not state relevant facts establishing why the

⁷ *State v. Biernacki*, 237 Neb. 215, 217, 465 N.W.2d 732, 734 (1991).

⁸ See rule 9C.

⁹ *Grubbs v. Kula*, 212 Neb. 735, 739, 325 N.W.2d 835, 837 (1982).

¹⁰ *McCoy v. Cunningham*, 141 Neb. 708, 709, 4 N.W.2d 835, 836 (1942).

¹¹ See rule 9D(1)d.

¹² See rule 9D(1)c.

judgment or order sought to be reviewed is an appealable order; nor does it include the date of entry of the judgment or order sought to be reviewed or the date of filing of the notice of appeal and the date of depositing of the docket fee, all of which are required by court rules.

Thus, the court could consider this case as one in which no brief was filed by Montana Feeders. Alternatively, the court may examine the proceedings for plain error. In *Leisy v. Lisco State Bank*,¹³ we stated, “Our cases have indicated that even if appellant does not assign any errors, this court examines the proceedings for plain error.” The court continued:

When a case is presented to this court for review, and a controlling defect in appellant’s procedure is pointed out to us by appellee, it would be the height of inconsistency to allow appellant “to mend his hold” and thus circumvent the statute and our rules which have been applied to other litigants. To do so would reward appellant’s carelessness and punish appellee’s knowledge of the statute and the rules. Therefore, . . . Leisy’s appeal presented no error for review by this court. In the absence of error presented for review, we affirm the judgment of the district court as to Leisy’s cause of action against the [Lisco State] Bank.¹⁴

Montana Feeders did not submit a brief that complies with statute or court rules and did not specifically assign any error to the district court. In the interest of fairness, the court has reviewed the record for plain error, and we have found none.

CONCLUSION

The judgment of the district court is affirmed.

AFFIRMED.

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

¹³ *Leisy v. Lisco State Bank*, 223 Neb. 946, 947, 395 N.W.2d 517, 519 (1986).

¹⁴ *Id.* at 948, 395 N.W.2d at 519 (citations omitted).

RODNEY G. ZWYGART, APPELLANT, V. STATE BOARD OF PUBLIC
ACCOUNTANCY OF THE STATE OF NEBRASKA, APPELLEE.

730 N.W.2d 103

Filed April 20, 2007. No. S-05-1457.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: _____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Judgments: Collateral Estoppel.** Under the doctrine of collateral estoppel, when an issue of ultimate fact has been determined by a final judgment, that issue cannot again be litigated between the same parties in a future lawsuit.
4. **Collateral Estoppel.** Four conditions must exist for the doctrine of collateral estoppel to apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.

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

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

Robert T. Gritmit, of Baylor, Evnen, Curtiss, Gritmit & Witt,
L.L.P., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, and
MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

The Nebraska State Board of Public Accountancy (Board) found that Rodney G. Zwygart had violated Neb. Rev. Stat. § 1-137 (Reissue 1997) and rules and regulations promulgated by the Board. The Board revoked Zwygart's license to practice as a certified public accountant (CPA). The Board's decision was affirmed by the Lancaster County District Court, and Zwygart appeals.

SCOPE OF REVIEW

[1,2] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Wilson v. Nebraska Dept. of Health & Human Servs.*, 272 Neb. 131, 718 N.W.2d 544 (2006). 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. *Wilson, supra*.

BACKGROUND

Zwygart was licensed to practice as a CPA in 1976. In 1997, two lawsuits were filed against Zwygart in the Madison County District Court (trial court) alleging fraudulent acts related to a closely held corporation. The trial court found that Zwygart had made misrepresentations and violated his fiduciary duty as a corporate officer. The trial court concluded that Zwygart had perpetrated fraud on William Anderson and, as a result of fraudulent acts, had violated his fiduciary duty to David Fauss. A judgment of \$93,501.54 was entered against Zwygart. Via a memorandum opinion, this court affirmed the trial court's ruling. See *Fauss v. Norfolk Avenue Liquor Mart*, 264 Neb. xxi (Nos. S-01-696, S-01-697, Sept. 18, 2002) (*Fauss* cases).

On May 16, 2003, an amended complaint was filed before the Board alleging that Zwygart had violated the Public Accountancy Act and the Board's rules and regulations. The complaint was based in part on the actions of Zwygart that were detailed in the *Fauss* cases.

The Board alleged that in the underlying *Fauss* cases, Zwygart had, in his capacity as a CPA, performed professional services for Fauss, Anderson, and various business entities. The services included using his accounting or auditing skills in the preparation of financial statements and tax returns, providing advisory or consulting services, and furnishing advice on tax matters. The Board also alleged that Zwygart kept the corporate records for the business entities and prepared necessary documents for filing with regulatory authorities, including Nebraska's Secretary of

State and the Nebraska Liquor Control Commission. The Board asserted that Zwygart's conduct was not limited to his activities as a shareholder in the business entities, that Zwygart used the knowledge he gained in his capacity as a CPA for Anderson and Fauss to further Zwygart's interest as a stockholder in the business entities, and that Zwygart used information gained from income tax returns he prepared for Fauss to further his own interest as a shareholder. The complaint alleged that Zwygart disclosed Fauss' confidential tax and financial information without consent, information which Zwygart had obtained in the course of performing professional services.

The Board alleged that Zwygart's conduct arose out of dishonesty, fraud, or gross negligence in the practice of public accountancy, in violation of § 1-137(2). It also alleged that Zwygart's conduct violated the following disciplinary rules:

Integrity and Objectivity. A licensee shall not in the performance of professional services knowingly misrepresent facts, nor subordinate his judgment to others.

Title 288, Chapter 5-003.

....

Confidential Client Information. A licensee shall not disclose any confidential information obtained in the course of performing professional services except with the consent of the client.

Title 288, Chapter 5-005.01.

....

Acts [D]iscreditable. A licensee shall not commit an act that reflects adversely on his fitness to engage in the practice of public accountancy.

Title 288, Chapter 5-007.01.

In response to the complaint, Zwygart filed an answer alleging that (1) the complaint failed to state a claim for which relief could be granted; (2) the complaint attempted to sanction Zwygart for actions other than those taken "in the practice of public accountancy," see § 1-137(2), and therefore, the Board lacked jurisdiction over the subject matter of the action; and (3) the claims raised in the complaint were barred by the doctrine of laches and the statute of limitations.

PROCEEDINGS BEFORE BOARD

The Board held a hearing pursuant to its statutory authority to take disciplinary action. See § 1-137 and Neb. Rev. Stat. §§ 1-140 to 1-149 (Reissue 1997). The hearing officer adopted the trial court's findings of fact and noted the following relevant facts:

In late 1992, Anderson sold his interest in Norfolk Big Red Bottle Shop, Inc. (Big Red), and Norfolk Avenue Liquor Mart, Inc. (Liquor Mart), to Zwygart and Fauss for \$40,000. If a stock transfer had been entered in the corporate minutes, Zwygart and Fauss would each have owned 3,750 shares of Liquor Mart and 1,500 shares of Big Red. However, the stock was never transferred. Anderson believed his interest in the corporations was terminated at that time.

From 1992 until January 1997, Anderson had no involvement in either corporation. Anderson's name no longer appeared on any corporate documents, including those filed with the State of Nebraska and the Internal Revenue Service that were prepared by Zwygart or under his direction. The hearing officer found that Anderson was linked to the corporations only by the failure of the corporations to transfer and deliver Anderson's shares to Fauss and Zwygart and by the pledge of Anderson's personal assets on secured notes of the corporations.

After Anderson was removed from corporate affairs, the business relationship between Fauss and Zwygart became strained. In order to resolve the problems, Fauss and Zwygart agreed to split the management of the businesses, with Fauss' acting as operator and manager of Big Red and Liquor Mart. The parties also agreed as to the servicing of the debts of Big Red and Liquor Mart.

In January 1997, Zwygart paid Anderson \$100 for the Big Red shares and \$100 for the Liquor Mart shares previously sold by Anderson but not transferred on the corporate books. The hearing officer found that Zwygart also induced Anderson to vote with Zwygart on the assurance that Fauss would be ousted and Anderson's personal obligation on the outstanding debts would be discharged.

Zwygart and Anderson called a special meeting of the board of directors of Big Red and Liquor Mart for January 21, 1997, at which meeting Zwygart was elected as a new officer over the

protest of Fauss. Zwygart then fired Fauss from his employment as manager of Big Red and Liquor Mart. Zwygart and Anderson outvoted Fauss by a margin of 2 to 1 in corporate business. Zwygart and Anderson then called a shareholders' meeting for February 3, despite Fauss' written and verbal objections. At that meeting, Zwygart voted his one-third interest and the one-third interest he had purchased from Anderson. All resolutions concerning corporate business were adopted at the January 21 and February 3 meetings based on the strength of Anderson's vote as a director and Zwygart's vote based on the shares he acquired from Anderson. Thereafter, Anderson again was no longer involved in the affairs of the corporations and Zwygart ran the businesses to the exclusion of Fauss.

The trial court found that Zwygart perpetrated fraud in both the January 21 and February 3, 1997, meetings. Zwygart benefited from this fraud by the acquisition of management of the two businesses, and Fauss was excluded from the two businesses. Anderson was unaffected except for the \$200 received from Zwygart. The trial court imposed a constructive trust in favor of Fauss on one-half of the shares of stock in Big Red and Liquor Mart transferred by Anderson to Zwygart in January 1997 and voided all actions of the directors, officers, and shareholders at the January 21 and February 3 meetings.

Before the Board, Zwygart argued that the Board lacked jurisdiction over the subject matter because it was attempting to sanction him for actions other than those "in the practice of public accountancy." See § 1-137(2). Zwygart asserted that he was a shareholder in the corporations, that the corporations were not his clients, and that he was acting in his capacity as a shareholder.

The hearing officer concluded that the facts were sufficient to support the allegations in the complaint and that Zwygart was acting as a CPA during the performance of his duties and obligations on behalf of the corporations, as well as in actions he performed on behalf of Anderson. The hearing officer referred to definitions provided in the Board's rules and regulations:

(Practice of Public Accountancy) shall mean the performance or offering to perform by a person holding himself out to the public as a permit holder, for a client

or potential client, of one or more kinds of services involving:

001.17B: one or more kinds of management advisory or consulting services, or the preparation of tax returns or the furnishing of advice on tax matters.

288 Neb. ADMIN. Code Ch. 3 §001.17 (1999).

Based on the trial court's opinion and testimony given during trial, the hearing officer determined that Zwygart served as the CPA for "all of the individuals and entities involved in this matter" for many years. He acted as a CPA when filing documents with state and federal agencies. The hearing officer determined that Zwygart could not perform CPA duties on behalf of the corporations, Anderson, and Fauss and then suggest that he was merely acting as an agent or stockholder.

[Zwygart] possesses a significant amount of training and education which allowed him to receive his certificate as [a CPA] and was possessed of specific training and skills to perform duties that the other stockholders were unable or untrained to perform. By performing these accounting duties and responsibilities [o]n behalf of these specific business entities and individuals, [Zwygart] was acting in the capacity as a [CPA] and was holding himself out as such.

The hearing officer concluded that Zwygart was dishonest in his dealings with his business partners and that Zwygart committed fraud, as found by the trial court. Zwygart's actions reflected adversely on his fitness to engage in the practice of public accountancy because "honesty, integrity and utmost truthfulness are at the very core of the business relationship which must exist between a [CPA] and his clients." The hearing officer found that Zwygart's conduct in excluding Fauss from the two corporations reflected adversely on Zwygart's fitness to engage in the practice of public accountancy.

The hearing officer found no merit to Zwygart's allegation that the Board's complaint was barred by the doctrine of laches and the statute of limitations. The parties had previously entered into a "consent order," which specifically provided that the Board had jurisdiction over Zwygart and the subject matter of the litigation.

The hearing officer found that the record contained sufficient competent evidence that Zwygart should be disciplined. The hearing officer concluded that Zwygart violated § 1-137(2), which provides for discipline for dishonesty, fraud, or gross negligence in the practice of public accountancy, and that Zwygart violated the Board's rules and regulations by committing dishonesty, fraud, or gross negligence in the practice of public accountancy and by committing acts which reflected adversely on his fitness to engage in the practice of public accountancy.

On September 15, 2003, the Board voted to accept the hearing officer's findings of fact and conclusions of law. The Board found that Zwygart violated § 1-137 and rules and regulations promulgated by the Board and determined that Zwygart should be disciplined by the revocation of his CPA certificate and permit to practice. The order also assessed attorney fees and costs against Zwygart in the amount of \$14,693.05.

PROCEEDINGS BEFORE DISTRICT COURT

Zwygart appealed to the Lancaster County District Court (district court), which affirmed the Board's decision. Upon appeal to this court, the judgment was reversed and the cause remanded for further proceedings because the district court applied the incorrect standard of review for a case pursuant to the Administrative Procedure Act. See *Zwygart v. State*, 270 Neb. 41, 699 N.W.2d 362 (2005).

Upon receipt of this court's mandate, the district court conducted a de novo review of the record made at the administrative hearing. The district court noted that upon learning of the pendency of the *Fauss* cases, the Board notified Zwygart on June 3, 1997, that the Board's enforcement of professional conduct committee was aware of the complaint. Zwygart agreed with the Board's proposal that a consent order be entered which permitted the civil litigation to be completed before the committee proceeded with its investigation of the complaint. A consent order was entered into between Zwygart and the Board in October 1998 which provided that the Board had ongoing personal jurisdiction over Zwygart, that any contested hearing before the Board would not occur until the civil litigation was completed, and that Zwygart waived all defenses on the basis of laches or

statute of limitations. The parties also agreed to be bound by collateral estoppel.

The district court determined that Zwygart was collaterally estopped from contesting the decisions of the trial court and this court in the *Fauss* cases. Based on the trial court's determination that Zwygart committed fraud, the district court found that any evidence submitted to the Board to suggest Zwygart's actions were not fraudulent was irrelevant.

The district court rejected Zwygart's position that the Board could discipline him only if his conduct occurred while he was engaged in the practice of accountancy. The district court upheld the Board's conclusion that Zwygart's dishonesty and the fraud perpetrated on his business associates reflected adversely on his fitness to engage in the practice of public accountancy, in violation of the Board's rules and regulations.

Zwygart claimed the Board lacked jurisdiction because the complaint against him was filed too late, in violation of the statute of limitations. Zwygart acknowledged that he had entered into an agreement with the Board which tolled the statute of limitations and waived any claim of laches. The district court found that Zwygart specifically agreed that any delay would not impair the Board's authority to proceed against him. The only time restriction placed on the Board provided that the Board would dismiss this matter upon conclusion of the litigation or proceed to a contested case hearing within 180 days. Zwygart argued that the litigation was completed when the trial court entered its orders in the *Fauss* cases. The Board argued that the litigation was concluded when the Supreme Court rendered its opinion. The district court determined that the hearing on the complaint before the Board was set within the 180-day period as agreed by the parties. The district court found no merit to Zwygart's complaint that the costs assessed against him were excessive, and it affirmed the Board's decision, with costs assessed to Zwygart. Zwygart appeals to this court.

ASSIGNMENTS OF ERROR

In summary, Zwygart assigns as error the district court's affirmation of the Board's determination to revoke his license to practice as a CPA, based on the Board's finding that his conduct reflected adversely on his fitness to practice accounting. Zwygart

also argues that the district court erred in applying collateral estoppel, in finding that the statute of limitations had not run, and in affirming the financial sanctions imposed by the Board.

ANALYSIS

JURISDICTION

Zwygart appeals from the judgment of the district court which affirmed the action of the Board. 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. *Wilson v. Nebraska Dept. of Health & Human Servs.*, 272 Neb. 131, 718 N.W.2d 544 (2006). When reviewing such an order, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. See *id.*

The Board is authorized to discipline the holders of certificates and permits who fail to comply with the technical or ethical standards of the public accountancy profession. See Neb. Rev. Stat. § 1-105.01 (Reissue 1997). The Board may adopt and promulgate rules and regulations of professional conduct. Neb. Rev. Stat. § 1-112 (Reissue 1997). The Board may take disciplinary action for any one or any combination of nine enumerated causes set forth in § 1-137. Relevant to this action are § 1-137(2), which allows discipline for “[d]ishonesty, fraud, or gross negligence in the practice of public accountancy,” and § 1-137(4), which allows discipline for “[v]iolation of a rule of professional conduct adopted and promulgated by the board under the authority granted by the act.”

Zwygart argues that the Board did not have jurisdiction to discipline him because his actions in the *Fauss* cases were not undertaken “in the practice of public accountancy.” See § 1-137(2). However, the district court found that Zwygart performed accounting activities for the corporations, Fauss, and Anderson and that Zwygart prepared income tax returns for each of them. The district court found that Zwygart’s practice of accounting was intermingled with his conduct as an officer and shareholder of the various corporations.

Zwygart or his accounting firm served as the bookkeeper and accountant for all of the business entities, and Zwygart prepared

the tax returns and filed other regulatory documents on behalf of those entities with the Secretary of State and the Nebraska Liquor Control Commission. Zwygart maintained the financial and legal corporate books and records. Zwygart was Anderson's accountant, and he completed Internal Revenue Service reports for both Anderson and his business. Anderson relied on the advice of Zwygart in the stock transaction at issue in the *Fauss* cases. The evidence was clear that Zwygart held himself out to the public as an accountant who prepared tax returns and provided advice on tax matters. Zwygart submitted billings for professional services over a period of years to the business entities in question.

In *Smith v. State Board of Accountancy of Kentucky*, 271 S.W.2d 875, 876 (Ky. 1954), the Kentucky Court of Appeals reviewed the revocation of the certificate to practice as a CPA of an accountant (Smith) after he was charged with “[d]ishonesty, fraud or negligence in the practice of public accounting.” Smith had two lawsuits brought against him by different parties for an accounting, and recovery was obtained against him in each case.

In one case, Smith had been the administrator of an estate and was elected an officer in a corporation whose stock was owned by the estate. The corporation was engaged in leasing and drilling gas wells. Smith undertook management of the gas development interest of the heirs of the estate, charging \$200 per month for his services. He also kept the company's accounts.

The court found in *Smith* that the accounts were poorly kept, that reports made to other interested parties were inaccurate and misleading, that funds were handled in an unbusinesslike manner, that the cash balances in the reports did not match those in the bank records, and that Smith commingled his own funds with those of the company.

Smith claimed that he was acting only as agent for the other stockholders and that any dereliction of duty on his part was not in the practice of public accounting. The court stated: “While it is true that some of the services performed by him were not related to public accounting several of them certainly were, and association with a corporation in some other capacity does not relieve [Smith] of his duty to comply with the high standards of public accounting.” *Id.* at 877.

In the other lawsuit, Smith was sued after he became a partner in the development of gas wells and charged the partners \$60,000 for their share of drilling a particular well. It was later determined in a suit for accounting that the cost had been only \$43,000. Smith also charged \$4,500 for personal services, which the court said was apparently unjustified. In addition, proper records were not kept and Smith commingled his own funds with those of the partnership. Smith again argued that these actions were those of a businessman in a business venture and not part of the practice of public accounting. The court found it obvious that Smith's qualifications as a CPA were important to his partners and that the books he kept should have been above question. "Certainly the high standards of a [CPA] must be maintained in business transactions where he performs accounting services as a fiduciary and where his counsel is relied upon." *Id.*

The appellate court affirmed the revocation of Smith's certificate, stating:

The field of public accounting is a specialized one and the legislature has seen fit to regulate it. A certificate as a [CPA] indicates to the public that the person holding such a certificate possesses the highest sort of qualifications and is one in whom may be placed the utmost trust and confidence. The facts in this record show that [Smith] as a [CPA] has failed to live up to well recognized standards. After a full and fair hearing by a competent Board of experts and an excellent circuit judge, we find nothing to indicate that the action of the Board was unjustified.

Smith v. State Board of Accountancy of Kentucky, 271 S.W.2d 875, 877 (Ky. 1954).

This court has considered other professional licensure actions. In a case involving a license to practice as a chiropractor, this court noted that state law allows the revocation of a license when the licensee is guilty of "'grossly immoral or dishonorable conduct evidencing his unfitness.'" See *Poor v. State*, 266 Neb. 183, 190, 663 N.W.2d 109, 116 (2003). Gregory Poor had been found guilty in federal court of introducing misbranded and adulterated drugs into interstate commerce. We agreed with the licensing agency that Poor's conduct fell within the plain and ordinary meaning of grossly immoral or dishonorable conduct.

We then turned to the question whether his conviction had a rational connection with his fitness or capacity to practice the profession.

Chiropractic medicine is a regulated health care profession. Patients necessarily rely upon the chiropractor's honesty, integrity, sound professional judgment, and compliance with applicable governmental regulations. The record shows that Poor introduced misbranded and adulterated drugs into interstate commerce "with the intent to defraud and mislead." . . . We find that the record contains sufficient competent evidence to support the determination of the district court that Poor's federal felony conviction and conduct upon which it was based are rationally connected to Poor's fitness or capacity to practice his profession.

Id. at 194-95, 663 N.W.2d at 118 (emphasis omitted).

It is readily apparent that individuals rely upon honesty, integrity, sound professional judgment, and compliance with government regulations when they consult a CPA, even if the CPA may not be specifically acting as an accountant. The actions of Zwygart as a partner in the corporations were rationally connected to his activities as a CPA. Accounting is a regulated profession, and its members are held to standards established by the Board. The Board is authorized by state law to adopt rules to regulate practitioners.

ZwYGart complains because the district court referred to several attorney disciplinary actions in reaching its decision to affirm the Board's revocation of his license. The district court stated, "In professional licensure, it is not unusual for conduct outside the practice of the profession to be found to reflect adversely on the licensee's fitness to practice his or her profession."

We find no error in the district court's comparison of attorneys and accountants. Both professions are regulated and bound by certain codes. For attorneys, the Code of Professional Responsibility, which was in effect during the period of time at issue in this case, provided that a lawyer was not to "[e]ngage in any other conduct that adversely reflect[ed] on his or her fitness to practice law." Canon 1, DR 1-102(A)(6). The district court found that ZwYGart's practice of accountancy was intermingled with his conduct as an officer and shareholder of the

corporations, but that even if his actions did not occur “while he was practicing accountancy, his conduct clearly ‘reflect[ed] adversely’ on his fitness to practice accountancy.”

The district court considered the trial court’s decisions and additional facts submitted to the Board. The district court stated: “The evidence adduced before the Board and Zwygart’s arguments attempt to excuse or rationalize his dishonesty. There is evidence in which Zwygart blames his attorney. The fact remains that it is Zwygart who carried out the acts of dishonesty and fraud.”

Much of Zwygart’s argument relies on his claim that the evidence did not support a finding that his actions were taken while in the practice of public accountancy. However, he seems to ignore that by adopting the hearing officer’s findings, the Board determined he was guilty of violating both § 1-137(2), based on dishonesty, fraud, or gross negligence in the practice of public accountancy, and § 1-137(4), violation of a rule of professional conduct. The complaint alleged that Zwygart violated the following: “A licensee shall not commit an act that reflects adversely on his fitness to engage in the practice of public accountancy.” This provision does not require that the actions resulting in revocation arise from the practice of public accountancy. Any activity that reflects adversely on a CPA’s fitness to engage in public accounting can lead to revocation.

The hearing officer determined that Zwygart’s actions related to the corporations in the *Fauss* cases reflected adversely on his fitness to engage in public accounting. The Board agreed and revoked his license. The district court, upon de novo review, also concluded that Zwygart’s dishonesty and fraud on his business associates reflected adversely on his fitness to practice as a CPA. We find no error in this holding. It conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. See *Wilson v. Nebraska Dept. of Health & Human Servs.*, 272 Neb. 131, 718 N.W.2d 544 (2006).

COLLATERAL ESTOPPEL

[3,4] Zwygart argues that the district court erred in finding that collateral estoppel applied under the facts of this case. Under the doctrine of collateral estoppel, when an issue of ultimate fact

has been determined by a final judgment, that issue cannot again be litigated between the same parties in a future lawsuit. *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005). Four conditions must exist for the doctrine of collateral estoppel to apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action. *Id.*

Zwygart argues that the first and fourth requirements have not been met here. He claims that the question whether the identical issue was decided in a prior action has not been satisfied because any prior finding of fraud was not premised on the condition that it occurred in the practice of public accountancy. He also asserts that because the issues were not the same, there was not an opportunity to fully and fairly litigate the issue in the prior action. He argues that he was not confronted with the possibility of losing his CPA license in the *Fauss* cases.

The district court applied collateral estoppel and stated that the issue was whether the fraudulent conduct described in the *Fauss* cases, “coupled with the additional facts submitted to the Board,” established that Zwygart displayed dishonesty, fraud, or gross negligence in the practice of public accountancy or violated one of the Board’s rules of conduct.

In October 1998, the parties entered into a consent order. It stated that the Board knew of the *Fauss* cases and that Zwygart consented to the ongoing personal jurisdiction of the Board over him. The order also stated:

[The] Board and [Zwygart], for purposes of the contested case proceeding regarding the subject of this litigation, agree to be bound by any final stipulation, order, judgment, finding, or adjudication of any relevant fact made in the context of the litigation to the extent provided by Nebraska law pertaining to collateral estoppel, except any dismissal obtained as part of a settlement agreement.

In the consent order, Zwygart agreed to be bound by any final order in the underlying cases.

STATUTE OF LIMITATIONS

Zwygart claims that the sanctions must be dismissed because the relevant statute of limitations expired before the Board acted. He argues that the statute of limitations for fraud is 4 years and that the cause of action accrues upon discovery of the fraud. Zwygart contends the statute of limitations had run because the trial court entered its initial judgment against Zwygart on August 31, 1998, and the Board did not file its complaint until February 14, 2003.

This assignment of error has no merit. Zwygart agreed to the following:

[Zwygart] agrees to waive all defenses to subsequent Board action regarding this matter based upon the doctrine of [l]aches, statutes of limitation, or delay that [Zwygart] did not have on the date of this Consent Order. It is agreed that any delay in proceedings resulting from this Order shall not impair the Board's authority to proceed against [Zwygart] regarding the subject matter of the litigation.

Thus, Zwygart expressly agreed not to raise the statute of limitations as a bar to any proceeding by the Board.

In addition, even though the trial court's orders in the *Fauss* cases were entered in 1998, the decision by this court was not entered until September 2002. It was Zwygart who appealed the decision of the trial court in the *Fauss* cases, which extended the time before the Board could proceed. The Board filed its complaint in February 2003, which was well within any statutory limitation period and within the 180-day period agreed to by the parties in the consent order.

SANCTIONS

Finally, Zwygart assigns as error the district court's affirmation of the sanctions imposed by the Board. The Board found that it had authority under § 1-148(8) to assess attorney fees and other expenses related to the hearing. It assessed a total of \$14,693.05 to Zwygart based on the following: (1) fee of court reporter for hearing and transcript—\$1,118.50, (2) fee of hearing officer—\$1,185, and (3) fees and expenses of counsel for the Board—\$12,389.55. The district court reviewed the record de novo and found no merit to Zwygart's complaint that the costs were excessive.

On appeal, Zwygart complains that the Board did not take into consideration the testimony concerning his standing as a good citizen and his accounting practice in Norfolk, Nebraska. He argues that the sanctions are unduly excessive and punitive because of the economic damage he endured prior to the imposition of the sanctions, including the fact that he made full restitution to Fauss.

Section 1-148(8) provides that the Board has discretion to impose “costs as in ordinary civil actions in the district court, which may include attorney and hearing officer fees incurred by the board and the expenses of any investigation undertaken by the board.” Zwygart argues that the statute does not expressly cover fees for the prosecutor. We disagree. The statute includes attorney fees incurred by the Board. The “prosecutor” in this case was an attorney who represented the Board, and his expenses were therefore incurred by the Board. The statute expressly provides for fees as imposed by the Board, and this assignment of error has no merit.

CONCLUSION

The Board had jurisdiction over Zwygart. The evidence before the district court was sufficient to demonstrate that Zwygart committed fraud while in the practice of public accountancy and that his actions adversely reflected on that practice. Zwygart waived any right to object to the proceedings on the basis of collateral estoppel or statute of limitations. There was no error in the award of fees and expenses as ordered by the Board. The district court correctly affirmed the decision of the Board, and we affirm the judgment of the district court.

AFFIRMED.

GERRARD, J., not participating.

KAREN B. ALSTON, APPELLANT, v.
HORMEL FOODS CORPORATION, APPELLEE.
730 N.W.2d 376

Filed April 20, 2007. No. S-05-1488.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Limitations of Actions: Torts.** A statute of limitations begins to run as soon as the claim accrues, and an action in tort accrues as soon as the act or omission occurs.
4. **Limitations of Actions.** In certain categories of cases, the statute of limitations begins to run on the date when the party holding the claim discovers or, in the exercise of reasonable diligence, should have discovered the existence of the injury.
5. **Limitations of Actions: Torts: Damages.** A claim for damages caused by a continuing tort can be maintained for injuries caused by conduct occurring within the statutory limitations period.
6. **Limitations of Actions: Damages.** When there are continuing or repeated wrongs that are capable of being terminated, a claim accrues every day the wrong continues or each time it is repeated, the result being that a plaintiff is only barred from recovering those damages that were ascertainable prior to the statutory period preceding the lawsuit.
7. **Limitations of Actions.** The discovery rule does not alter the underlying principle that a claim accrues when the aggrieved party has the right to institute and maintain suit.
8. **Limitations of Actions: Words and Phrases.** "Discovery," in the context of statutes of limitations, does not refer to the legal right to seek redress, but to the fact that one knows of the existence of an injury.
9. **Limitations of Actions: Torts: Damages.** In a continuing tort case, where the discovery rule is not applicable, a claim for damages from a continuing tort may be brought to the extent that the claim accrued within 4 years.

Appeal from the District Court for Dodge County: JOHN E. SAMSON, Judge. Reversed and remanded for further proceedings.

Betty L. Egan and Kylie A. Wolf, of Walentine, O'Toole, McGuillan & Gordon, for appellant.

James L. Quinlan and Kristin A. Crone, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

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

GERRARD, J.

NATURE OF CASE

The plaintiff in this appeal was allegedly injured by exposure to smoke and odors. She was first exposed to the alleged hazards in 1990 or 1991, her medical condition was diagnosed by 1996, and she was last exposed to the alleged hazards in November 1999. She did not file her complaint against the alleged tortfeasor until October 2003. The issue presented in this appeal is when the 4-year statute of limitations¹ began to run on the plaintiff's tort claim. The plaintiff asks this court to adopt the "continuing tort doctrine" and conclude that the statute of limitations began to run, not from the date of the injury or her discovery of the injury, but from her last exposure to the alleged hazard.

BACKGROUND

Karen B. Alston, the plaintiff, began working for the U.S. Department of Agriculture (USDA) as a meat inspector in September 1988, and held that position until November 1999. In 1990 or 1991, she was assigned to the Hormel Foods Corporation (Hormel) plant in Fremont, Nebraska. In her deposition, Alston stated that while she was working at the Hormel site, "on the kill floor there was an excessive amount of smoke, there w[ere] excessive amounts of odor coming from the smokehouse, which I feel played a tremendous part in my health problems." Alston said that the smoke and odor aggravated her asthma and exacerbated her lower airway reactivity. Alston said it was "almost impossible to breathe in that establishment." Alston claimed that because of her respiratory problems, she also suffered from depression.

In May 1996, Alston was hospitalized for her condition. She was suffering from significant wheezing, shortness of breath, and dyspnea on exertion and was treated with intravenous fluids, intravenous steroids, and aerosol treatments. The principal diagnosis included acute exacerbation of asthmatic bronchitis and allergic rhinitis. Alston was discharged after 3 days in the hospital and was prescribed oral and aerosol medications.

¹ See Neb. Rev. Stat. § 25-207 (Reissue 1995).

Alston missed work in November 1997 because of exacerbation of her asthma. In March 1999, Alston completed and filed an application for immediate retirement from her USDA employment. In her application, Alston wrote that she had become disabled from her position in approximately April 1995. She wrote about her condition at length and stated, among other things, that her disease interfered with the performance of her duties because “[t]he work environment bring[s] on asthma conditions which [result] in a secondary condition.” Alston also wrote that “[t]he final results are moderate depression, shortness of breath, extreme frustration and complete fatigue.” She had used her sick leave and annual leave because, she wrote, she “[had] to leave [her] position when the environment [became] intolerable.” She characterized the restrictions on her activities, among others, as avoiding “humid conditions, to avoid vapors, smoke, fumes and to avoid industrial environments.”

In November 1999, Alston’s doctor wrote a letter to Alston’s attorney stating that Alston had “significant asthma which is exacerbated by her environmental exposure at her place of employment.” In December 1999, an allergy and asthma specialist opined in a letter to Alston’s attorney that Alston’s “current symptoms seem to show a lack of any significant improvement in terms of symptom control” and his “suspicion” was that “that will be the same until we get her away from her current work environment. Hopefully, with a change in work environment, she will have improved asthma symptom control.”

Alston filed a complaint against Hormel in the district court on October 23, 2003. The record shows that Alston terminated her employment at Hormel in November 1999. Alston alleged in her complaint that excessive smoke and odor periodically reached the kill floor where Alston worked, Hormel had notice of the smoke and odor, and Alston’s asthma was exacerbated by the smoke and odor. Alston alleged that Hormel had a duty to provide Alston with a safe place to work and breached that duty by causing, allowing, or failing to prevent the smoke and odor from reaching the kill floor. Hormel alleged an affirmative defense of the statute of limitations and filed a corresponding motion for summary judgment.

The district court concluded that Alston was aware she was affected by disabling conditions in her work environment as early as April 1995 or 1996 and that she was certainly aware of the nature and extent of her injuries by March 1999, when she applied for retirement. Thus, the court concluded that the 4-year statute of limitations began to run on Alston's claim no later than March 1999, and her complaint, filed in October 2003, was time barred. The court entered summary judgment for Hormel, and Alston appeals.

ASSIGNMENT OF ERROR

Alston assigns that the district court erred in sustaining Hormel's motion for summary judgment.

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.² In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.³

ANALYSIS

[3,4] Section 25-207 provides that a tort action, described as "an action for an injury to the rights of the plaintiff, not arising on contract," "can only be brought within four years." It has generally been stated that a statute of limitations begins to run as soon as the claim accrues, and an action in tort accrues as soon as the act or omission occurs.⁴ But while § 25-207 provides no exception for causes of action that are not discovered before the statute of limitations expires,⁵ we have held that in certain

² *City of Lincoln v. Hershberger*, 272 Neb. 839, 725 N.W.2d 787 (2007).

³ *Id.*

⁴ See *Shlien v. Board of Regents*, 263 Neb. 465, 640 N.W.2d 643 (2002).

⁵ Compare Neb. Rev. Stat. §§ 25-222 and 25-223 (Reissue 1995).

categories of cases, the statute of limitations begins to run on the date when the party holding the claim discovers or, in the exercise of reasonable diligence, should have discovered the existence of the injury.⁶

In this case, Alston argues that because she alleged that Hormel engaged in a course of continuing tortious conduct, the statute of limitations ran from her last exposure to the alleged hazard, which was less than 4 years before she filed her complaint. But it is not disputed that Alston discovered or should have discovered the effect of Hormel's alleged conduct more than 4 years prior to the filing of her complaint. Hormel argues that Alston's claim accrued when she discovered or should have discovered her injury; thus, Hormel asserts that Alston's claim is barred by § 25-207. Resolving these competing contentions will require us to examine the continuing tort doctrine generally and then consider how the discovery rule affects the statute of limitations for a continuing tort.

DAMAGES CAUSED BY CONTINUING TORTIOUS CONDUCT
WITHIN STATUTE OF LIMITATIONS ARE NOT TIME BARRED

It is well accepted that when an individual is subject to a continuing, cumulative pattern of tortious conduct, capable of being terminated and involving continuing or repeated injury, the statute of limitations does not run until the date of the last injury or cessation of the wrongful action.⁷ This “continuing tort doctrine” requires that a tortious act—not simply the continuing ill effects of prior tortious acts—fall within the limitation period.⁸ Nor can the necessary tortious act merely be the failure to right a wrong committed outside the statute of limitations, because if it were, the statute of limitations would never run because a

⁶ See *Teater v. State*, 252 Neb. 20, 559 N.W.2d 758 (1997).

⁷ See, *Copier Word Processing v. WesBanco Bank*, 220 W. Va. 39, 640 S.E.2d 102 (2006); *Beard v. Edmondson and Gallagher*, 790 A.2d 541 (D.C. 2002); *Wilson v. Wal-Mart Stores*, 158 N.J. 263, 729 A.2d 1006 (1999). See, also, *Anonymous v. St. John Lutheran Church*, 14 Neb. App. 42, 703 N.W.2d 918 (2005), citing *Curtis v. Firth*, 123 Idaho 598, 850 P.2d 749 (1993).

⁸ See, *Anonymous*, *supra* note 7; *Gettis v. GMEDC*, 179 Vt. 117, 892 A.2d 162 (2005); *Beard*, *supra* note 7.

tort-feasor can undo all or part of the harm.⁹ Rather, when a tort is continuing, although the initial tortious act may have occurred longer than the statutory period prior to the filing of an action, an action will not be barred if it can be based upon the continuance of that tort within that period.¹⁰

There is some disagreement as to whether the continuing tort doctrine is a tolling doctrine or a doctrine of accrual—that is, whether continuing tortious conduct tolls the running of the statute of limitations with respect to a claim or whether the claim accrues as the tort continues.¹¹ But the better-reasoned view is that it is a doctrine of accrual. As explained by the Seventh Circuit, “[t]olling rules create defenses; they are optional with the plaintiff; he can sue as soon as his claim accrues.”¹² When an alleged tort-feasor’s conduct is continuing, however, the plaintiff can sue only with respect to what the tort-feasor has already done, not what the tort-feasor might continue to do; so, it makes little sense to describe the continuing tort as “tolling” the statute of limitations with respect to injuries not yet inflicted. Instead, “the usual and it seems to [the Seventh Circuit] the correct characterization of the doctrine . . . is that it is a doctrine governing accrual.”¹³

The more significant difference of opinion concerns whether a claim based on a continuing tort may be brought for all damages caused by the tort or only the damages caused by tortious conduct within the statutory limitations period. As explained by the Eleventh Circuit:

Under the pure version of the continuing tort theory, a cause of action for any of the damages a plaintiff has suffered does not “accrue” until the defendant’s tortious conduct ceases.¹⁴ Under the pure continuing tort theory, a plaintiff

⁹ See *Gettis*, *supra* note 8.

¹⁰ *Thorndike v. Thorndike*, 154 N.H. 443, 910 A.2d 1224 (2006).

¹¹ See *Heard v. Sheahan*, 253 F.3d 316 (7th Cir. 2001). See, also, *Wilson*, *supra* note 7.

¹² *Id.* at 319.

¹³ *Id.*

¹⁴ See, e.g., *Everhart v. Rich’s, Inc.*, 229 Ga. 798, 194 S.E.2d 425 (1972).

may recover for all the harm he has suffered, not just that suffered during the limitations period.¹⁵ By contrast, the modified version of that theory allows recovery for only that part of the injury the plaintiff suffered during the limitations period.¹⁶

Thus, some courts hold that where a tort is “continuing,” the plaintiff can reach back to the beginning even if it lies outside the statutory limitations period.¹⁷ But other courts have concluded, in various contexts, that even if claims based on tortious conduct outside the statutory limitations period are time barred, claims based on subsequent tortious activity are not.¹⁸ As explained by the Supreme Court of Missouri:

[I]f the wrong done is of such a character that it may be said that all of the damages, past and future, are capable of ascertainment in a single action so that the entire damage accrues in the first instance, the statute of limitation begins to run from that time. If, on the other hand, the wrong may be said to continue from day to day, and to create a fresh injury from day to day, and the wrong is capable of being

¹⁵ See *Taylor v. Meirick*, 712 F.2d 1112 (7th Cir. 1983).

¹⁶ *White v. Mercury Marine, Div. of Brunswick, Inc.*, 129 F.3d 1428, 1430 (11th Cir. 1997).

¹⁷ See, e.g., *Heard*, *supra* note 11; *Page v. United States*, 729 F.2d 818 (D.C. Cir. 1984); *Meadows v. Union Carbide Corp.*, 710 F. Supp. 1163 (N.D. Ill. 1989); *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 798 N.E.2d 75, 278 Ill. Dec. 228 (2003); *Beard*, *supra* note 7; *Wilson*, *supra* note 7; *Curtis*, *supra* note 7; *Ambling Management Co. v. Purdy*, 283 Ga. App. 21, 640 S.E.2d 620 (2006); *Anderson v. State*, 88 Haw. 241, 965 P.2d 783 (Haw. App. 1998); *Tennessee Eastman Corp. v. Newman*, 22 Tenn. App. 270, 121 S.W.2d 130 (1938).

¹⁸ See, e.g., *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971); *Santiago v. Lykes Bros. S.S. Co., Inc.*, 986 F.2d 423 (11th Cir. 1993); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988); *Kichline v. Consolidated Rail Corp.*, 800 F.2d 356 (3d Cir. 1986); *Daniels v. Beryllium Corporation*, 211 F. Supp. 452 (E.D. Pa. 1962); *Taylor v. Culloden Public Service Dist.*, 214 W. Va. 639, 591 S.E.2d 197 (2003); *Russo Farms v. Bd. of Educ.*, 144 N.J. 84, 675 A.2d 1077 (1996); *Hegg v. Hawkeye Tri-County REC*, 512 N.W.2d 558 (Iowa 1994); *Wilson v. McLeod Oil Co.*, 327 N.C. 491, 398 S.E.2d 586 (1990); *Bradley v. American Smelting*, 104 Wash. 2d 677, 709 P.2d 782 (1985); *Davis v. Laclede Gas Co.*, 603 S.W.2d 554 (Mo. 1980) (en banc); *Davis v. Bostick*, 282 Or. 667, 580 P.2d 544 (1978).

terminated, a right of action exists for the damages suffered within the statutory period immediately preceding suit.¹⁹

We endorsed the “modified” continuing tort doctrine, also described as the “rule of separate accrual,”²⁰ in *Wischmann v. Raikes*.²¹ In that case, the plaintiffs sued their neighbor for money damages for property damage from flooding allegedly caused by construction on the neighbor’s land. The plaintiffs, suing in 1954, sought damages going back to 1945. We concluded that the plaintiffs’ action was barred by res judicata because, in a previous action, they had sought injunctive relief but not money damages. However, in dicta, we also addressed the defendant’s statute of limitations defense. Citing § 25-207, we stated that

[b]y the allegations of their amended and supplemental petition the appellees sought to recover monetary benefits from 1945 forward for damages, if any, which they had suffered. The trial court limited such right to June 10, 1950, or a 4-year period prior to the bringing of this action. “A temporary injury is defined . . . as ‘An injury that may be abated or discontinued at any time, either by the act of the wrongdoer, or by the injured party.’”^[22] That was the appellant’s position with reference to what he had done. . . . “ . . . [W]here damages result from a continuing nuisance . . . a recovery may be had for each injury as it occurs.” However, recovery could only be had for a period of 4 years from the time each of such causes of action accrued.²³

[5,6] We reaffirm our statement in *Wischmann* and conclude that a claim for damages caused by a continuing tort can be maintained for injuries caused by conduct occurring within the statutory limitations period. Seen in this light, the “continuing

¹⁹ *Laclede Gas Co.*, *supra* note 18, 603 S.W.2d at 556.

²⁰ See James R. MacAyeal, *The Discovery Rule and the Continuing Violation Doctrine as Exceptions to the Statute of Limitations for Civil Environmental Penalty Claims*, 15 Va. Envtl. L.J. 589 at 620 (1996).

²¹ *Wischmann v. Raikes*, 168 Neb. 728, 97 N.W.2d 551 (1959).

²² *Applegate v. Platte Valley Public Power and Irrigation District*, 136 Neb. 280, 285 N.W. 585 (1939).

²³ *Wischmann*, *supra* note 21, 168 Neb. at 747, 97 N.W.2d at 563-64 (citation omitted) (emphasis supplied).

tort doctrine” is not a separate doctrine, or an exception to the statute of limitations, as much as it is a straightforward application of the statute of limitations: It simply allows claims to the extent that they accrue within the limitations period.²⁴ A “continuing tort” ought not to be a rationale by which the statute of limitations policy can be avoided.²⁵ But when there are continuing or repeated wrongs that are capable of being terminated, a claim accrues every day the wrong continues or each time it is repeated, the result being that the plaintiff is only barred from recovering those damages that were ascertainable prior to the statutory period preceding the lawsuit.²⁶

Turning to the facts of this case, and mindful of our standard of review on summary judgment, we conclude that there is an issue of material fact with respect to whether Alston was injured by a continuing tort occurring within the statutory limitations period. For reasons we will explain below, the discovery rule does not affect this conclusion. Taken in the light most favorable to Alston, she alleged negligence on the part of Hormel’s meeting the requirements of a continuing tort: a course of continuing wrongful conduct, capable of termination, causing continuing and repeated injury.²⁷ And Hormel acknowledges that for purposes of this appeal, we must assume that Hormel was negligent up to and including Alston’s last day of employment in November 1999. Because Alston’s complaint was filed on October 23, 2003, at least some of Hormel’s alleged negligence could have occurred within the limitations period.

DISCOVERY RULE DOES NOT PREVENT RECOVERY OF DAMAGES
CAUSED BY CONDUCT WITHIN STATUTE OF LIMITATIONS

The issue Hormel presents to this court is how to apply the discovery rule to a continuing tort. We have concluded that

²⁴ See *Russo Farms*, *supra* note 18.

²⁵ See *Bostick*, *supra* note 18.

²⁶ See *Cook v. DeSoto Fuels, Inc.*, 169 S.W.3d 94 (Mo. App. 2005), citing *Laclede Gas Co.*, *supra* note 18.

²⁷ Compare, e.g., *Ambling Management Co.*, *supra* note 17; *Biglioli v. Durotest Corp.*, 44 N.J. Super. 93, 129 A.2d 727 (1957), *affirmed* 26 N.J. 33, 138 A.2d 529 (1958); *Tennessee Eastman Corp.*, *supra* note 17.

Alston's claim is not time barred with respect to damages caused by conduct within the statutory limitations period. But that leaves open the question whether she can recover for that period despite the fact that she discovered or should have discovered her injury before then. For a continuing tort, the statute of limitations runs from the time of the last injury or the time that the tortfeasor's tortious conduct ceases.²⁸ But under the discovery rule, the statute of limitations runs from the time that the potential plaintiff discovers, or with reasonable diligence should have discovered, the injury.²⁹ Obviously, if a continuing tort is not discovered, the discovery rule may toll the statute of limitations with respect to the entire claim. But we must determine when a claim accrues for a continuing tort when it is "discovered," within the meaning of the discovery rule, *before* the tort-feasor terminates the alleged tort.

That depends, in part, on whether the discovery rule is a tolling doctrine or doctrine of accrual. Although we acknowledge that we have occasionally referred to discovery being the time when a claim "accrues,"³⁰ the discovery rule, as it exists in Nebraska, is better understood as a tolling doctrine. In explaining the discovery rule, we have stated that

"[t]he mischief which statutes of limitations are intended to remedy is the general inconvenience resulting from delay in the assertion of a legal right which it is practicable to assert." . . . The statutes of limitations are "enacted upon the presumption that one having a well-founded claim will not delay enforcing it beyond a reasonable time if he [or she] has the right to proceed. The basis of the presumption is gone whenever the ability to resort to the courts is taken away." . . . "If an injured party is wholly unaware of the nature of his [or her] injury or the cause of it, it is difficult

²⁸ See *Copier Word Processing*, *supra* note 7.

²⁹ See *Shlien*, *supra* note 4.

³⁰ See, e.g., *Nichols v. Ach*, 233 Neb. 634, 639, 447 N.W.2d 220, 224 (1989), *disapproved on other grounds*, *Anderson v. Service Merchandise Co.*, 240 Neb. 873, 485 N.W.2d 170 (1992).

to see how he [or she] may be charged with lack of diligence or sleeping on his [or her] rights.’”³¹

The rationale behind the discovery rule is that in certain categories of cases, the injury is not obvious and the individual is wholly unaware that he or she has suffered an injury or damage. In such cases, it is manifestly unjust for the statute of limitations to begin to run before a claimant could reasonably become aware of the injury.³²

Thus, we have stated that when the discovery rule is applicable, the statute of limitations does not begin to run until the potential plaintiff discovers, or with reasonable diligence should have discovered, the injury. In those cases in which the discovery rule applies, the beneficence of the discovery rule is not bestowed on a potential plaintiff where the potential plaintiff in fact discovers, or in the exercise of reasonable diligence should have discovered, the injury within the initial period of limitations running from the wrongful act or omission. However, in a case where the injury is not obvious and is neither discovered nor discoverable within the limitations period running from the wrongful act or omission, the statute of limitations does not begin to run until the potential plaintiff discovers, or with reasonable diligence should have discovered, the injury.³³

[7,8] But the discovery rule does not alter the underlying principle that a claim accrues when the aggrieved party has the right to institute and maintain suit.³⁴ “Discovery,” in the context of statutes of limitations, does not refer to the legal right to seek redress, but to the fact that one knows of the existence of an injury.³⁵ Thus, as we explained in the context of the statutory discovery provision for professional negligence claims, § 25-222,

³¹ *Shlien, supra* note 4, 263 Neb. at 472, 640 N.W.2d at 650 (citations omitted).

³² *Shlien, supra* note 4.

³³ *Id.*

³⁴ See *Pennfield Oil Co. v. Winstrom*, 272 Neb. 219, 720 N.W.2d 886 (2006).

³⁵ See *Gordon v. Connell*, 249 Neb. 769, 545 N.W.2d 722 (1996).

[o]ne of the obvious purposes of § 25-222 was to prevent the unjust result of having a cause of action in tort accrue and become barred by the applicable statute of limitations before the injured party knew or could reasonably have discovered the existence of the cause of action.

Importantly, § 25-222 does not alter our long-held approach to when a cause of action accrues. We continue to abide by the occurrence rule in actions arising in tort and in malpractice actions based upon fraudulent misrepresentation. Under that rule, a statute of limitations begins to run as soon as the cause of action accrues, and an action in tort accrues as soon as the act or omission occurs.³⁶

Instead, the 1-year discovery exception of § 25-222 is a tolling provision. It tolls the statute of limitations, thereby permitting an injured party to bring an action beyond the time limitation for bringing the action in those cases in which the injured party did not discover and could not reasonably have discovered the existence of the cause of action within the applicable statute of limitations.³⁷

The same reasoning is applicable to the common-law discovery rule we have applied in cases where an injury is not obvious and an individual is wholly unaware that he or she has suffered an injury.³⁸ This is significant because while a tolling doctrine can keep a statute of limitations *from running*, it should not cause a statute of limitations *to run* when it otherwise would not.

Nonetheless, there is conflicting authority in other jurisdictions on the interaction between the continuing tort doctrine and the discovery rule. Several courts, particularly in cases involving the Federal Employers' Liability Act (FELA),³⁹ have held that the continuing tort doctrine is inapplicable when an injury

³⁶ *St. Paul Fire & Marine Ins. v. Touche Ross & Co.*, 244 Neb. 408, 507 N.W.2d 275 (1993). See, also, *Rosnick v. Marks*, 218 Neb. 499, 357 N.W.2d 186 (1984).

³⁷ *Berntsen v. Coopers & Lybrand*, 249 Neb. 904, 911-12, 546 N.W.2d 310, 314-15 (1996).

³⁸ See *Shlien*, *supra* note 4.

³⁹ See 45 U.S.C. § 51 et seq. (2000).

is discovered or discoverable before the termination of the tort.⁴⁰ Other courts, however, have concluded that regardless of when an initial injury is discovered, the statute of limitations runs with respect to claims for successive injuries at the time they accrue.⁴¹

We find the latter view to be more persuasive and more consistent with Nebraska law. Much of the authority for applying the discovery rule to bar recovery for after-incurred injuries arises in the context of FELA litigation, which is distinguishable because under federal law, in FELA cases, the discovery rule is not a tolling doctrine, but a doctrine of accrual.⁴² Under Nebraska law, however, the discovery rule simply provides an exception to a statute of limitations for a claim that would otherwise be outside the statutory period. There is no basis for applying that rule to preclude claims that are *within* the statutory limitations period. As the D.C. Circuit has reasoned, “[j]ust as *res judicata* cannot bar a claim predicated on events that have not yet transpired,” knowledge acquired that one has a claim cannot trigger time limitations on allegedly tortious conduct that has not yet occurred.⁴³

Furthermore, to apply the discovery rule under such circumstances would be to issue a tort-feasor an “open-ended license” to continue engaging in tortious conduct.⁴⁴ If we were to apply the

⁴⁰ See, e.g., *Mix v. Delaware and Hudson Ry. Co.*, 345 F.3d 82 (2d Cir. 2003); *Matson v. Burlington Northern Santa Fe R.R.*, 240 F.3d 1233 (10th Cir. 2001); *Mounds v. Grand Trunk Western R.R.*, 198 F.3d 578 (6th Cir. 2000); *Barnes v. American Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998); *White*, *supra* note 16; *Waters v. Rosenbloom*, 268 Ga. 482, 490 S.E.2d 73 (1997); *Lecy v. Burlington Northern and Santa Fe*, 663 N.W.2d 589 (Minn. App. 2003); *Hill v. Transportation*, 76 Wash. App. 631, 887 P.2d 476 (1995); *Parks v. Madison County*, 783 N.E.2d 711 (Ind. App. 2002); *Asher v Exxon Co*, 200 Mich. App. 635, 504 N.W.2d 728 (1993).

⁴¹ See, e.g., *Bankers Trust Co.*, *supra* note 18; *Kichline*, *supra* note 18; *Page*, *supra* note 17; *Meadows*, *supra* note 17; *Beard*, *supra* note 7; *Hegg*, *supra* note 18; *Wilson*, *supra* note 18.

⁴² See *Urie v. Thompson*, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949). See, also, e.g., *Monaghan v. Union Pacific RR. Co.*, 242 Neb. 720, 496 N.W.2d 895 (1993).

⁴³ See *Page*, *supra* note 17, 729 F.2d at 821.

⁴⁴ See *id.* at 823.

discovery rule as Hormel suggests, once the statute of limitations elapsed after the discovery of a potential claim, the tort-feasor would be free to continue behaving tortiously, without consequence. It is one thing to enforce a statute of limitations against an otherwise valid claim, but it would be quite another to allow a tort-feasor to continue injuring a plaintiff without compensation.⁴⁵ Nor is there any basis in § 25-207 for doing so.

We also note that while the statute of limitations may not bar a continuing tort claim despite the plaintiff's discovery of the injury, a plaintiff is not free to delay suit with impunity. The plaintiff still risks losing damages as the limitations period runs as to various injuries, and a plaintiff's decision not to act on his or her knowledge may allow an alleged tort-feasor to raise other defenses, such as contributory negligence, assumption of the risk, laches, or the doctrine of avoidable consequences.⁴⁶

[9] We conclude, therefore, that in a continuing tort case, where the discovery rule is not applicable, § 25-207 applies according to its terms: A claim for damages from a continuing tort may be brought to the extent that the claim accrued within the statutory limitations period. In this case, it is not disputed that Alston was or should have been aware of her injury no later than March 1999, more than 4 years before she filed her complaint. Thus, the discovery rule is not applicable to this case and does not toll the statute of limitations with respect to damages caused outside the statute of limitations. But that does not affect our conclusion that there is an issue of material fact as to whether Hormel was liable to Alston for injuries caused by alleged continuing negligence within the limitations period, i.e., between October 23, 1999, and the last date of Alston's employment in November 1999.

CONCLUSION

To the extent that Alston's claim is directed at damages accruing within the statutory limitations period, it is not time barred.

⁴⁵ See *id.* See, also, *Heard*, *supra* note 11; *Meadows*, *supra* note 17; *Curtis*, *supra* note 7.

⁴⁶ See, e.g., *Kichline*, *supra* note 18; *Meadows*, *supra* note 17; *Ambling Management Co.*, *supra* note 17.

The district court erred in entering summary judgment and dismissing Alston's complaint. The judgment of the district court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.

JOE EMMETT FINNEY, APPELLEE, V.
TERESA JO FINNEY, APPELLANT.
730 N.W.2d 351

Filed April 20, 2007. No. S-06-001.

1. **Modification of Decree: Appeal and Error.** Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court.
2. **Modification of Decree: Alimony: Good Cause.** Pursuant to Neb. Rev. Stat. § 42-365 (Reissue 2004), alimony orders may be modified or revoked for good cause shown.
3. **Modification of Decree: Alimony: Good Cause: Words and Phrases.** Good cause for modifying or revoking an alimony order means a material and substantial change in circumstances and depends upon the circumstances of each case.
4. **Modification of Decree: Alimony: Proof.** The moving party has the burden of demonstrating a material and substantial change in circumstances which would justify the modification of an alimony award.
5. **Modification of Decree: Alimony.** Changes in circumstances which were within the contemplation of the parties at the time of the decree, or that were accomplished by the mere passage of time, do not justify a change or modification of an alimony award.
6. **Judgments: Time: Appeal and Error.** Where a judgment has been modified on appeal and the only action necessary in the trial court is compliance with the mandate of the appellate court, then the judgment that was affirmed as modified is effective from the time that it was originally entered by the trial court, just as if it had been affirmed without modification.
7. **Modification of Decree: Time: Appeal and Error.** In an action to modify a decree of dissolution, it is the decree that was affirmed as modified, from the time it was originally entered, that provides the appropriate frame of reference for the subsequent application to modify.
8. **Modification of Decree: Appeal and Error.** To determine whether there has been a material and substantial change in circumstances warranting modification of a divorce decree, a trial court should compare the financial circumstances of the parties

at the time of the divorce decree, or last modification of the decree, with their circumstances at the time the modification at issue was sought, and an intervening appellate decision has no bearing on the analysis.

9. **Modification of Decree: Attorney Fees: Appeal and Error.** In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.
10. **Attorney Fees.** The award of attorney fees depends on multiple factors that include the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case.

Appeal from the District Court for Thomas County: JOHN P. MURPHY, Judge. Affirmed in part, and in part reversed.

Daylene A. Bennett, of Burger & Bennett, P.C., for appellant.

Rodney J. Palmer, of Palmer & Flynn, P.C., for appellee.

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

GERRARD, J.

NATURE OF CASE

Joe Emmett Finney and Teresa Jo Finney were divorced, and Teresa was awarded certain property and alimony in the decree. In a previous appeal, we modified the property award. The question presented in this appeal is whether our appellate modification of the property settlement was a material and substantial change in circumstances warranting subsequent modification of the alimony award.

BACKGROUND

Joe and Teresa were married in 1980 and divorced in 2001. In its 2001 decree, the district court determined that stock owned by the parties in the family ranch, incorporated as Finney Land & Livestock, was marital property. The court ordered Joe to pay Teresa \$134,000 to compensate her for what it concluded was the value of her stock. The court also awarded Teresa alimony in the amount of \$500 per month for 120 months. On appeal, the Nebraska Court of Appeals concluded that the district court had abused its discretion in connection with the valuation and division of the stock and modified the decree to award Teresa

\$255,138.¹ We granted further review and concluded, in a memorandum opinion (*Finney I*),² that the Court of Appeals had also erred in its valuation of the stock and modified the decree to award Teresa \$343,412. We affirmed the decree as modified, and our mandate issued on April 8, 2004.

On November 10, 2004, Joe filed an “Application to Modify or Contempt” in the district court, alleging a material and substantial change of circumstances between the parties. In particular, Joe alleged that Teresa’s salary had substantially increased while Joe’s had declined. Joe also alleged that “the amount of alimony as set is too high under the circumstances of the parties.” On November 16, Teresa filed a motion that, among other things, requested attorney fees. After an evidentiary hearing, the court entered an order modifying the decree. The court specifically found that “the income levels of the parties have not changed materially since the entry of the Decree of Dissolution.” The court noted an increase in Teresa’s income, “but not one that would lead the court to conclude that there has been a material change in circumstances in that regard.”

Instead, the court stated:

The actual material change in circumstances which occurred in this case was the resolution by the Nebraska Supreme Court that the monies to be paid to [Teresa] from [Joe] for the marital stock should be increased from \$134,000 to \$343,000. That significant increase provides more monies to [Teresa] which could be invested, draw interest, and provide greater income. Therefore, the amount of alimony awarded should decrease in light of the extra monies made available to [Teresa] by [the] Nebraska Supreme Court.

On that basis, the court reduced Teresa’s alimony from \$500 per month to \$250 per month beginning December 1, 2005. The court denied Teresa’s request for attorney fees.

¹ *Finney v. Finney*, No. A-01-770, 2003 WL 433525 (Neb. App. Feb. 25, 2003) (not designated for permanent publication).

² *Finney v. Finney*, 267 Neb. xix (No. S-01-770, Feb. 25, 2004).

ASSIGNMENTS OF ERROR

Teresa assigns that the district court erred in (1) finding that this court's decision modifying the original decree of dissolution constituted a material change in circumstances justifying a reduction in the amount of alimony and (2) not awarding attorney fees to Teresa.

In his "Brief of Appellee," Joe assigns that the court erred in finding (1) there was not a material change in the income of the parties and (2) the balance of the judgment should draw interest from June 1, 2004. But Joe's brief does not meet this court's requirements for a cross-appeal,³ and we do not consider his putative assignments of error.⁴

STANDARD OF REVIEW

[1] Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court.⁵

ANALYSIS

[2-5] Pursuant to Neb. Rev. Stat. § 42-365 (Reissue 2004), alimony orders may be modified or revoked for good cause shown.⁶ Good cause means a material and substantial change in circumstances and depends upon the circumstances of each case.⁷ The moving party has the burden of demonstrating a material and substantial change in circumstances which would justify the modification of an alimony award.⁸ Changes in circumstances which were within the contemplation of the parties at the time of the decree, or that were accomplished by the mere passage of time, do not justify a change or modification of an alimony award.⁹

³ See Neb. Ct. R. of Prac. 9D(4) (rev. 2001).

⁴ See *New Tek Mfg. v. Beehner*, 270 Neb. 264, 702 N.W.2d 336 (2005).

⁵ *Wood v. Wood*, 266 Neb. 580, 667 N.W.2d 235 (2003).

⁶ *Davis v. Davis*, 265 Neb. 790, 660 N.W.2d 162 (2003).

⁷ See *Bowers v. Scherbring*, 259 Neb. 595, 611 N.W.2d 592 (2000).

⁸ *Id.*

⁹ *Collett v. Collett*, 270 Neb. 722, 707 N.W.2d 769 (2005).

The initial question we confront in this appeal is whether the district court was correct in concluding that Joe's burden of showing a material and substantial change in circumstances was met by this court's modification of the property settlement in *Finney I*. That question requires us to consider, more generally, the effect of appellate modification of a judgment.

This court, and the Court of Appeals, have considered similar issues in the context of postjudgment interest. In *Gallner v. Gallner*,¹⁰ we confronted a situation in which the district court had awarded a cash payment as part of the property settlement in a divorce decree and the Court of Appeals had increased that award on appeal. On remand, the district court determined that the judgment had been satisfied, but the wife disagreed, contending the postjudgment interest had not been fully paid. We agreed, adopting the holding and reasoning of the Court of Appeals in *Ramaekers, McPherron & Skiles v. Ramaekers*,¹¹ that when a judgment is modified on appeal, interest accrues on the full amount of the judgment as modified from the date the original judgment is due.¹²

In *Ramaekers*, the Court of Appeals had been required to determine when a judgment that is increased upon appeal is considered to have been rendered for purposes of interest accrual.¹³ The Court of Appeals noted our opinion in *Rawlings v. Anheuser-Busch Brewing Co.*,¹⁴ in which we held that interest commenced to run on the date the trial court rendered its original judgment when the amount of the judgment had been decreased on appeal by a remittitur. We had concluded that the remittitur related back to the date of the rendition of the original judgment.¹⁵ The Court of Appeals also relied on our decision in *Koterzina v. Copple*

¹⁰ *Gallner v. Gallner*, 257 Neb. 158, 595 N.W.2d 904 (1999).

¹¹ *Ramaekers, McPherron & Skiles v. Ramaekers*, 4 Neb. App. 733, 549 N.W.2d 662 (1996).

¹² See *Gallner*, *supra* note 10.

¹³ See *Ramaekers*, *supra* note 11.

¹⁴ *Rawlings v. Anheuser-Busch Brewing Co.*, 69 Neb. 34, 94 N.W. 1001 (1903).

¹⁵ See *id.*

Chevrolet,¹⁶ in which a prior appellate decision had increased the percentage of a workers' compensation disability award that a judgment debtor was required to pay. We held that the appellate modification of the award "had a nunc pro tunc effect," so that the claimant was entitled to interest on 100 percent of the award from the date of the original award.¹⁷

Reading *Koterzina* and *Rawlings* together, the Court of Appeals reasoned that when a judgment is modified on appeal, interest runs on the full amount of the judgment as modified from the date the original judgment was rendered by the trial court, because the modified judgment is deemed to have been rendered when the original judgment was rendered.¹⁸ As the Tennessee Court of Appeals reasoned under similar circumstances,

[t]he appellate court acts only upon the record in the case in the trial court and when the appellate court enters an order modifying the trial court order it is doing what should have been done in the first instance. The modification of the trial court order should be effective as of the date of the trial court order.¹⁹

[6-8] The reasoning of the foregoing cases is applicable here. Where a judgment has been modified on appeal and the only action necessary in the trial court is compliance with the mandate of the appellate court, then the judgment that was affirmed as modified is effective from the time that it was originally entered by the trial court, just as if it had been affirmed without modification.²⁰ It is the decree that was affirmed as modified, from the time it was originally entered, that provides the appropriate frame of reference for a subsequent application to modify. To determine whether there has been a material and substantial change

¹⁶ *Koterzina v. Copple Chevrolet*, 249 Neb. 158, 542 N.W.2d 696 (1996).

¹⁷ *Id.* at 167, 542 N.W.2d at 703.

¹⁸ See *Ramaekers*, *supra* note 11. See, also, *Pursley v. Pursley*, 261 Neb. 478, 623 N.W.2d 651 (2001); *Lebrato v. Lebrato*, 3 Neb. App. 505, 529 N.W.2d 90 (1995); *State ex rel. Crook v. Mendoza*, 1 Neb. App. 180, 491 N.W.2d 62 (1992).

¹⁹ *Gotten v. Gotten*, 748 S.W.2d 430, 431 (Tenn. App. 1987).

²⁰ See *Gallner*, *supra* note 10.

in circumstances, a trial court should compare the financial circumstances of the parties at the time of the divorce decree, or last modification of the decree, with their circumstances at the time the modification at issue was sought, and an intervening appellate decision has no bearing on the analysis.²¹

In this case, the district court should have compared the financial circumstances of the parties in 2001, including our decision in *Finney I*, with the circumstances of the parties at the time modification was requested. Since the court expressly rejected Joe's arguments and concluded that those circumstances were unchanged, it should have denied Joe's motion to modify the alimony award. Teresa's first assignment of error has merit.

[9,10] Teresa also assigns that the court erred in not awarding her attorney fees. In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.²² The award of attorney fees depends on multiple factors that include the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case.²³ Having reviewed the record and considered the financial circumstances of the parties, we conclude the court did not abuse its discretion in denying Teresa's request for fees.

CONCLUSION

The district court erred in concluding that our decision in *Finney I* was a material and substantial change in circumstances warranting further modification of the decree. The court's modification of the alimony award is reversed. The judgment is affirmed in all other respects.

AFFIRMED IN PART, AND IN PART REVERSED.

²¹ See *London v. London*, 192 S.W.3d 6 (Tex. App. 2005).

²² *Emery v. Moffett*, 269 Neb. 867, 697 N.W.2d 249 (2005).

²³ *Id.*

STATE ON BEHALF OF A.E., APPELLEE, v.
CORRELL BUCKHALTER, APPELLANT.

730 N.W.2d 340

Filed April 20, 2007. No. S-06-693.

1. **Motions to Vacate: Appeal and Error.** An appellate court reviews a ruling on a motion to vacate for abuse of discretion.
2. **Child Support: Appeal and Error.** An appellate court reviews child support cases de novo on the record and will affirm the trial court's decision in the absence of an abuse of discretion.
3. **Divorce: Service of Process: Notice.** Where a party in a dissolution of marriage case is served personally with a summons and a copy of the petition in the case, and that party chooses not to file any pleading nor to enter an appearance in the case, and has not otherwise requested notice of hearing, notice of a default hearing need not be given to such party.
4. **Due Process.** The concept of due process embodies the notion of fundamental fairness and defies precise definition.
5. _____. Due process is a flexible notion that calls for such procedural protections as the particular situation demands.
6. **Paternity: Default Judgments.** Neb. Rev. Stat. § 43-1412(2) (Reissue 2004) provides for a default judgment to be entered in a paternity action upon a showing of service and failure of the defendant to answer or otherwise appear.
7. **Default Judgments: Proof: Time.** When the court has entered a default judgment and the defendant has made a prompt application at the same term to set it aside, with the tender of an answer or other proof disclosing a meritorious defense, the court should on reasonable terms sustain the motion and permit the cause to be heard on the merits.
8. **Default Judgments: Motions to Vacate: Words and Phrases.** In the context of a motion to vacate a default judgment, a meritorious or substantial defense or cause means one which is worthy of judicial inquiry because it raises a question of law deserving some investigation and discussion or a real controversy as to the essential facts.
9. **Default Judgments: Motions to Vacate.** To vacate a default judgment, a defendant is not required to show that he will ultimately prevail, but only that he has a recognized defense that is not frivolous.
10. **Child Support: Rules of the Supreme Court.** In general, child support payments should be set according to the Nebraska Child Support Guidelines.
11. **Child Support: Rules of the Supreme Court: Words and Phrases.** The Nebraska Child Support Guidelines provide that in calculating child support, a court must consider the total monthly income, defined as the income of both parties derived from all sources, except all means-tested public assistance benefits and payments received for children of prior marriages.
12. **Child Support: Rules of the Supreme Court: Presumptions.** The Nebraska Child Support Guidelines are applied as a rebuttable presumption, and all orders for child support shall be established under the provisions of the guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption.

13. **Child Support: Rules of the Supreme Court.** A court may deviate from the Nebraska Child Support Guidelines whenever the application of the guidelines in an individual case would be unjust or inappropriate.
14. **Child Support: Rules of the Supreme Court: Appeal and Error.** Total monthly child support calculations which exceed the combined net monthly income provided for in the Nebraska Child Support Guidelines should be left to the discretion of the trial court and affirmed absent an abuse of discretion.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

Lindsay K. Lundholm and William G. Dittrick, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, L.L.P., for appellant.

Gary Lacey, Lancaster County Attorney, and Barbara J. Armstead for appellee.

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

CONNOLLY, J.

The State of Nebraska sued Correll Buckhalter on behalf of A.E., a minor child, to establish paternity and award child support. Buckhalter, however, failed to answer or otherwise appear. On December 2, 2005, 17 months after the State filed the action, and after Buckhalter failed to appear numerous times for verified genetic testing, a referee found that Buckhalter is A.E.'s father by default and recommended the district court award child support of \$4,035 per month.

Buckhalter claims that (1) he did not receive notice of the evidentiary hearing, (2) an unverified, private paternity test exculpates him as the father, and (3) the evidence of his income was insufficient to award child support. We affirm because after failing to answer or appear, Buckhalter was not entitled to notice of the hearing, the unsubstantiated test results are not a meritorious defense, and the child support award is supported by the evidence.

I. BACKGROUND

1. A.E.'s BIRTH AND PATERNITY TESTS

While a student at the University of Nebraska-Lincoln, Buckhalter had a sexual relationship with Jennifer Brown. In

1999, Brown gave birth to A.E. Buckhalter currently plays professional football for the Philadelphia Eagles.

Brown had sexual relationships with three men about the time A.E. was conceived, including Buckhalter. The other two men took paternity tests through the State, which excluded both of them as being A.E.'s father. In April 2004, Buckhalter and Brown arranged for private genetic testing to determine if Buckhalter was the father. The test purported to exclude him as the father. The record, however, fails to show how Buckhalter's DNA sample was taken, and no fingerprint or photographic evidence authenticated that the DNA sample tested was Buckhalter's.

Despite the test results, Brown still believed that Buckhalter was A.E.'s father because, according to her, no one else could have been the father. She testified that Buckhalter continued to acknowledge that A.E. is his child after the test results. Brown testified that she and Buckhalter agree that A.E. looks like Buckhalter. Buckhalter has sent A.E. gifts, including shoes, clothes, and Philadelphia Eagles merchandise; he regularly speaks to him on the telephone; and he has offered to pay child support in the past.

2. PATERNITY AND CHILD SUPPORT SUIT AGAINST BUCKHALTER

In June 2004, the State filed a complaint against Buckhalter to establish paternity and award child support. The complaint and summons were served at Buckhalter's mother's home in Mississippi on July 15, 2004. On September 9, Buckhalter was personally served with a summons and a copy of the complaint at the Eagles headquarters in Philadelphia, Pennsylvania.

(a) The District Court Orders Buckhalter to Take a Verified Paternity Test

On December 20, 2004, the State moved to compel Buckhalter to submit to genetic testing. On January 5, 2005, Buckhalter contacted the Lancaster County Attorney's office and told the paralegal that he had taken a private paternity test. The paralegal informed him that he would need to send in the original results with photographs attached to verify that the DNA sample was his. Otherwise, the hearing on the State's motion would take place. Buckhalter did not send the results or any identifying documentation.

The court granted the motion and ordered Buckhalter to submit to genetic testing on January 25, 2005. Buckhalter contacted the county attorney's office to reschedule, and the county attorney's office arranged testing for February 22. Buckhalter apparently arrived late for the appointment, and later called the office to reschedule. The county attorney's office rescheduled the paternity test twice more, but Buckhalter did not show up for either of these rescheduled appointments and did not contact the county attorney's office. On May 25, the State filed an affidavit informing the court that Buckhalter had not submitted to genetic testing as ordered.

(b) Hearing Before Referee

(i) *Buckhalter's Addresses*

In January 2005, Buckhalter told the paralegal at the county attorney's office to send all mail to the Mississippi address where his mother lived. In February, Buckhalter informed the paralegal that he was then living at an address in New Jersey, but also gave her an address in Texas. The evidence is somewhat contradictory regarding whether he was then moving to Texas or whether, at that time, he was just going to be in Texas for a few days.

(ii) *Notice and Hearing*

On September 2, 2005, the State notified Buckhalter that a hearing would be held on September 13 to determine paternity and child support. The notice was delivered by regular U.S. mail to Buckhalter's Mississippi, Pennsylvania, and New Jersey addresses. Buckhalter contacted the county attorney's office to inform them he could not attend that day because he had to play in a football game. The hearing was continued to October 25; notice of the new hearing date was mailed to Buckhalter's New Jersey address.

Buckhalter did not attend the hearing, nor did he contact the county attorney's office again before the October 25, 2005, hearing. Neb. Rev. Stat. § 43-1412(2) (Reissue 2004) permits a default judgment of paternity upon a showing of service and failure of the defendant to answer or otherwise appear. The referee found that Buckhalter is A.E.'s father by default under § 43-1412(2).

(iii) Child Support Calculation

At the hearing, the State produced employment verification forms submitted by the Philadelphia Eagles showing Buckhalter's salary. The evidence showed that Buckhalter earned \$1,075,000 annually; the referee concluded that Buckhalter's gross monthly income was \$89,583.33. However, she did not have evidence of any deductions to which he would be entitled in calculating child support, so she used Buckhalter's gross income in the calculation. Brown testified that she was unemployed so that she could stay at home to care for another child of hers who was ill. She had previously received Medicaid, but stopped receiving payments in anticipation of receiving child support from Buckhalter.

Evidence revealed that A.E. has special financial needs. Brown testified that A.E. is autistic and has been diagnosed with "ADHD." His medication alone costs \$300 per month. He has received counseling through a psychiatrist, participated in a therapeutic program called "Karate Kicks," and attended a specialized daycare center to address his needs. He no longer participates in these services, however, because of the cost.

Because the Nebraska Child Support Guidelines do not set out support amounts for income levels over \$10,000 per month, the referee extrapolated from the child support chart to calculate an appropriate support level. She recommended that the court award child support of \$4,035 per month. She further recommended retroactive child support from July 2004—the date the complaint was served on Buckhalter—for a total of 17 months. The referee sent a copy of her findings to Buckhalter on December 2, 2005, at his addresses in Pennsylvania, New Jersey, and Texas.

(c) Buckhalter Gets Involved

On December 12, 2005, Buckhalter moved to dismiss and vacate the referee's report and filed exceptions to the referee's report and notice of appeal and hearing. On March 1, 2006, he moved to compel discovery of the private genetic test results and to continue the hearing. The court, however, denied all of his motions and overruled the exceptions. The court found that Buckhalter is A.E.'s father and ordered child support consistent with the referee's recommendations.

II. ASSIGNMENTS OF ERROR

Buckhalter assigns that the district court erred in (1) adopting and refusing to vacate the default judgment of paternity, (2) denying his motion to compel discovery of genetic testing evidence in the State's possession, (3) violating his due process rights, and (4) approving the referee's child support calculation.

III. STANDARD OF REVIEW

[1] We review a ruling on a motion to vacate for abuse of discretion.¹

[2] We review child support cases de novo on the record and will affirm the trial court's decision in the absence of an abuse of discretion.²

IV. ANALYSIS

1. DUE PROCESS

(a) Failure to Provide Notice of Evidentiary Hearing

Buckhalter alleges that the State failed to provide notice of the evidentiary hearing to establish paternity and award child support. He contends that Neb. Rev. Stat. § 25-534 (Reissue 1995) required the State to serve him with notice of the property hearing at his "last-known address." He argues that his last known address was in Texas. The State, however, contends that because Buckhalter did not answer or otherwise enter an appearance, he was not entitled to receive notice of the hearing. And alternatively, the State contends that notice was properly sent to Buckhalter's New Jersey address.

[3] We have consistently held that a party who is served with summons and a copy of the complaint and fails to answer or make an appearance in a case is not entitled to further notice of a hearing. In *Tejral v. Tejral*,³ the district court entered a default judgment dissolving the parties' marriage. The wife had been personally served with summons and a copy of the petition, but did not answer or appear. After the district court entered the

¹ *Destiny 98 TD v. Miodowski*, 269 Neb. 427, 693 N.W.2d 278 (2005).

² See *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004).

³ *Tejral v. Tejral*, 220 Neb. 264, 369 N.W.2d 359 (1985).

default judgment, she moved to vacate, arguing that she had not received notice of the dissolution hearing. We held that

where a party in a dissolution of marriage case is served personally with a summons and a copy of the petition in the case, and that party chooses not to file any pleading nor to enter an appearance in the case, and has not otherwise requested notice of hearing, notice of a default hearing need not be given to such party.⁴

We reasoned that to accept her position “would mean that service is required twice in every case before a default judgment could be entered. A party’s voluntary inaction and inattention should not be permitted to paralyze the ordinary and orderly functioning of the legal process.”⁵

We applied the *Tejral* holding to a paternity and child support suit in *Starr v. King*.⁶ There, the plaintiff personally served the defendant with summons and a copy of the petition. He did not answer or appear. Notice of the hearing was delivered to an address where the defendant claimed he had never lived, and he argued that he did not receive notice. But we held that notice of the hearing was not required under the rule in *Tejral*.

Buckhalter attempts to distinguish this case by arguing that § 25-534 required notice of the hearing. Section 25-534 designates how service should be made in any action or proceeding. That section provides: “Whenever in any action or proceeding, any . . . notice, or other document, except a summons, is required by statute or rule of the Supreme Court” to be served on a party represented by an attorney, service may generally be made upon the attorney. It also requires that for parties “*appearing* in an action without an attorney,” service by mail must be to the address designated on the record or to a party’s “last-known address.”

Section 25-534 does not apply to Buckhalter because he did not appear until after the hearing had taken place. Here, Buckhalter was personally served with summons and a copy of

⁴ *Id.* at 267, 369 N.W.2d at 361. Accord *Joyce v. Joyce*, 229 Neb. 831, 429 N.W.2d 355 (1988).

⁵ *Tejral v. Tejral*, *supra* note 3, 220 Neb. at 267, 369 N.W.2d at 361.

⁶ *Starr v. King*, 234 Neb. 339, 451 N.W.2d 82 (1990).

the complaint. Despite multiple contacts with both Brown and the Lancaster County Attorney's office, he failed to answer or appear. Buckhalter was aware that a case was proceeding against him, and in fact, on September 2, 2005, he received actual notice of the original September 13 hearing date. Yet, he failed to involve himself for 17 months. We conclude that he was not entitled to notice of the hearing.

(b) Failure to Disclose Paternity Test

Buckhalter contends that the State violated his due process rights by failing to present documentary evidence of the genetic test. He argues that it was "contrary to notions of due process, which embody the principle of fundamental fairness,"⁷ not to present genetic testing evidence. The State, however, argues that it did disclose the existence of the paternity test exculpating Buckhalter through testimony. But the test itself was not admitted because it lacked foundation.⁸

[4,5] Buckhalter cites *In re Interest of Kelley D. & Heather D.*⁹ for the proposition that "[t]he concept of due process embodies the notion of fundamental fairness and defies precise definition." And due process is a flexible notion that calls for such procedural protections as the particular situation demands.¹⁰ Yet, the only argument Buckhalter makes is the bare assertion that the State's failure to present relevant, exculpatory evidence was unfair. But failure to introduce his genetic test—whose authenticity could not be verified—does not violate a principle of fundamental fairness.

2. DEFAULT JUDGMENT AND MOTION TO VACATE

Buckhalter contends that the district court should have vacated the referee's report concluding that Buckhalter is A.E.'s father. Buckhalter argues that the court should have vacated the default finding of paternity because he has a meritorious defense.

⁷ Reply brief for appellant at 7.

⁸ See *State on behalf of Joseph F. v. Rial*, 251 Neb. 1, 554 N.W.2d 769 (1996).

⁹ *In re Interest of Kelley D. & Heather D.*, 256 Neb. 465, 476, 590 N.W.2d 392, 401 (1999).

¹⁰ *Id.*

Buckhalter's alleged meritorious defense is that the private paternity test results excluded him as the child's father. The State argues alternatively that (1) the private, unsubstantiated genetic test results do not provide a meritorious defense to paternity, or (2) the court's decision should be upheld on the evidence.

[6-9] Section 43-1412(2) provides for a default judgment to be entered in a paternity action upon a showing of service and failure of the defendant to answer or otherwise appear. But when the court has entered a default judgment and the defendant has made a prompt application at the same term to set it aside, with the tender of an answer or other proof disclosing a meritorious defense, the court should on reasonable terms sustain the motion and permit the cause to be heard on the merits.¹¹ A meritorious or substantial defense or cause means one which is worthy of judicial inquiry because it raises a question of law deserving some investigation and discussion or a real controversy as to the essential facts.¹² To vacate the default judgment, Buckhalter is not required to show that he will ultimately prevail, but only that he has a recognized defense that is not frivolous.¹³

The State contends that the private paternity test excluding Buckhalter as A.E.'s father is not a meritorious defense. They assert that Buckhalter's defense is simply to deny paternity. And if we allowed such a defense to vacate the default judgment, defendants in paternity cases would always have the incentive to wait until after the hearing is over before appearing in the case.

Two of the leading cases in which we recognized a meritorious defense are *Miller v. Steichen*¹⁴ and *Beren Corp. v. Spader*.¹⁵ *Miller* involved a garnishment proceeding against a liability insurance provider. The summons and garnishment order were served on the ex-president of the insurance company, and the

¹¹ See *Miller v. Steichen*, 268 Neb. 328, 682 N.W.2d 702 (2004). See, also, *Steinberg v. Stahlnecker*, 200 Neb. 466, 263 N.W.2d 861 (1978); *Beren Corp. v. Spader*, 198 Neb. 677, 255 N.W.2d 247 (1977).

¹² *Miller v. Steichen*, *supra* note 11.

¹³ See *id.*

¹⁴ *Id.*

¹⁵ *Beren Corp. v. Spader*, *supra* note 11.

company did not appear. After the trial court entered a default judgment against the insurance company, the company moved to vacate the judgment. It asserted that its policy did not cover the acts upon which the suit was based. It presented a federal district court decision, in which the federal court had previously found that claims such as the plaintiff's were not covered by the insurer's policy. We held that the insurer had sufficiently demonstrated a defense "“worthy of judicial inquiry.””¹⁶

In *Beren Corp.*, we addressed whether the trial court should have vacated a default judgment in an action to quiet title to real estate in the plaintiff. The defendants moved to vacate the order and presented a proposed answer in which they alleged that the relevant documents showed they had an interest in the real estate. The issue they raised was primarily one of law—that under the facts alleged by the plaintiff, they owned an interest. After a detailed analysis of the law in the area, we concluded the defendants had raised a question deserving investigation.¹⁷

Here, we must decide whether the unsubstantiated paternity test results create a "“real controversy . . . worthy of judicial inquiry.””¹⁸ In addressing this issue, it is useful to consider when genetic tests may be admitted as evidence of paternity. In *State on behalf of Joseph F. v. Rial*,¹⁹ we addressed whether paternity test results were properly admitted as evidence. There, the testimony revealed in detail the procedures used and the chain of custody involved in handling the paternity test. We concluded that “[t]he procedures for the collection, transportation, and examination of the blood were reliable so as to allow the trial court to find that the test results were what the State claimed, results of parentage tests performed on blood samples drawn from [the parties involved].”²⁰ Although *Rial* did not address the same issue, it does demonstrate that evidence is needed to confirm the reliability of genetic tests if they are to be used as evidence.

¹⁶ *Miller v. Steichen*, *supra* note 11, 268 Neb. at 335, 682 N.W.2d at 708.

¹⁷ *Beren Corp. v. Spader*, *supra* note 11.

¹⁸ See *Miller v. Steichen*, *supra* note 11, 268 Neb. at 335, 682 N.W.2d at 708.

¹⁹ *State on behalf of Joseph F. v. Rial*, *supra* note 8.

²⁰ *Id.* at 11, 554 N.W.2d at 776.

Here, the private paternity test was unsubstantiated, and Buckhalter has offered nothing to suggest that the test results are reliable. Buckhalter argues that this evidence creates a “genuine factual controversy.” He cites the Nebraska Court of Appeals’ decision in *Quintela v. Quintela*²¹ for the rule that medical evidence of nonpaternity convincingly rebuts the presumption of paternity arising from marriage. But in *Quintela*, the validity and reliability of the testing was not at issue.

The existence of Buckhalter’s unverified test results does not create a meritorious defense that would require the district court to vacate the referee’s findings. Without verification, we cannot determine whether the test results are what Buckhalter claims, and thus, they do not create a “real controversy.” Further, Buckhalter’s defense does not create any dispute that was not already known. Brown’s testimony established that the paternity test exists, so the referee was aware of the test results at the evidentiary hearing. And the State attempted for several months to obtain reliable genetic test results after warning Buckhalter that the private paternity test was insufficient. By failing to take the genetic testing ordered by the court, Buckhalter passed up the opportunity to present a meritorious defense.

Although he does not need to prove that he would ultimately prevail, under these facts, Buckhalter has failed to show a meritorious defense. The trial court did not err in denying Buckhalter’s motion to vacate.

3. CHILD SUPPORT AWARD

Buckhalter argues that the court erred in approving the referee’s child support recommendation. He alleges that the evidence of his income—employment verification forms submitted by the Philadelphia Eagles—was insufficient because tax returns, financial statements, and wage stubs should be used. He also contends that the referee improperly used his gross income instead of net income. Buckhalter argues that the State had the burden to present the appropriate evidence of his income and deductions.

²¹ *Quintela v. Quintela*, 4 Neb. App. 396, 544 N.W.2d 111 (1996).

[10,11] In general, child support payments should be set according to the Nebraska Child Support Guidelines.²² The guidelines provide that in calculating child support, the court must consider the total monthly income, defined as the income of both parties derived from all sources, except all means-tested public assistance benefits and payments received for children of prior marriages.²³

[12,13] The guidelines are applied as a rebuttable presumption, and all orders for child support shall be established under the provisions of the guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption.²⁴ A court may deviate from the guidelines whenever the application of the guidelines in an individual case would be unjust or inappropriate.²⁵

(a) Use of Employment Verification
Forms Instead of Tax Returns

Buckhalter argues that the employment verification forms the State introduced to show Buckhalter's income were inadequate. Paragraph D of the Nebraska Child Support Guidelines provide, "[c]opies of at least 2 years' tax returns, financial statements, and current wage stubs should be furnished to the court and the other party to the action at least 3 days before any hearing requesting relief." Buckhalter contends that the State should have requested his tax returns through discovery instead of relying on the employment verification forms as evidence of his income.

Buckhalter, however, was in the best position to provide more "thorough" evidence of his income. Yet, he chose not to participate. He now suggests that the State should have used discovery to gain information about his income. We believe the State used a reasonable method to obtain information about Buckhalter's

²² See, Neb. Rev. Stat. § 42-364.16 (Reissue 2004); *Gangwish v. Gangwish*, *supra* note 2.

²³ *Gangwish v. Gangwish*, *supra* note 2; *Marcovitz v. Rogers*, 267 Neb. 456, 675 N.W.2d 132 (2004); *Rhoades v. Rhoades*, 258 Neb. 721, 605 N.W.2d 454 (2000).

²⁴ See *Faaborg v. Faaborg*, 254 Neb. 501, 576 N.W.2d 826 (1998).

²⁵ *Rhoades v. Rhoades*, *supra* note 23; *Faaborg v. Faaborg*, *supra* note 24.

income when he refused to participate in the proceedings or submit evidence in his own behalf. The court did not err in calculating its child support award on employment verification forms instead of tax returns or wage stubs.

(b) Use of Gross Income Instead of Net Income

Buckhalter contends that the court erred in calculating his child support obligation using his gross monthly income. He argues that because the court did not include any deductions, the calculation is “grossly incorrect and inequitable.”²⁶

Paragraph E of the Nebraska Child Support Guidelines provides for deductions from a party’s monthly income for federal and state income taxes, FICA, health insurance, retirement contributions, and child support and other obligations to other children. These items are annualized to arrive at “monthly net income.” Monthly support amounts are then determined by plugging the combined monthly net income of both parties into table 1 of the guidelines to establish the appropriate support level.

[14] Table 1, however, does not provide for support amounts when combined net monthly income exceeds \$10,000. Paragraph C(3) provides that when total net income exceeds \$10,000, child support “may be more but shall not be less than the amount which would be computed using the \$10,000 monthly income unless other permissible deviations exist.” We have previously held that “total monthly child support calculations which exceed the combined net monthly income provided for in the guidelines should be left to the discretion of the trial court and affirmed absent an abuse of discretion.”²⁷

Although the referee did not consider any deductions which Buckhalter may have been allowed for taxes, the court did not abuse its discretion in adopting her child support recommendation. Contrary to Buckhalter’s assertion, the referee’s calculations were far from arbitrary. She engaged in a detailed extrapolation of the child support guidelines, in which she determined a pattern of increases for every \$1,000 increase in income starting at \$7,000 per month. She extended that pattern until she reached

²⁶ Brief for appellant at 30.

²⁷ *Faaborg v. Faaborg*, *supra* note 24, 254 Neb. at 506, 576 N.W.2d at 830.

a monthly income of \$89,000. Further, she provided a table which shows her calculations.

Buckhalter proposes that the referee should have reduced Buckhalter's income by one-third to one-half to allow for deductions he could have received. But the referee's table reveals that even with such deductions, the child support award would change very little. Deducting one-third of Buckhalter's income for a net monthly income of \$59,000 would yield a support amount of \$3,975—a difference of only \$60 or about 1.4 percent. Even allowing for deductions worth half Buckhalter's income would yield a support amount of \$3,929—a difference of \$106 or about 2.5 percent. Thus, \$4,035 was not grossly incorrect or inequitable. The referee acted well within her discretion in recommending \$4,035. The trial court did not err in adopting the child support recommendation.

V. CONCLUSION

Because of his failure to answer or appear in this case for 17 months, Buckhalter was not entitled to receive notice of the evidentiary hearing. Thus, his due process rights were not violated. The State's failure to introduce the unsubstantiated private paternity test results also did not violate his due process rights. The trial court did not err in denying Buckhalter's motion to vacate because he does not have a meritorious defense.

Finally, the court did not abuse its discretion in ordering Buckhalter to pay monthly child support of \$4,035 based on the evidence at the hearing. We affirm the district court's decision.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
MARIO M. HERNANDEZ, JR., APPELLANT.

730 N.W.2d 96

Filed April 20, 2007. No. S-06-745.

1. **Probation and Parole.** The revocation of probation is a matter entrusted to the discretion of the trial court.
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. **Probation and Parole: Time.** If a court is to revoke probation for a violation occurring within the probationary period, it is sufficient if procedure to that end was instituted within the probationary period or within a reasonable time thereafter.
4. ____: _____. In evaluating the reasonableness of a delay in probation revocation proceedings, a court should consider such factors as the length of the delay, the reasons for the delay, and the prejudice to the defendant resulting from the delay.
5. **Extradition and Detainer: Probation and Parole.** If a defendant is incarcerated in another jurisdiction and the State wishes to charge the defendant with violating probation, it provides the defendant with reasonably “prompt consideration” of the charge if the State invokes the detainer process and notifies the defendant of the pending revocation proceedings. Absent unusual circumstances, the State is not required to extradite the defendant to revoke probation and sentence the defendant before the term of the defendant’s foreign incarceration expires.
6. **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 Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays for appellant.

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

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

GERRARD, J.

NATURE OF CASE

The defendant, Mario M. Hernandez, Jr., was sentenced to probation, but the State moved to revoke his probation after he was arrested in Arizona. Hernandez entered a plea of guilty to the State’s motion, but did not appear for sentencing because he was incarcerated in Arizona. The State did not ask for Hernandez to be returned to Nebraska before his Arizona sentence was complete, and Hernandez was eventually sentenced nearly a year after the term of his probation expired. The question presented in this appeal is whether Hernandez was denied his right to “prompt consideration” of the motion to revoke probation.¹

¹ See Neb. Rev. Stat. § 29-2267 (Reissue 1995).

BACKGROUND

In 2002, Hernandez was found guilty of possession of a controlled substance with intent to deliver and was sentenced by the district court on June 19, 2002, to a 3-year period of probation. The order of probation specified that Hernandez “[s]hall reside in Arizona” and “[s]hall refrain from unlawful or disorderly conduct or acts injurious to others.” The order also required Hernandez to waive extradition to Nebraska during the term of probation.

On June 30, 2003, a notice of probation violation was filed in the district court, alleging that Hernandez had been arrested in Arizona on June 20 for two felony counts of trafficking stolen property. The case was referred to the county attorney, who filed a motion for revocation of probation on July 14, and a hearing was scheduled for August 6. That hearing is not reflected in our record, but on October 31, Hernandez changed his previous plea, admitted the allegation, and pleaded guilty to the probation violation. Sentencing was scheduled for January 21, 2004, but on December 23, 2003, Hernandez was sentenced to a 30-month prison term in Arizona. Hernandez failed to appear in Nebraska for sentencing, and a bench warrant was issued for his arrest.

On March 1, 2006, Hernandez filed a motion to dismiss the motion to revoke his probation, based on the State’s alleged failure to timely prosecute the matter. The district court concluded that because Hernandez was in custody in another jurisdiction during his term of probation, he was not entitled to dismissal. On June 6, Hernandez was sentenced to a term of imprisonment of 4 to 8 years.

ASSIGNMENTS OF ERROR

Hernandez assigns that the court erred in (1) overruling his motion to dismiss and (2) imposing an excessive sentence.

STANDARD OF REVIEW

[1,2] The revocation of probation is a matter entrusted to the discretion of the trial court.² Sentences within statutory limits will

² *State v. Finnegan*, 232 Neb. 75, 439 N.W.2d 496 (1989); *State v. Clark*, 8 Neb. App. 525, 598 N.W.2d 765 (1999).

be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.³

ANALYSIS

[3] Section 29-2267 provides in part that “[w]henver a motion or information to revoke probation is filed, the probationer shall be entitled to a prompt consideration of such charge by the sentencing court.” We have held that if a court is to revoke probation for a violation occurring within the probationary period, it is sufficient if procedure to that end was instituted within the probationary period or within a reasonable time thereafter.⁴ Hernandez does not contend that the motion to revoke his probation was not timely filed. It was. Rather, Hernandez argues that the charge against him was not promptly considered in this case because the State failed to extradite him from Arizona for sentencing after he pled guilty to the probation violation. Hernandez concedes that the interstate Agreement on Detainers⁵ is inapplicable to this situation.⁶ Instead, he argues that he should have been extradited pursuant to the Uniform Criminal Extradition Act.⁷ But assuming, without deciding, that Hernandez could have been extradited from Arizona for sentencing in Nebraska, we conclude, for the following reasons, that the delay in sentencing was nonetheless reasonable.

[4] The statutory requirement of “prompt consideration” is similar to standards in other jurisdictions, based in statutory language or constitutional due process, which require proceedings to revoke probation to be undertaken with “reasonable promptness” or “due diligence,” or with only a “reasonably necessary”

³ *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006).

⁴ See, *State v. Windels*, 244 Neb. 30, 503 N.W.2d 834 (1993); *State v. Ladehoff*, 229 Neb. 111, 425 N.W.2d 352 (1988); *State v. White*, 193 Neb. 93, 225 N.W.2d 426 (1975); *State v. Holiday*, 182 Neb. 229, 153 N.W.2d 855 (1967); *Phoenix v. State*, 162 Neb. 669, 77 N.W.2d 237 (1956).

⁵ Neb. Rev. Stat. § 29-759 et seq. (Reissue 1995).

⁶ See *Carchman v. Nash*, 473 U.S. 716, 105 S. Ct. 3401, 87 L. Ed. 2d 516 (1985).

⁷ Neb. Rev. Stat. § 29-729 et seq. (Reissue 1995 & Cum. Supp. 2006).

delay.⁸ Generally, in evaluating the reasonableness of a delay, courts should consider such factors as the length of the delay, the reasons for the delay, and the prejudice to the defendant resulting from the delay. We endorsed those factors in *State v. Windels*.⁹

But neither party in this case cites our decision in *State v. Washa*,¹⁰ which, although decided before § 29-2267 was enacted, considered similar factors under comparable facts. In *Washa*, the defendant was convicted in Nebraska on January 27, 1961, of issuing a check on a bank in which he did not have an account. He was placed on probation for 2 years. He was given permission to leave the state and was convicted in Arizona on June 20 of passing a bogus check. He was sentenced to 5 years' imprisonment on that charge and then sentenced to life imprisonment in Arizona for first degree murder. The State of Nebraska filed a motion on July 24, asking for revocation of the order of probation, and a detainer was filed with Arizona authorities. But the defendant was not extradited to Nebraska until 1969, after he demanded immediate prosecution. The defendant was sentenced in Nebraska to 2 years' imprisonment.¹¹

The defendant challenged the sentence on speedy trial grounds. We rejected his argument, concluding that he had not been prejudiced. We explained that the defendant

was already confined in Arizona and was serving a life sentence from which he could not reasonably expect to have been released after the lapse of only 8 years. He had been convicted of several felonies in the past, as well as the two more recent convictions in Arizona He had already been convicted on the Nebraska check charge and no showing is made that the delay impaired any defense he had to the charge of violating the order of probation. In the present instance, the 2 year sentence imposed was not specifically

⁸ See, e.g., *U.S. v. Garrett*, 253 F.3d 443 (9th Cir. 2001); *State v. Berry*, 287 Md. 491, 413 A.2d 557 (1980); *Commonwealth v. Sawicki*, 369 Mass. 377, 339 N.E.2d 740 (1975); *Decker v. State*, 209 N.W.2d 879 (N.D. 1973); *Com. v. Stancil*, 362 Pa. Super. 276, 524 A.2d 505 (1987).

⁹ See, *Windels*, *supra* note 4; *Stancil*, *supra* note 8.

¹⁰ *State v. Washa*, 185 Neb. 639, 177 N.W.2d 740 (1970).

¹¹ *Id.*

directed to run concurrently with the Arizona term. In fact, in sentencing defendant to a term in a Nebraska penal institution, it is difficult to see how it could be made concurrent with one in Arizona as the defendant cannot be in both places at once. Under such circumstances, the Nebraska term commences on termination of the Arizona term. . . . It is therefore apparent that defendant will continue to be subject to a detainer filed with the Arizona authorities and that any chance of having the Nebraska term run concurrently with the Arizona term is and has been nonexistent. . . . This record discloses that upon defendant's demand, proceedings to bring him to trial in [Nebraska] were instituted and trial had within a reasonable time.¹²

Other jurisdictions have applied similar considerations in determining whether statutory or constitutional requirements for prompt disposition of probation violations were satisfied. Those courts have almost uniformly concluded that a revocation hearing is reasonably prompt if it is held after a defendant's release from incarceration in another jurisdiction.¹³

For instance, federal courts have rejected claims that it was unreasonable for federal authorities to wait for the completion of a state sentence of incarceration to revoke a defendant's federal probation or supervised release.¹⁴ As explained by the Ninth Circuit, "[a] contrary interpretation would be tantamount to holding that the federal government is statutorily required to writ a defendant out of state custody and bring him before the federal

¹² *Id.* at 641-42, 177 N.W.2d at 741-42.

¹³ See, e.g., *Garrett*, *supra* note 8; *United States v. Blunt*, 680 F.2d 1216 (8th Cir. 1982); *United States v. Wickham*, 618 F.2d 1307 (9th Cir. 1979); *U.S. v. Cobbs*, 436 F. Supp. 2d 860 (E.D. Mich. 2006); *State v. Inscore*, 219 W. Va. 443, 634 S.E.2d 389 (2006); *Rease v. Commonwealth*, 227 Va. 289, 316 S.E.2d 148 (1984); *State v. Duncan*, 396 So. 2d 297 (La. 1981); *Stelljes v. State*, 72 S.W.3d 196 (Mo. App. 2002); *State v. Dunn*, 123 Or. App. 288, 859 P.2d 1169 (1993); *Edge v. State*, 63 Md. App. 676, 493 A.2d 437 (1985); *Bryant v. State*, 496 S.W.2d 565 (Tex. Crim. App. 1973). Cf. *Moody v. Daggett*, 429 U.S. 78, 97 S. Ct. 274, 50 L. Ed. 2d 236 (1976). But see *State v. Adler*, 189 Ariz. 280, 942 P.2d 439 (1997).

¹⁴ See, e.g., *Garrett*, *supra* note 8; *Blunt*, *supra* note 13; *Wickham*, *supra* note 13; *Cobbs*, *supra* note 13.

district court for his revocation hearing.”¹⁵ The court observed that neither federal statutes nor any court had imposed such a duty, and the court was “mindful of the fact that requiring the federal government to writ a defendant out of state custody for a . . . revocation hearing could prove extremely burdensome.”¹⁶ As further explained by the Nevada Supreme Court, under circumstances similar to those of this case,

[the defendant] willfully failed to appear for sentencing and engaged in other criminal acts, which resulted in his imprisonment in Arizona. He caused the delay of which he complains. It seems unfair to require the State to potentially incur two expenses: [the defendant’s] transportation to Nevada for sentencing and then back again to Arizona for completion of his sentence of imprisonment, all in order to timely sentence him when he is the source of his own problems.¹⁷

In addition to finding that incarceration in another jurisdiction is a justified reason for delay, courts have generally found that delay due to incarceration is not prejudicial to a defendant.¹⁸ The Ninth Circuit explained that

the delay must have prejudicially affected the probationer’s ability to contest revocation. Prejudice might result from delays causing probationers difficulty in contesting the alleged facts constituting a violation of their release conditions; hardship in finding and presenting favorable witnesses; or inability to produce evidence of mitigating circumstances which might result in continued probation despite the violation.¹⁹

But a probation revocation hearing usually involves a limited inquiry by the trial judge, focusing on whether the defendant has

¹⁵ *Garrett*, *supra* note 8, 253 F.3d at 450. Cf. *Moody*, *supra* note 13.

¹⁶ *Garrett*, *supra* note 8, 253 F.3d at 450. Accord *Stelljes*, *supra* note 13. See, also, *Wickham*, *supra* note 13; *Inscore*, *supra* note 13. But see *Adler*, *supra* note 13.

¹⁷ *Prince v. State*, 118 Nev. 634, 640, 55 P.3d 947, 950 (2002).

¹⁸ See, e.g., *Blunt*, *supra* note 13; *Wickham*, *supra* note 13; *Cobbs*, *supra* note 13; *Prince*, *supra* note 17; *Duncan*, *supra* note 13; *Dunn*, *supra* note 13; *Edge*, *supra* note 13.

¹⁹ *Wickham*, *supra* note 13, 618 F.2d at 1310.

been convicted for another offense or failed to comply with a specific condition of probation.²⁰ Although some of the adverse consequences experienced by a defendant may be similar, the problems of proof, staleness of evidence, and loss of memory that may be encountered in a criminal prosecution are usually not significant concerns in a probation revocation proceeding.²¹

[5] We agree with the foregoing authority, as suggested by our decision in *State v. Washa*,²² and likewise hold that if a defendant is incarcerated in another jurisdiction and the State wishes to charge the defendant with violating probation, it provides the defendant with reasonably “prompt consideration” of the charge if the State invokes the detainer process and notifies the defendant of the pending revocation proceedings.²³ Absent unusual circumstances, the State is not required to extradite the defendant to revoke probation and sentence the defendant before the term of the defendant’s foreign incarceration expires.²⁴

Such unusual circumstances are not present here. The notice of Hernandez’ probation violation was filed 10 days after he had been arrested in Arizona, and the State’s motion to revoke probation was filed 14 days after that. A hearing was promptly scheduled, and Hernandez pled guilty to violating his probation. It is clear from the record that Hernandez did not lose any opportunity to contest the allegation against him. The delay before Hernandez was sentenced was lengthy but reasonable, considering that the basis for the delay was Hernandez’ incarceration in Arizona.

Hernandez specifically argues that he was prejudiced because he lost the opportunity to serve his sentences of incarceration concurrently. As previously noted, we rejected a similar argument in *State v. Washa*.²⁵ And courts have consistently rejected

²⁰ *Edge*, *supra* note 13.

²¹ *Id.* See, also, *Com. v. Dickens*, 327 Pa. Super. 147, 475 A.2d 141 (1984).

²² *Washa*, *supra* note 10.

²³ See *Inscore*, *supra* note 13.

²⁴ See, *Garrett*, *supra* note 8; *Wickham*, *supra* note 13; *Inscore*, *supra* note 13; *Stelljes*, *supra* note 13.

²⁵ *Washa*, *supra* note 10.

arguments that a delay that may affect a defendant's ability to serve concurrent sentences is prejudicial within the meaning of any constitutional or statutory requirement for a prompt hearing.²⁶ A sentence imposed upon revocation of probation is simply a new sentence for the crime of which the defendant was originally convicted,²⁷ and a defendant has no more entitlement to serve sentences concurrently than would exist in any situation in which a defendant has been convicted of unrelated offenses. This is simply not the sort of prejudice that the requirement of "prompt consideration" was intended to preclude. And in any event, the sentencing court is free to consider the defendant's already-completed incarceration in determining how to dispose of the case,²⁸ providing the opportunity for the court to impose the functional equivalent of concurrent sentences when warranted.²⁹

Hernandez also relies on our decision in *State v. Windels*,³⁰ in which we reversed the trial court's finding that the defendant had violated probation because the defendant was not notified of the warrant issued for his arrest, or the allegation that he had violated his probation, until nearly 7 months after they were made and after his term of probation expired. But *Windels* is clearly distinguishable from the present case. In *Windels*, we noted that "the State made no explanation concerning its delay in prosecuting the defendant for his probation violation."³¹ We concluded that "[s]ince the State failed to diligently pursue the revocation of the defendant's probation and has failed to explain its delay

²⁶ See, *U.S. v. Sanchez*, 225 F.3d 172 (2d Cir. 2000); *U.S. v. Throneburg*, 87 F.3d 851 (6th Cir. 1996); *U.S. v. Tippens*, 39 F.3d 88 (5th Cir. 1994); *United States v. Sackinger*, 537 F. Supp. 1245 (W.D. N.Y. 1982), *affirmed* 704 F.2d 29 (2d Cir. 1983); *Duncan*, *supra* note 13; *Dunn*, *supra* note 13. Cf. *Moody*, *supra* note 13.

²⁷ See, Neb. Rev. Stat. § 29-2268 (Reissue 1995); *State v. Caniglia*, 272 Neb. 662, 724 N.W.2d 316 (2006); *State v. Wragge*, 246 Neb. 864, 524 N.W.2d 54 (1994).

²⁸ See § 29-2268.

²⁹ See, *Moody*, *supra* note 13; *Sanchez*, *supra* note 26; *Tippens*, *supra* note 26; *Dunn*, *supra* note 13.

³⁰ *Windels*, *supra* note 4.

³¹ *Id.* at 34, 503 N.W.2d at 837.

in prosecuting the defendant on that charge, it was unreasonable to revoke his probation”³² But as explained above, in this case, the basis for the State’s delay in sentencing Hernandez was objectively reasonable and did not prejudice him. In short, we find Hernandez’ first assignment of error to be without merit.

Hernandez also argues that the sentence imposed upon him, a term of imprisonment of 4 to 8 years, was excessive. Hernandez had been convicted of possession of a Schedule I controlled substance with intent to deliver, a Class III felony,³³ punishable by a minimum of 1 year’s imprisonment and a maximum of 20 years’ imprisonment, a \$25,000 fine, or both.³⁴

[6] 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.³⁵ Hernandez argues that he had no criminal record before the conviction underlying this case and that he was sorry for what he had done. But the sentence imposed was on the lower end of the statutory range, and Hernandez had been convicted of other crimes before his sentencing. Hernandez “was shown a great deal of leniency when he was placed on probation,” and it was “evident that [he] was unable to rehabilitate himself on probation.”³⁶ Under the circumstances, we find no abuse of discretion in the district court’s sentence.

CONCLUSION

Hernandez was not denied “prompt consideration” of his probation revocation, and the district court’s sentence was not an abuse of discretion. The court’s judgment is affirmed.

AFFIRMED.

³² *Id.* at 35, 503 N.W.2d at 837.

³³ See Neb. Rev. Stat. § 28-416(2) (Cum. Supp 2002).

³⁴ Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2002).

³⁵ *State v. Marrs*, 272 Neb. 573, 723 N.W.2d 499 (2006).

³⁶ See *State v. Osterman*, 197 Neb. 727, 729, 250 N.W.2d 654, 655 (1977).

DOLF R. ICHTERTZ, M.D., APPELLANT, v.
 ORTHOPAEDIC SPECIALISTS OF NEBRASKA, P.C.,
 AND GORDON D. BAINBRIDGE, M.D., APPELLEES.
 730 N.W.2d 798

Filed April 26, 2007. No. S-05-1000.

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. **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. **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.
4. **Pleadings: Appeal and Error.** 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.
5. **Res Judicata.** The applicability of the doctrine of res judicata is a question of law.
6. **Judgments: Appeal and Error.** On questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
7. **Judgments: Res Judicata.** The doctrine of res judicata, or claim preclusion, bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.
8. **Res Judicata.** The doctrine of res judicata bars relitigation not only of those matters actually litigated, but also of those matters which might have been litigated in the prior action.
9. _____. Res judicata does not apply when there has been an intervening change in facts or circumstances.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Reversed and remanded for further proceedings.

Ronald S. Depue, of Shamberg, Wolf, McDermott & Depue, and Raymond E. Walden, of Walden Law Office, for appellant.

Daniel E. Klaus and Kristin Schroeder Simpson, of Rembolt Ludtke, L.L.P., for appellees.

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

WRIGHT, J.

NATURE OF CASE

Gordon D. Bainbridge, M.D., was the sole shareholder of Orthopaedic Specialists of Nebraska, P.C. (the corporation). In a previous action, Dolf R. Ichtertz, M.D., a former employee, sued Bainbridge and the corporation. Bainbridge was dismissed from the previous action, but Ichtertz obtained a judgment against the corporation in the amount of \$633,867. In the present action, Ichtertz sought to pierce the corporate veil in order to collect his judgment from Bainbridge. He alleged that Bainbridge caused the corporation to lack sufficient funds to pay the judgment. Bainbridge moved to dismiss the action because the complaint failed to state a claim upon which relief could be granted. See Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003). The motion was sustained, and Ichtertz appeals.

SCOPE OF REVIEW

[1,2] An appellate court reviews de novo a lower court's dismissal of a complaint for failure to state a claim. *Doe v. Omaha Pub. Sch. Dist.*, ante p. 79, 727 N.W.2d 447 (2007). 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. *Doe*, supra.

FACTS

PREVIOUS ACTION

Ichtertz and Bainbridge were licensed medical doctors who specialized in orthopedic surgery. Beginning in January 1997, Ichtertz was employed by the corporation. He was guaranteed a minimum monthly salary based on a contract with the corporation and a local hospital. The agreement expired in December 1997. Ichtertz, the corporation, and Bainbridge subsequently entered into an oral contract regarding division of the income and expenses of the corporation. Ichtertz left the corporation on September 30, 1998.

In December 1998, Ichtertz sued Bainbridge and the corporation for breach of contract. At trial, Ichtertz testified that he had orally agreed to join Bainbridge's medical practice in December

1996. He said the parties agreed that Ichtertz would be paid on the basis of his production minus his expenses, which would include a certain percentage of Bainbridge's overhead.

At the close of Ichtertz' evidence, Bainbridge moved for a directed verdict as to his personal liability on the basis that Ichtertz had failed to prove an oral contract that would entitle him to bonuses, deferred income, or accounts receivable. The trial court sustained the motion, and Bainbridge was dismissed from the suit. At the end of the trial, a jury returned a verdict against the corporation for \$633,867, and judgment was entered against the corporation on March 12, 2004.

CURRENT ACTION

On February 22, 2005, Ichtertz commenced the current action against Bainbridge and the corporation (hereinafter collectively the defendants), claiming that the corporation had failed to pay the judgment and that Bainbridge, as sole shareholder and officer of the corporation, controlled the actions of the corporation. Ichtertz asked that the corporate entity be disregarded, the corporate veil be pierced, and Bainbridge be held personally liable for the judgment.

Ichtertz alleged that (1) the corporation was grossly and inadequately capitalized; (2) Bainbridge, as shareholder and director, had diverted corporate funds or assets to his own improper use; (3) the corporation was a sham and a facade for Bainbridge's personal dealings, and the operations of the corporation were carried out by Bainbridge in disregard of the corporate entity; (4) Bainbridge withdrew assets from the corporation without leaving sufficient assets for the corporation to pay its debts, including the judgment owed to Ichtertz; and (6) the corporate entity should be disregarded to prevent fraud or injustice to Ichtertz.

The defendants moved to dismiss pursuant to rule 12(b)(6). The motion alleged that the complaint failed to state a claim upon which relief could be granted. There were no other allegations upon which the motion was based. At a hearing on the motion, the defendants offered, and the court received, certain evidence from the previous case: excerpts from the trial testimony and argument made during the course of the previous trial, the third amended petition from the previous action, and excerpts from the deposition of Ichtertz taken in the previous action. The

defendants argued to the district court that the request to pierce the corporate veil was barred by an order in the previous action which granted a directed verdict for Bainbridge personally and dismissed him from that action.

In its order sustaining the defendants' motion to dismiss, the district court found that Ichtertz had filed an earlier lawsuit against the defendants in the district court for Hall County. At the close of Ichtertz' evidence in the previous action, the court had sustained a motion for directed verdict which dismissed Bainbridge individually from the suit. The jury subsequently returned a verdict against the corporation for \$633,867.

The district court noted that in the present case, Ichtertz claimed the corporate veil should be pierced and Bainbridge should be held personally liable for the judgment rendered in the previous case. In the current action, the court concluded that there was insufficient evidence in the previous case to hold Bainbridge personally liable for any claims by Ichtertz and that the claims in the current action were identical to those on which a jury had rendered judgment. Relying on the doctrine of *res judicata*, the court sustained the defendants' motion to dismiss. Ichtertz appealed.

ASSIGNMENTS OF ERROR

Ichtertz assigns the following errors: The district court erred (1) in converting the motion to dismiss into a motion for summary judgment by relying on matters outside the pleadings and (2) in sustaining the motion to dismiss on the basis of *res judicata*.

ANALYSIS

[3,4] An appellate court reviews *de novo* a lower court's dismissal of a complaint for failure to state a claim. *Doe v. Omaha Pub. Sch. Dist.*, ante p. 79, 727 N.W.2d 447 (2007). 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. *Doe, supra*. 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. *Doe, supra*. 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.*

We first consider Ichtertz' claim that the district court erred in converting the motion to dismiss into a motion for summary judgment by relying on matters outside the pleadings.

Rule 12(b) provides that when matters outside the pleadings are presented by the parties and accepted by the trial court with respect to a motion to dismiss under rule 12(b)(6), the motion "shall be treated" as a motion for summary judgment as provided in Neb. Rev. Stat. §§ 25-1330 to 25-1336 (Reissue 1995 & Cum. Supp. 2006) and the parties shall be given reasonable opportunity to present all pertinent material. *Doe, supra*. In the case at bar, the defendants offered in evidence and the district court received three items from the first trial: a portion of the transcript of the proceedings, the third amended petition, and portions of Ichtertz' deposition.

Under our current notice pleading rules, by receiving and considering matters outside the pleadings, the district court converted the motion to dismiss into a motion for summary judgment. Our rules concerning pleadings in civil actions are modeled after the Federal Rules of Civil Procedure, and we look to federal decisions for guidance. See *Kellogg v. Nebraska Dept. of Corr. Servs.*, 269 Neb. 40, 690 N.W.2d 574 (2005). The principle recognized by federal courts is that when a court receives evidence which converts a motion to dismiss into a motion for summary judgment, it is important for the trial court to "'give the parties notice of the changed status of the motion and a 'reasonable opportunity to present all material made pertinent to such a motion.'" See *Doe, ante* at 83, 727 N.W.2d at 452-53, quoting 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1366 (3d ed. 2004). See, e.g., *Country Club Estates, L.L.C. v. Town of Loma Linda*, 213 F.3d 1001 (8th Cir. 2000).

Federal courts have also noted that when a motion to dismiss is converted to a motion for summary judgment, reversal of the "ruling may become necessary if the district court has not provided the adversely affected party with notice and an opportunity to respond." *Alioto v. Marshall Field's & Co.*, 77 F.3d 934, 936 (7th Cir. 1996). "The primary vice of unexpected conversion to

summary judgment is that it denies the surprised party sufficient opportunity to discover and bring forward factual matters which may become relevant only in the summary judgment, and not the dismissal, context.” *Portland Retail, etc. v. Kaiser Foundation, etc.*, 662 F.2d 641, 645 (9th Cir. 1981).

The record shows that the parties appeared for a hearing on the motion to dismiss. The defendants offered into evidence the above-described exhibits. Ichtertz raised no objection to the offer. The district court then asked Ichtertz if he had any evidence in opposition to the motion to dismiss. Ichtertz did not, and the parties were given time to submit briefs on the motion. Ichtertz now claims the court erred in converting the motion to dismiss into a motion for summary judgment by receiving evidence outside the pleadings. Ichtertz was given an opportunity to present evidence and did not do so. We cannot determine from the record before us whether Ichtertz raised before the lower court the issue of conversion of the motion to dismiss into a motion for summary judgment. However, whether the court erred in its procedure regarding the motion to dismiss is not decisive of the matter, and we decline to resolve the cause on that basis.

We now consider Ichtertz’ claim that the district court erred in sustaining the motion to dismiss on the basis of *res judicata*. The court found that the claims in the current action were identical to the claims upon which the jury rendered judgment in the previous action. The court held that the judgment in the previous action between the same parties was final as to every issue which could have been decided in that action.

[5,6] The applicability of the doctrine of *res judicata* is a question of law. See *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005). On questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.*

[7,8] The doctrine of *res judicata*, or claim preclusion, bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions. *Id.* The doctrine bars relitigation

not only of those matters actually litigated, but also of those matters which might have been litigated in the prior action. *Id.*

In his complaint in the current action, Ichtertz sought to have Bainbridge held personally liable for the judgment awarded in the previous action. Ichtertz made a number of allegations related to the business of the corporation. For example, Ichtertz alleged that Bainbridge had withdrawn assets from the corporation without leaving sufficient assets for the corporation to pay its debt to Ichtertz. Whether Bainbridge withdrew assets from the corporation after the judgment was entered against it was a fact which was not answered by the record before us.

[9] Res judicata does not apply “when there has been an intervening change in facts or circumstances.” *Moulton v. Board of Zoning Appeals*, 251 Neb. 95, 102, 555 N.W.2d 39, 45 (1996). In the case at bar, it was alleged that there had been a change in circumstances brought about by the corporation’s failure to pay the judgment entered against it. Ichtertz alleged that the corporation was inadequately capitalized, that Bainbridge had diverted corporate funds to his own improper use, and that Bainbridge withdrew assets from the corporation without leaving sufficient assets for the corporation to pay its debt to Ichtertz. The previous action did not address any of these issues which, if proved, would show a change in circumstances that occurred after the judgment was awarded.

The U.S. Court of Appeals for the Second Circuit addressed a res judicata question in *Maharaj v. Bankamerica Corp.*, 128 F.3d 94 (2d Cir. 1997), in which a former corporate officer and shareholder was awarded a judgment in a cause of action for breach of employment. In a second action, he alleged three individual causes of action: failure to give notice of dissolution, conversion, and breach of the stockholders’ agreement. He filed two derivative causes of action on behalf of another corporation: demand for an accounting and breach of fiduciary duty. The appellate court stated:

In determining whether a second suit is barred by [res judicata], the fact that the first and second suits involved the same parties, similar legal issues, similar facts, or essentially the same type of wrongful conduct is not dispositive. . . . Rather, the first judgment will preclude a second suit

only when it involves the same “transaction” or connected series of transactions as the earlier suit; that is to say, the second cause of action requires the same evidence to support it and is based on facts that were also present in the first. . . .

Thus, as a matter of logic, when the second action concerns a transaction occurring after the commencement of the prior litigation, claim preclusion generally does not come into play.

Id. at 97 (citations omitted).

Applying South Dakota law, the U.S. Court of Appeals for the Eighth Circuit held that even where there is identity of claims, res judicata will not preclude a second suit if a claim could not have been fully and fairly adjudicated in the prior case. *Hicks v. O’Meara*, 31 F.3d 744 (8th Cir. 1994). In *Hicks*, the plaintiffs first filed a claim for wrongful termination. In the second action, they sought recovery based on unpaid minimum and overtime wages. The court stated, “Whether causes of action are identical depends on whether the wrong sought to be redressed is the same in both actions.” *Id.* at 746.

In *Labelle Processing Co. v. Swarrow*, 72 F.3d 308 (3d Cir. 1995), the U.S. Court of Appeals for the Third Circuit found that res judicata did not bar a second claim even if the same parties were involved. Although new factual allegations attempting to support a previously denied claim do not create a new cause of action, “new facts (i.e., events occurring after the events giving rise to the earlier claim) may give rise to a new claim, which is not precluded by the earlier judgment.” *Id.* at 314.

In the case at bar, Ichtertz’ previous action sought recovery from Bainbridge and the corporation for breach of contract, after termination of an agreement between Ichtertz and Bainbridge related to a medical practice. Bainbridge was dismissed from the action by a directed verdict. The jury found in Ichtertz’ favor against the corporation, and a judgment of \$633,867 was entered against the corporation. When the judgment was not paid, Ichtertz filed the current action, seeking to pierce the corporate veil. Ichtertz’ complaint alleged that assets had been withdrawn from the corporation without leaving sufficient assets to pay its debts. Although the record was not fully developed at the time

of the hearing on the motion to dismiss in the current action, the complaint alleged there were intervening facts or circumstances which arose in the period following the previous action.

The district court erred in concluding that the claims in the current action were identical to those in the previous action. When the judgment against the corporation was not paid, Ichtertz sought to collect from Bainbridge. There is nothing in the record to suggest that Ichtertz knew in the previous action that it would be necessary to pierce the corporate veil in order to collect on the judgment. Actions involving the liquidity of the corporation that are alleged to have occurred after the judgment was entered would not be issues that could have been resolved in the previous action.

This case is presented to us as the dismissal of a complaint based upon the alleged failure to state a claim. We review such cases de novo. See *Doe v. Omaha Pub. Sch. Dist.*, ante p. 79, 727 N.W.2d 447 (2007). 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.* Dismissal under rule 12(b)(6) should be granted only in the unusual case in which the allegations show on the face of the complaint that there is some insuperable bar to relief. *Doe, supra.* We do not conclude that Ichtertz is barred from relief.

CONCLUSION

The district court's order sustaining the motion to dismiss is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE,
v. FREN MATA, APPELLANT.
730 N.W.2d 396

Filed April 26, 2007. No. S-05-1404.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.

2. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a post-conviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court resolves the question independently of the lower court's conclusion.
3. **Criminal Law: Double Jeopardy.** The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
4. ____: ____. 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.
5. **Criminal Law: Convictions: Statutes: Legislature: Intent.** Whether multiple convictions in a single trial lead to multiple punishments depends on whether the Legislature, when designating the criminal statutory scheme, intended that cumulative sentences be applied for conviction on such offenses.
6. **Double Jeopardy: Legislature: Intent.** When the Legislature has demonstrated an intent to permit cumulative punishments, the Double Jeopardy Clause is not violated as long as the court imposes the cumulative punishments in a single proceeding.
7. **Criminal Law: Legislature: Intent.** The Legislature intended the crime of using a deadly weapon to commit a felony to remain an independent offense from the underlying felony.
8. **Right to Counsel: Appeal and Error.** States must appoint counsel to represent indigent defendants in first appeals as of right.
9. ____: ____. The right to counsel does not extend to discretionary appeals to a state's highest court.
10. **Constitutional Law: Right to Counsel: Effectiveness of Counsel: Time: Appeal and Error.** Because defendants do not have a constitutional right to counsel beyond the conclusion of their direct appeal, they cannot be deprived of the effective assistance of counsel by their retained counsel's failure to timely file a petition for further review.

Appeal from the District Court for Scotts Bluff County:
RANDALL L. LIPPSTREU, Judge. Affirmed.

Richard L. DeForge, Deputy Scotts Bluff 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.

CONNOLLY, J.

A jury convicted the appellant, Fren Mata, of 22 offenses resulting from a high-speed chase and shootout. On direct appeal,

Mata challenged the sufficiency of the evidence and excessive sentences. The Nebraska Court of Appeals affirmed the judgment.¹ We denied Mata's petition for further review because it was untimely filed. Mata moved for postconviction relief alleging, among other things, that he was subject to double jeopardy and received ineffective assistance of counsel. The district court denied Mata's motion.

The issue presented is whether Mata was denied effective assistance of counsel because his counsel did not timely file a petition for further review. We conclude that Mata did not have a constitutional right to counsel beyond the conclusion of his direct appeal. Thus, he was not deprived of effective assistance of counsel when his counsel failed to timely file his petition for further review. We affirm.

FACTS OF THE UNDERLYING OFFENSES

On the afternoon of June 13, 2001, Mata was driving on Highway 71 near Scottsbluff, Nebraska, when a Nebraska State Patrol trooper pursued Mata's speeding pickup. A lengthy high-speed chase ensued, during which Mata fired numerous shots from the pickup at both officers and civilians. Mata eventually stopped in Scottsbluff.

The Court of Appeals' direct appeal opinion summarized the evidence as follows:

[T]he evidence shows a wild and dangerous car chase, part of which was conducted after Mata's pickup had been damaged, including the front tires to the point that he was driving virtually on the rims. During the course of that car chase, Mata fired at law enforcement officers and civilians. He was in possession of three handguns. At least 24 spent casings were found inside the pickup. Witnesses identified the silver handgun as being stuck out the window and fired by Mata. We do not think it an exaggeration to characterize the evidence against Mata as overwhelming.²

¹ *State v. Mata*, No. A-01-1212, 2002 WL 31002276 (Neb. App. Aug. 6, 2002) (not designated for permanent publication).

² *State v. Mata*, *supra* note 1, 2002 WL 31002276 at *4.

A jury convicted Mata of 22 offenses, including four counts of discharging a firearm at an occupied motor vehicle, eight counts of terroristic threats, eight counts of use of a firearm to commit a felony for each of the underlying terroristic threats felonies, fleeing to avoid arrest, and misdemeanor willful reckless driving. The district court sentenced Mata to a combined prison sentence of 18 to 36 years with credit for 122 days served.

The Court of Appeals issued its decision on August 6, 2002. Leonard Tabor, Mata's trial counsel and counsel for direct appeal, sent Mata a letter on August 7. It stated that "you can appeal this to the Supreme Court or ask that the Court of Appeals review it." The letter, however, also stated that in Tabor's opinion, "it is quite obvious that the Court of Appeals is not going to redo their decision and I seriously doubt that the Supreme Court would take it seriously."

On August 13, 2002, Mata wrote a letter to Tabor saying that he wanted to exhaust all of the state and federal remedies and requesting that Tabor file the petition for further review on his behalf. Tabor filed a petition for further review with this court on September 6, and we overruled it because it was untimely filed. Tabor moved to reconsider, but we denied the motion.

MATA'S POSTCONVICTION HEARING

Mata gave a telephonic deposition for his postconviction evidentiary hearing. Mata testified that Tabor provided ineffective assistance of counsel because he did not file a motion to change venue and failed to request a continuance of the trial, investigate the crime scene, take the depositions of witnesses, and call additional witnesses to testify (including a ballistics expert witness). He also claimed that Tabor failed to raise a double jeopardy issue and that the jury instructions were misleading. Mata testified that he requested Tabor, both by telephone and by letter, to seek review of his convictions after the Court of Appeals affirmed his convictions. Tabor filed Mata's petition for further review, but this court denied it as untimely.

Tabor testified at Mata's postconviction evidentiary hearing that he did not file a motion to change venue. Tabor stated that he had a prior unsuccessful experience on a change of venue motion and that he wanted to honor Mata's request "to get this over with and done with." In preparing for trial, he reviewed the

police reports, examined all the exhibits, and viewed videotapes that law enforcement had taken contemporaneous with the alleged offenses. He stated he was personally familiar with the locations where the crimes were committed because he had lived in the area for 35 years and, therefore, felt no need to visit the crime scenes. Tabor stated that Mata never provided him with the names of any additional witnesses and that there was no factual foundation to have a ballistics expert testify. Tabor also stated that there was no benefit to taking depositions of the witnesses and that Mata never requested Tabor to seek a continuance of the trial.

Tabor stated that he visited Mata in jail to discuss the case, but he could not remember how many times. Tabor testified that his strategy was to get Mata the best plea bargain possible but that once Mata rejected the plea bargain, the only option was to make the State prove its case.

THE DISTRICT COURT'S DECISION

The district court overruled Mata's motion for postconviction relief. The court rejected Mata's claims that Tabor was ineffective in his failure to seek a change of venue, in his trial preparation and performance, and in his failure to object to the jury instructions.

The court also rejected Mata's argument that the jury instructions were confusing, misleading, and contradictory. It concluded that Mata's double jeopardy claims were without merit for two reasons. First, the State never charged Mata nor did the court sentence him for using a firearm to commit the felony crime of shooting at an occupied motor vehicle. Instead, he was convicted and sentenced with using a firearm to commit the felony crime of terroristic threats. Second, *State v. McBride*³ barred Mata's double jeopardy arguments concerning terroristic threats and using a firearm to make such threats. The district court also rejected Mata's claim that his counsel was ineffective for failing to file a petition for further review.

ASSIGNMENTS OF ERROR

Mata argues that the district court erred when it found that (1) he was not subjected to double jeopardy for being sentenced

³ *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997).

for both the discharge of a firearm at an occupied motor vehicle and the use of a firearm to commit the same felony, and for terroristic threats and using a firearm to commit such threats; (2) the jury instructions were not confusing, misleading, and contradictory, that they did not subject Mata to double jeopardy, and that trial counsel was not ineffective for failing to object to the instructions; (3) Mata failed to show that he was prejudiced by trial counsel's failure to suppress physical evidence, adequately investigate the charges and failure to visit the crime scene, depose witnesses, pursue ballistic testing evidence, adequately cross-examine witnesses, and seek a continuance of trial; (4) trial counsel was not ineffective when he failed to seek a change of venue; (5) Mata failed to show that he was denied his right to effective assistance of counsel because his counsel did not timely file a petition for further review; (6) trial counsel was not ineffective on direct appeal; (7) trial counsel's failure to sufficiently prepare for trial did not deny Mata effective assistance of counsel; and (8) Mata was not denied effective assistance of counsel on appeal when trial counsel did not assign as error and argue that Mata was not subjected to double jeopardy.

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.⁴

[2] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, we resolve the question independently of the lower court's conclusion.⁵

ANALYSIS

We will address only Mata's claims of ineffective assistance of counsel for not raising double jeopardy and ineffective assistance of appellate counsel for not timely filing a petition for further review. Mata's remaining claims have either been procedurally defaulted because he raised them on direct appeal or,

⁴ *State v. Deckard*, 272 Neb. 410, 722 N.W.2d 55 (2006).

⁵ See *State v. Marshall*, 272 Neb. 924, 725 N.W.2d 834 (2007).

after examining the record, are so lacking in merit to not require discussion.

MATA WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL
FOR NOT RAISING DOUBLE JEOPARDY CLAIMS

Mata claims that Tabor was ineffective for failing to argue at trial and on direct appeal that Mata was subject to double jeopardy. He argues double jeopardy applies because the court sentenced him for both the discharge of a firearm at an occupied motor vehicle and the use of a firearm to commit the same felony. The district court properly found that it never sentenced Mata for using a firearm to commit the felony of discharging a firearm at an occupied motor vehicle. Instead, the court sentenced him for using a firearm to commit terroristic threats. Mata misstates the record. Mata's first double jeopardy argument has no merit.

[3,4] Mata also argues that Tabor provided him with ineffective assistance of counsel for failing to argue at trial and on direct appeal that Mata was subject to double jeopardy because he was sentenced for both terroristic threats and using a firearm to commit such threats. 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.⁷

[5,6] 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.⁸ When the Legislature has demonstrated an intent to permit

⁶ *State v. Humbert*, 272 Neb. 428, 722 N.W.2d 71 (2006).

⁷ *Id.*

⁸ See *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006).

cumulative punishments, the Double Jeopardy Clause is not violated as long as the court imposes the cumulative punishments in a single proceeding.⁹

[7] The statute establishing the crime of using a deadly weapon to commit a felony provides that the offense “shall be treated as [a] separate and distinct offense . . . from the felony being committed, and sentences imposed under this section shall be consecutive to any other sentence imposed.”¹⁰ We have held that this statutory language

expressly provides that the Legislature intended the crime of using a deadly weapon to commit a felony to remain an independent offense from the underlying felony. [T]here can be no question that the Legislature intended that one using a deadly weapon be subjected to cumulative punishments for committing the underlying felony and for the use of the weapon to commit it.¹¹

Mata’s convictions for terroristic threats and using a firearm to commit the underlying crime of terroristic threats, therefore, did not violate his double jeopardy rights. The Legislature expressly intended these crimes to remain independent offenses. Because Mata’s double jeopardy argument has no merit, Tabor did not render ineffective assistance of counsel for failing to raise the claim.

MATA WAS NOT DENIED EFFECTIVE ASSISTANCE OF
APPELLATE COUNSEL FOR NOT TIMELY FILING
A PETITION FOR FURTHER REVIEW

[8,9] Mata also claims that his counsel was ineffective because he failed to timely file his petition for further review. The U.S. Supreme Court has held that in first appeals as of right, states must appoint counsel to represent indigent defendants.¹² The court, however, has also held that the right to counsel does

⁹ *State v. Spotts*, 257 Neb. 44, 595 N.W.2d 259 (1999).

¹⁰ Neb. Rev. Stat. § 28-1205(3) (Reissue 1995).

¹¹ *State v. McBride*, *supra* note 3, 252 Neb. at 882, 567 N.W.2d at 147.

¹² *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963).

not extend to discretionary appeals to a state's highest court.¹³ Instead, the right to counsel is limited to the first appeal as of right.¹⁴

The Court of Appeals recently addressed this issue in *State v. Taylor*.¹⁵ In *Taylor*, the appellant also claimed ineffective assistance of counsel because his lawyer failed to timely file his petition for further review. The Court of Appeals reasoned that before it reached the merits of this claim, it must first address whether Taylor had a constitutional right to further review by this court after his conviction and sentence were affirmed by the Court of Appeals on direct appeal. The Court of Appeals framed the issue: If Taylor had no constitutional right to further review, then he had no right to counsel for that appeal and, accordingly, no basis for a claim of ineffective assistance of counsel. The Court of Appeals concluded that Taylor was entitled to only one appeal as a matter of right, which he had exercised in his first direct appeal to the Court of Appeals. It held that Taylor was not entitled to further review by this court as a matter of right or "to the assistance of counsel, effective or ineffective, in filing the petition requesting further review."¹⁶ We agree.

[10] Mata's constitutional right to counsel and to effective assistance of counsel ended when the Court of Appeals decided his direct appeal. It did not extend to subsequent discretionary appellate review. Because Mata did not have a constitutional right to counsel beyond the conclusion of his direct appeal, he could not be deprived of effective assistance of counsel by his retained counsel's failure to timely file his petition for further review.

CONCLUSION

Mata's counsel was not ineffective for failing to raise double jeopardy claims that have no merit. Also, because Mata did not have a constitutional right to counsel beyond the conclusion of

¹³ *Ross v. Moffitt*, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

¹⁴ *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985).

¹⁵ *State v. Taylor*, 14 Neb. App. 849, 716 N.W.2d 771 (2006).

¹⁶ *Id.* at 853, 716 N.W.2d at 775.

his direct appeal, he could not be deprived of effective assistance of counsel by his retained counsel's failure to timely file his petition for further review. Finding no merit to Mata's assigned errors, we affirm.

AFFIRMED.

RON CUMMING ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, APPELLANTS, AND BOB LINDERHOLM, APPELLEE, V. RED WILLOW SCHOOL DISTRICT NO. 179, ALSO KNOWN AS SOUTHWEST PUBLIC SCHOOL DISTRICT, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, AND AMERITAS INVESTMENT CORP., A NEBRASKA CORPORATION, APPELLEES.

730 N.W.2d 794

Filed April 26, 2007. No. S-06-025.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. ____: _____. When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.

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

Jeffery R. Kirkpatrick, of McHenry, Haszard, Hansen, Roth & Hupp, P.C., for appellants.

Kelley Baker and John Selzer, of Harding, Shultz & Downs, for appellee Red Willow County School District No. 179.

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

STEPHAN, J.

This appeal involves the same school district reorganization that was before us in *Nicholson v. Red Willow Cty. Sch. Dist. No. 0170*.¹ Appellee Red Willow County School District No. 179, also known as Southwest Public School District (Southwest),

¹ *Nicholson v. Red Willow Cty. Sch. Dist. No. 0170*, 270 Neb. 140, 699 N.W.2d 25 (2005).

was formed as the result of the reorganization of Red Willow County School District No. 0170 (Twin Valley) and Red Willow County School District No. 0109 (Republican Valley), both of which were dissolved pursuant to a reorganization petition and plan approved by the State Committee for the Reorganization of School Districts (State Committee) on May 9, 2003. The issue presented in this case is whether the appellants, who are all residents and electors of Southwest, may collaterally attack and seek to enjoin the issuance of bonds by Southwest pursuant to the approved petition and plan. For the reasons discussed in *Nicholson*, we conclude that they cannot.

BACKGROUND

Southwest is a Class III public school district and political subdivision of the State of Nebraska. The appellants reside and own property in the geographic area encompassed by Southwest.

On January 29, 2003, the boards of education of Twin Valley and Republican Valley voted to approve a petition and plan to reorganize by dissolving the two school districts and creating a new Class III district in their place. The petition and plan provided:

Neither the Twin Valley Public School District nor the Republican Valley Public School District has any bonded indebtedness existing on the date of the signing of this Petition. However, if the voters of both the existing Twin Valley Public School District and the existing Republican Valley Public School District vote to authorize the issuance of bonds in elections in both school districts, any authority to issue bonds, and any bonded indebtedness created pursuant to such authority which exists on the effective date of the dissolution and reorganization of the existing Twin Valley Public School District and the existing Republican Valley Public School District shall become the authority and/or obligation of the New School District.

The reorganization petition was contingent upon the approval of separate bond issues in both Twin Valley and Republican Valley.

Separate bond elections were held in Twin Valley and Republican Valley on March 25, 2003. The voters of Twin Valley approved, by a vote of 296 to 266, the issuance of bonds by Twin Valley in the amount of \$3,495,000 for the purpose of paying the

costs of land acquisition, constructing a school building, and providing for necessary furniture and apparatus for such a building. Republican Valley voters approved, by a vote of 296 to 272, the issuance of bonds by Republican Valley in the amount of \$3,495,000 for the same purposes as the Twin Valley bond issue. The issuance of the bonds was made contingent upon the approval of identical bond issues by the voting electors of each district, and upon the approval of the petition and plan as required by law. The petition and plan specifically stated that any authority to issue bonds by the two existing districts would be transferred to the newly formed district. Neither Republican Valley nor Twin Valley ever issued any bonds based on the authority of the elections held on March 25, 2003.

On May 9, 2003, the State Committee approved the petition and plan for reorganization. As a result, Twin Valley and Republican Valley were dissolved and reorganized into Southwest, which is validly established and existing pursuant to Neb. Rev. Stat. § 79-405 (Reissue 2003).

On September 28, 2005, Southwest's board of education voted to issue bonds in the amount of \$6,990,000 for the acquisition of land, construction of a building, and furnishing of that building for a new school. Since the inception of Southwest, no bond issue has been submitted to the qualified voters of that school district. Southwest relied upon the bonding authority transferred from its predecessor districts under the approved petition and plan.

On October 14, 2005, the appellants filed a class action lawsuit against Southwest and Ameritas Investment Corp. in the district court for Lancaster County. They sought injunctive relief preventing the issuance of the bonds without a vote of the electors of Southwest. They also sought a declaratory judgment that "Nebraska law does not allow for the transfer of bonding authority from dissolving school districts to successor school districts."

Southwest moved for summary judgment, and a hearing was held on stipulated facts. The district court granted Southwest's motion for summary judgment and dismissed the case. Relying on our holding in *Nicholson*, the court determined that

[the appellants] have been adversely affected by the State Committee's action in approving the [petition] which called

for a transfer of the bonding authority from Twin Valley and Republican Valley to Southwest. The fact that they have chosen a different argument to present to the Court than Nicholson chose, is not material. Their remedy, just as Nicholson's, was to appeal from the State Committee's decision as provided for in [Neb. Rev. Stat.] § 79-413(4) [(Supp. 2005)].

The appellants timely appealed from the order of the district court. We granted Southwest's petition to bypass the Court of Appeals.²

ASSIGNMENT OF ERROR

The appellants assign that the district court erred in sustaining Southwest's motion for summary judgment.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.³

ANALYSIS

[2] We understand the order of the district court to be a determination that it lacked subject matter jurisdiction over what it deemed to be an impermissible collateral action similar to that in *Nicholson*. When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.⁴ Accordingly, we address this threshold jurisdictional issue.

Nicholson involved a claim for injunctive relief seeking to prevent the issuance of bonds and the implementation of the reorganization petition, and a declaration that the petition and Neb. Rev. Stat. § 79-422(1) (Reissue 2003) were unconstitutional under Neb. Const. art. VII, § 4. Section 79-422(1) provided in part: "Bonded indebtedness approved by legal voters

² See Neb. Rev. Stat. § 24-1106(2) (Reissue 1995).

³ *Pfeil v. State*, ante p. 12, 727 N.W.2d 214 (2007).

⁴ *Chase 3000, Inc. v. Nebraska Pub. Serv. Comm.*, ante p. 133, 728 N.W.2d 560 (2007); *Kaplan v. McClurg*, 271 Neb. 101, 710 N.W.2d 96 (2006).

prior to any change in school district boundary lines pursuant to sections 79-413 to 79-421 shall remain the obligation of the school district voting such bonds unless otherwise specified in the petitions.” We noted in *Nicholson* that the reorganization petition and plan approved by the State Committee did “‘otherwise specify’” a reallocation of bonded indebtedness, and we held that a challenge to this term could be brought only in an appeal of the State Committee’s action pursuant to § 79-413(4) or, alternatively, through a petition in error.⁵ Accordingly, we held that the challenge in *Nicholson* was an impermissible collateral action over which we had no jurisdiction.

In this action, the appellants seek to enjoin the issuance of the same bonds on slightly different grounds. They contend that the phrase “[b]onded indebtedness” used in § 79-422(1) is limited to bonds which are actually issued prior to the reorganization and does not include the authority by the successor district to issue bonds at some time in the future. Southwest counters that the phrase must be read in context with language which immediately follows, i.e., “[b]onded indebtedness approved by legal voters prior to any change in school district boundary lines,” and that when so read, the statute permits a successor district to issue bonds approved by the legal voters of the predecessor districts which were dissolved in the process of reorganization.

As in *Nicholson*, the appellants’ objection to the issuance of the bonds is in reality an objection to the terms and conditions of the petition and plan, which provide that if voters of both Twin Valley and Republican Valley vote to authorize the issuance of bonds prior to the reorganization, “any *authority to issue bonds, and any bonded indebtedness* created pursuant to such authority which exists on the effective date of the dissolution and reorganization . . . shall become the *authority and/or obligation* of the New School District.” (Emphasis supplied.) The petition and plan clearly contemplates a transfer of both existing bonded indebtedness, if any, and the authority to issue bonds which were approved by voters but not issued prior to the reorganization. The appellants’ claim—that this transfer of authority to issue bonds

⁵ *Nicholson v. Red Willow Cty. Sch. Dist. No. 0170*, *supra* note 1, 270 Neb. at 146, 699 N.W.2d at 30.

is not permissible under § 79-422(1)—is really an argument that the State Committee should not have approved the petition and plan because of this provision. But the State Committee did approve the petition and plan, and the appellants apparently did not exercise their right to judicial review either by petition in error or by appeal pursuant to § 79-413(4). The issue of statutory construction which the appellants now seek to raise could have been resolved in such a review proceeding, but neither this court nor the district court has jurisdiction to address it in this collateral proceeding.⁶

Perhaps recognizing this obstacle, the appellants argue that a collateral attack is permissible if the State Committee was without authority to act. Relying on *School Dist. of Gering v. Stannard*,⁷ they contend that any action by the State Committee which is prohibited by statute is void and is subject to collateral attack.

In *Stannard*, the plaintiff brought a collateral action to determine the validity of a school district reorganization petition approved by the county superintendent, the predecessor to the State Committee. The petition in question called for a change in school district boundaries by transferring land from one school district to another school district. We recognized that if the petition were legally sufficient, the county superintendent had jurisdiction to approve the petition. However, we acknowledged that the county superintendent's "proceedings may be attacked collaterally when such proceedings are void and the county superintendent lacks jurisdiction."⁸ In analyzing the petition, we found that state law unequivocally prohibited the specific transfer of land from one school district to another, as was attempted by the petition. Thus, the county superintendent had no authority to act, as the substance of the petition clearly contravened state law. We concluded that the action of the county superintendent in approving the petition was void and was subject to collateral attack.

⁶ See *Nicholson v. Red Willow Cty. Sch. Dist. No. 0170*, *supra* note 1.

⁷ *School Dist. of Gering v. Stannard*, 193 Neb. 624, 228 N.W.2d 600 (1975).

⁸ *Id.* at 629, 228 N.W.2d at 605.

As in *Nicholson*, we reject the argument that *Stannard* permits a collateral attack directed at the authority of Southwest to issue bonds pursuant to the reorganization plan approved by the State Committee. The appellants are not contesting the legitimacy of Southwest as a school district and, thus, cannot be understood to be challenging the State Committee's approval of the reorganization petition itself. Instead, the appellants are challenging a provision contained within the approved petition. And unlike *Stannard*, we cannot say that the challenged provision is, on its face, clearly and unequivocally prohibited by state law. Therefore, we have no basis to find that the State Committee's approval of the reorganization petition was void.

Based on our rationale in *Nicholson*, we conclude that the appellants have brought an impermissible collateral action as to which neither the district court nor this court has subject matter jurisdiction. Accordingly, we do not reach the substantive issues presented.

CONCLUSION

The State Committee approved the reorganization petition and plan pursuant to which Southwest seeks to issue bonds previously authorized by Twin Valley and Republican Valley voters. The transfer of bonding authority is permitted by the approved petition and plan. The reorganization itself is not void. Accordingly, this challenge to Southwest's authority to issue bonds does not fall within the subject matter jurisdiction of the district court or this court. The district court did not err in dismissing the action, and we dismiss the appeal.

APPEAL DISMISSED.

IN RE ESTATE OF GERALD V. ROSE, DECEASED.
RUSSELL A. ROSE, PERSONAL REPRESENTATIVE OF THE
ESTATE OF GERALD V. ROSE, DECEASED, APPELLANT,
V. MARJORIE JANE HETRICK-ROSE, APPELLEE.

730 N.W.2d 391

Filed April 26, 2007. No. S-06-078.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law, which requires an appellate court to reach a conclusion independent from that of the trial court.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the tribunal from which the appeal is taken.
4. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 1995), the three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.
5. ____: _____. 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.
6. ____: _____. A substantial right is not affected when that right can be effectively vindicated in an appeal from the final judgment.

Appeal from the County Court for Dakota County: KURT RAGER, Judge. Appeal dismissed.

Wayne E. Boyd, of Boyd Law Office, P.C., for appellant.

Robert W. Green, P.L.C., for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

The fundamental issue before the county court for Dakota County in this probate case was the determination of the size of the augmented estate of Gerald V. Rose which would serve as

the basis for an award of the statutory elective share to his widow, Marjorie Jane Hetrick-Rose. On December 19, 2005, the county court established a family allowance to Marjorie which reduced the size of the augmented estate and determined that two annuity contracts should be included in the augmented estate for purposes of calculating Marjorie's statutory elective share. The county court retained jurisdiction to determine the size of the augmented estate. Russell A. Rose, personal representative of the estate of Gerald V. Rose (the Estate), appeals the county court's ruling regarding the family allowance and the treatment of the two annuities. We dismiss this appeal for lack of jurisdiction.

STATEMENT OF FACTS

Gerald and Marjorie were married on March 14, 1998. Gerald died on March 9, 2005. Gerald was survived by Marjorie and by his six children. Prior to Gerald's death, he and Marjorie lived in a house that Gerald owned prior to their marriage. Gerald had sold the house but retained a life estate at the time of their marriage. Shortly after Gerald's death, Marjorie was evicted from the house and she moved to another home. Prior to Gerald and Marjorie's marriage, Gerald entered into an agreement to sell a farm. The sale was not completed until shortly after their wedding, and Marjorie signed the deed transferring title of the farm. Gerald used part of the proceeds from the sale of the farm to purchase two annuity contracts. The first was purchased April 3, 1998, in the amount of \$45,000, and the second was purchased July 11, 2000, in the amount of \$51,811.51. On the date of Gerald's death, the annuity contracts were worth \$62,023.67 and \$66,044.81. The contracts named Gerald's six children as equal primary beneficiaries. They were not designated as irrevocable beneficiaries, and Marjorie was not named as a beneficiary. Each of the contracts provided that after completion of 1 contract year, up to 10 percent of the annuity purchase value could be withdrawn penalty free in any 12-month period. The remaining amount could be withdrawn subject to a penalty that decreased from 6 percent of the annuity purchase value in the first year to 0 percent in the eighth year and thereafter.

On June 16, 2005, Marjorie filed in county court a petition under Neb. Rev. Stat. § 30-2317 (Reissue 1995) electing to take

her elective share of 50 percent of the augmented estate and an application under Neb. Rev. Stat. §§ 30-2324 and 30-2325 (Reissue 1995) requesting a family allowance as the surviving spouse. The county court held a hearing on November 17, and on December 19, it entered an order relating to Marjorie's requests for the elective share and the family allowance.

In the December 19, 2005, order, the court noted that pursuant to § 30-2325, a personal representative could, without court approval, pay a family allowance "in a lump sum not exceeding nine thousand dollars [\$9,000] or periodic installments not exceeding seven hundred fifty dollars [\$750] per month for one year." The court determined that \$750 per month was a fair amount to pay Marjorie as a family allowance because the amount "would help to meet [her] housing needs." The court ordered the personal representative to pay Marjorie \$750 per month during the period of administration but ordered that the allowance could not continue for longer than 1 year. In its December 19 order, the court also found that the annuity contracts were property that fell within the meaning of Neb. Rev. Stat. § 30-2314(a)(1)(i) and (ii) (Reissue 1995) and that therefore the two annuity contracts should be part of the augmented estate for purposes of determining Marjorie's statutory elective share.

In the December 19, 2005, order, the court also stated that it would "retain jurisdiction to make a further determination of the augmented estate." The Estate appeals the December 19 order.

ASSIGNMENTS OF ERROR

The Estate asserts that the county court erred in (1) establishing a family allowance to Marjorie in the amount of \$750 per month and (2) finding that the two annuity contracts should be included in the augmented estate for purposes of determining Marjorie's statutory elective share.

STANDARD OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law, which requires an appellate court to reach a conclusion independent from that of the trial court. *Susan L. v. Steve L.*, ante p. 24, 729 N.W.2d 35 (2007).

ANALYSIS

[2] Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties. *Chase 3000, Inc. v. Nebraska Pub. Serv. Comm.*, ante p. 133, 728 N.W.2d 560 (2007). We conclude that the December 19, 2005, order is not a final, appealable order and that therefore this court lacks jurisdiction over this appeal.

[3,4] 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). Under Neb. Rev. Stat. § 25-1902 (Reissue 1995), the three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.

[5,6] In considering the meaning of a “substantial right,” we have observed that a substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken. *In re Guardianship & Conservatorship of Larson*, 270 Neb. 837, 708 N.W.2d 262 (2006). In the criminal context, we have observed that “a substantial right is not affected when that right can be effectively vindicated in an appeal from the final judgment.” *State v. Vela*, 272 Neb. 287, 290, 721 N.W.2d 631, 635 (2006). See, also, *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000) (stating that no substantial right was affected where ruling raised in premature appeal could be effectively considered in timely appeal taken after final judgment). Relative to an order which determined the action, we have stated that such order is final even though incidental matters are retained where the order “determined all the issues in the action, and nothing was reserved for decision by the court.” *Fischer v. Cvitak*, 264 Neb. 667, 670, 652 N.W.2d 274, 276 (2002). We apply these principles to the instant case and

determine that the December 19, 2005, ruling is not a final, appealable order.

With respect to the three types of final orders, we observe as an initial matter that the December 19, 2005, order from which this appeal is taken did not determine an action and prevent a judgment, nor was it made on summary application in an action after judgment was rendered. Thus, we are left to consider whether the order was made during a special proceeding and affected a substantial right. A special proceeding entails civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes. *In re Estate of Peters*, 259 Neb. 154, 609 N.W.2d 23 (2000). The proceedings in this case were undertaken pursuant to the Nebraska Probate Code, which is contained in chapter 30 of the Nebraska Revised Statutes. Marjorie's application for a family allowance was made under §§ 30-2324 and 30-2325, and her petition for her statutory elective share was made under § 30-2317. This court has found other proceedings under the Nebraska Probate Code to be special proceedings. See, *In re Estate of Peters*, *supra*; *In re Estate of Seidler*, 241 Neb. 402, 490 N.W.2d 453 (1992); *In re Estate of Snover*, 233 Neb. 198, 443 N.W.2d 894 (1989). We determine that the proceedings in this case to determine the family allowance and the elective share were special proceedings because they involved civil statutory remedies not encompassed in chapter 25.

Because the December 19, 2005, order was made in a special proceeding, we next consider whether the order affected a substantial right as understood in our jurisprudence relative to § 25-1902. We have stated that a substantial right is an essential legal right, not a mere technical right. *In re Estate of Peters*, *supra*. The requests for a family allowance and an elective share are statutory rights and involve substantial rights. See *In re Estate of Carman*, 213 Neb. 98, 327 N.W.2d 611 (1982). Under the December 19 ruling, the family allowance is an item that reduces the size of the augmented estate and the annuity contracts are items that increase the size of the augmented estate. However, the size of the augmented estate has yet to be finally determined and the county court specifically retained jurisdiction to make this ultimate determination. Because the size of the augmented estate has not been determined and the December 19 ruling is limited

to the treatment of only certain items which will go into the calculation of the augmented estate, we conclude that the rights involved in the substance of the December 19 ruling can be effectively considered in an appeal from the final judgment in which the augmented estate is finally established. Given the facts and our jurisprudence under § 25-1902, the December 19 ruling does not affect substantial rights.

Our cases support the conclusion that various items included in the computation of the augmented estate can be effectively considered on appeal. In this respect, we note that in *In re Estate of Jakopovic*, 261 Neb. 248, 622 N.W.2d 651 (2001), this court considered on appeal issues regarding the family allowance and whether certain assets should be included in the augmented estate. However, unlike the instant case, the county court in *In re Estate of Jakopovic* had made a final determination of the augmented estate and of the elective share, and the court had ordered the estate to pay such share.

We conclude that the items decided in the December 19, 2005, order were preliminary to a complete determination of the size of the augmented estate which was the fundamental issue before the county court and that the December 19 order did not affect a substantial right and was not a final, appealable order. Accordingly, this court lacks jurisdiction over the appeal from this order.

CONCLUSION

We conclude that because the December 19, 2005, order did not affect a substantial right, it was not a final, appealable order. We therefore lack jurisdiction over this appeal, and we dismiss this appeal.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, v.
CAREY DEAN MOORE, APPELLANT.
730 N.W.2d 563

Order filed May 2, 2007. No. S-95-485.

By order of the Supreme Court, execution stayed, and warrant withdrawn.

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

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

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ., and CASSEL, Judge.

GERRARD, J.

The court, on its own motion, has reconsidered its order for the issuance of a death warrant for Carey Dean Moore. Under Nebraska law, the mode of inflicting the punishment of death, in all cases, is “by causing to pass through the body of the convicted person a current of electricity of sufficient intensity to cause death.”¹ In another case on our docket,² we have been asked to determine whether electrocution is cruel and unusual punishment.³ And we have repeatedly noted that recent decisions of the U.S. Supreme Court at least raised the question whether electrocution is constitutional.⁴ Our constitutional responsibility to decide whether electrocution is lawful requires us to consider whether any convicted person should be electrocuted before that question is answered. We conclude that we acted prematurely in ordering a death warrant before resolving that constitutional question in *State v. Mata*.⁵ For the following reasons, we stay Moore’s execution and withdraw the order of our clerk directing the warden of the Nebraska State Penitentiary to electrocute him.

In the context of capital sentencing, we have explained that it has “‘long been settled’” that our jurisdiction “‘is not exhausted by the rendition of its judgment, but continues until

¹ Neb. Rev. Stat. § 29-2532 (Reissue 1995).

² *State v. Mata*, docket No. S-05-1268.

³ See, U.S. Const. amend. VIII; Neb. Const. art. I, § 9.

⁴ *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005); *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003).

⁵ *Mata*, *supra* note 2.

that judgment shall be satisfied.””⁶ Notwithstanding the issuance of a mandate to a trial court or death warrant to the warden, we retain jurisdiction to set an execution date or suspend the execution of a death sentence.⁷ And every court has the inherent power to control the execution of its orders or processes, to the end of preventing an abuse of them.⁸

Such power is not derived from legislative grant or specific constitutional provision, but from the very fact that this court has been created and charged by the state Constitution with certain duties and responsibilities.⁹ Through this court’s inherent judicial power, which is that power essential to the court’s existence, dignity, and functions, we have authority to do all things that are reasonably necessary for the proper administration of justice.¹⁰ And this includes supervisory power over the courts and the power to temporarily stay execution on judgments rendered by them whenever it is reasonably necessary to accomplish the ends of justice and prevent injustice.¹¹ Obviously, that inherent power extends to our own judgments and orders, including the death warrant in this case.

In deciding whether to exercise our inherent power, we are mindful of the “especial concern” that “is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different.”¹² Our unique constitutional responsibilities impose a heightened standard of vigilance as we administer and supervise implementation of the death penalty. Moore’s electrocution has been ordered by this

⁶ *State v. Joubert*, 246 Neb. 287, 298, 518 N.W.2d 887, 895 (1994).

⁷ See, *State v. Palmer*, 246 Neb. 305, 518 N.W.2d 899 (1994); *Joubert*, *supra* note 6; *Otey v. State*, 240 Neb. 813, 485 N.W.2d 153 (1992).

⁸ *Ex parte State ex rel. Attorney General*, 150 Ala. 489, 43 So. 490 (1907).

⁹ *In re Estate of Reed*, 267 Neb. 121, 672 N.W.2d 416 (2003); *Joubert*, *supra* note 6.

¹⁰ See *id.*

¹¹ *Wassung v. Wassung*, 136 Neb. 440, 286 N.W. 340 (1939). See, also, *State, ex rel. Phoenix Loan Co. v. Marsh*, 139 Neb. 290, 297 N.W. 551 (1941).

¹² *Ford v. Wainwright*, 477 U.S. 399, 411, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986).

court, and there can be no bureaucracy that discharges us from that responsibility.

There can be little question that Moore has received due process of law and has sought refuge in the courts before.¹³ We recently declined to consider, on postconviction review, Moore's challenge to both the mode and protocol of execution in Nebraska.¹⁴ Given the procedural posture of that case, and the uniquely limited scope of a postconviction proceeding, we correctly concluded that Moore's claims were barred.¹⁵ But issuing a warrant ordering Moore to be electrocuted implicates different responsibilities for this court and places the case in a different procedural posture.

Had we properly considered those responsibilities at the time, we would not have ordered the issuance of a death warrant. As already noted, another case on our docket,¹⁶ on a complete briefing and fully developed record, squarely presents us with the question whether electrocution is consistent with the prohibitions on cruel and unusual punishment imposed by the U.S. and Nebraska Constitutions. That case is scheduled for submission to this court in September 2007. While we have previously concluded that electrocution is constitutional, we have also noted a changing legal landscape that raises a question regarding the continuing vitality of that conclusion.¹⁷ Were we to conclude that electrocution is no longer constitutional, then we would have undeniably permitted a cruel and unusual punishment only a few months earlier. The damage to Moore, and to the integrity of the judicial process, would be irreparable. It would be premature to permit this electrocution to proceed without the benefit of deciding, on a developed record, whether electrocution is a lawful punishment. And if we were to conclude that electrocution was cruel and unusual *after* Moore had been electrocuted, "our citizens' confidence in this court and the rest

¹³ See, generally, *State v. Moore*, 272 Neb. 71, 718 N.W.2d 537 (2006).

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ *Mata*, *supra* note 2.

¹⁷ See, *Gales*, *supra* note 4; *Mata*, *supra* note 4.

of the judicial branch as a bastion of civil rights might suffer irreparable harm.”¹⁸

The purpose of a stay is to prevent a state from doing an act which is challenged and may be declared unlawful in a pending proceeding.¹⁹ The unique problem presented by this case is that Moore has not asked for a stay. But “[w]e simply are not permitted to avert our eyes from the fairness of a proceeding in which a defendant has received the death sentence.”²⁰ It is a natural reaction for some to wish to be rid of an admitted murderer who asks to be executed.²¹ We are nonetheless required to ensure the integrity of death sentences in Nebraska. In this case, that requires Moore to cede control of his defense to protect the public’s interest in the integrity and fairness of capital proceedings.²² Although we respect the defendant’s autonomy, the solemn business of executing a human being cannot be subordinated to the caprice of the accused.²³ We must adhere to our heightened obligation to ensure the lawful and constitutional administration of the death penalty, regardless of the wishes of the defendant in any one case.²⁴ Concerns for finality to a state’s judgments do not outweigh the absolute need to protect against the deprivation of an individual’s constitutional rights which might invalidate his capital sentence.²⁵

Finally, we observe that should Nebraska’s mode of execution be found lawful, the State’s interest in executing Moore’s sentence would only have been delayed. When a stay of execution is granted, it is also within the inherent power of this court to

¹⁸ See *State v. Ross*, 272 Conn. 577, 616, 863 A.2d 654, 676 (2005) (Norcott, J., concurring).

¹⁹ *Joubert*, *supra* note 6.

²⁰ See *State v. Reddish*, 181 N.J. 553, 603, 859 A.2d 1173, 1203 (2004).

²¹ *State v. Martini*, 144 N.J. 603, 677 A.2d 1106 (1996).

²² See *Reddish*, *supra* note 20.

²³ See *id.*, citing *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

²⁴ See *id.*

²⁵ *Joubert*, *supra* note 6, 246 Neb. at 304, 518 N.W.2d at 898.

terminate that stay and set a date when the sentence shall be carried into execution. We have the power to set successive execution dates and issue death warrants as the circumstances may dictate.²⁶ If Nebraska's method of execution is constitutional, a new warrant is not precluded and will issue.

For the foregoing reasons, we order, adjudge, and decree that the execution of Moore be, and hereby is, stayed and that the warrant of our clerk dated March 21, 2007, directing the warden of the Nebraska State Penitentiary to execute Moore be, and the same hereby is, withdrawn.

EXECUTION STAYED, AND WARRANT WITHDRAWN.

WRIGHT, J., not participating.

²⁶ *Palmer*, *supra* note 7.

HEAVICAN, C.J., dissenting.

Initially, we note that state and federal courts have considered numerous cases concerning Moore's conviction, sentencing, and resentencing.¹ In his second postconviction action following his resentencing to death, Moore raised an Eighth Amendment challenge to execution by electrocution generally and to the electrocution procedure in the then newly adopted 15-second protocol. Moore requested an order declaring electrocution to be unconstitutional.

On appeal from the denial of his request, this court determined that Moore's constitutional challenge to electrocution as the state-mandated method of execution was procedurally barred because in his direct appeal following resentencing, he did not

¹ See, *State v. Moore*, 272 Neb. 71, 718 N.W.2d 537 (2006); *State v. Moore*, 256 Neb. 553, 591 N.W.2d 86 (1999); *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); *State v. Moore*, 243 Neb. 679, 502 N.W.2d 227 (1993); *State v. Moore*, 217 Neb. 609, 350 N.W.2d 14 (1984); *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 v. Kinney*, 119 F. Supp. 2d 1022 (D. Neb. 2000), *affirmed* 320 F.3d 767 (8th Cir. 2003); and *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).

appeal the district court's overruling of his motion challenging the constitutionality of the death penalty.² We further concluded that we could not reach Moore's challenge to the protocol because "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,'"³ a requirement for relief under Nebraska's postconviction statutes.

However, we specifically distinguished civil rights actions under 42 U.S.C. § 1983 (2000) from actions for postconviction relief and indicated that a challenge to the protocol may be available under § 1983. We discussed cases in which the U.S. Supreme Court held that a § 1983 action was an appropriate vehicle for a prisoner's Eighth Amendment challenge to a state's method of execution, seeking temporary and permanent injunctive relief against application of its procedures.⁴ "A [civil rights] suit seeking to enjoin a particular means of effectuating a sentence of death does not directly call into question the 'fact' or 'validity' of the sentence itself—by simply altering its method of execution, the State can go forward with the sentence."⁵ This type of action is not procedurally barred as the functional equivalent of a successive application for habeas corpus relief.

Despite our clarification of the proper method for challenging the means of execution, Moore has not filed a § 1983 action seeking to enjoin his execution until the State alters its protocol or adopts another means of execution. Moreover, Moore has recently filed a pleading in this court stating that he no longer wishes to challenge his sentence and further stating that "no filings are to be accepted by this court which are not prepared and filed by myself." Moore's statements and lack of action show that he has elected to waive his right to challenge the State's protocol.

² See *State v. Moore*, *supra* note 1, 272 Neb. 71, 718 N.W.2d 537 (2006).

³ *Id.* at 80, 718 N.W.2d at 544.

⁴ See, *Hill v. McDonough*, 547 U.S. 573, 126 S. Ct. 2096, 165 L. Ed. 2d 44 (2006); *Nelson v. Campbell*, 541 U.S. 637, 124 S. Ct. 2117, 158 L. Ed. 2d 924 (2004).

⁵ *Nelson*, *supra* note 4, 541 U.S. at 644.

Through its inherent judicial power, this court has authority to do all things reasonably necessary for the proper administration of justice whether or not any previous form of remedy has been granted.⁶ We have specifically stated that we have the inherent judicial power to set successive execution dates and issue death warrants.⁷ However, in so doing, we must respect constitutional, jurisdictional, and jurisprudential restraints on our power to act.

Except in the exercise of its appellate jurisdiction, the Supreme Court is one of limited and enumerated powers.⁸ Article V, § 2, of the Nebraska Constitution prohibits the original jurisdiction of the Supreme Court except for causes of action listed in that provision.⁹ While it is not a constitutional prerequisite for jurisdiction, the existence of an actual case or controversy is necessary for the exercise of judicial power by a Nebraska state court.¹⁰ There is no pending request in this case, and the Attorney General has filed an affidavit averring that Moore has no known pending actions in state or federal court. We know of no case in which a court suspended a state's executions outside of the court's authority to act in response to a request for relief in an existing case by the condemned person.¹¹

We are aware of the Connecticut Supreme Court's decision in *In re Ross*,¹² in which petitioners—the public defender and

⁶ *State v. Joubert*, 246 Neb. 287, 518 N.W.2d 887 (1994).

⁷ *Id.*

⁸ *State ex rel. Wieland v. Moore*, 252 Neb. 253, 561 N.W.2d 230 (1997).

⁹ See *id.*

¹⁰ *Johnston v. Nebraska Dept. of Corr. Servs.*, 270 Neb. 987, 709 N.W.2d 321 (2006).

¹¹ Compare, e.g., *Morales v. Tilton*, 465 F. Supp. 2d 972 (N.D. Cal. 2006) (discussing history of stays and evidentiary hearings conducted after condemned prisoner filed 42 U.S.C. § 1983 action challenging lethal injection procedures); *Provenzano v. Moore*, 744 So. 2d 413 (Fla. 1999) (holding that execution by electric chair did not constitute cruel and unusual punishment after court had issued stay for evidentiary hearing pursuant to condemned prisoner's petition for writ of habeas corpus, filed while he was under warrant of death).

¹² *In re Ross*, 272 Conn. 676, 866 A.2d 554 (2005).

father of Michael B. Ross—sought to stay Ross’ execution and were denied relief. In an earlier case, the court had stated that Ross had not forfeited his ability to “exercise his right to file a petition for a writ of habeas corpus at any time and that, if he does so, the execution will be stayed.”¹³ Nonetheless, Ross specifically stated he did not wish to pursue such relief. The petitioners then sought postconviction relief on Ross’ behalf. They argued that Ross could not waive his right to seek postconviction remedies and that his execution must therefore be stayed.

The court rejected, for lack of standing, the petitioners’ attempt to gain next friend status to file the action on behalf of Ross and dismissed their motions to stay the execution. “It simply is unprecedented for this court to conclude that, although it has no jurisdiction over the case before it, it may act in that case to enter a stay in a separate proceeding.”¹⁴ The Connecticut Supreme Court further stated that the pendency of an unrelated unproven case in which the claim of systematic arbitrariness in the administration of the death penalty would not provide grounds for staying the death penalty in Ross’ case.¹⁵

Since this court issued the death warrant, there have been no requests for relief to this court by Moore, nor has he rescinded his earlier request that no action be taken by this court in his case. In the absence of any such action, this court has no immediate basis to act and it is unprecedented to do so.

MILLER-LERMAN, J., and CASSEL, Judge, join in this dissent.

¹³ *State v. Ross*, 272 Conn. 577, 580 n.2, 863 A.2d 654, 656 n.2 (2005).

¹⁴ *In re Ross*, *supra* note 12, 272 Conn. at 679-80, 866 A.2d at 557.

¹⁵ See *id.*

MILLER-LERMAN, J., dissenting.

There is no request for a stay or for other relief in the case before us. Mindful of the gravity of the matter, I write separately to note my concern at the issuance of a stay on the court’s own motion. Further, I am not persuaded that the pendency of other unrelated cases which will be heard and decided in a future term stands as a barrier to proceeding with the sentence in this case at this time.

IN RE INTEREST OF DALTON S., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V.
DALTON S., APPELLANT.
730 N.W.2d 816

Filed May 4, 2007. No. S-06-742.

1. **Juvenile Courts: Minors: Right to Counsel: Waiver: Appeal and Error.** The juvenile court's determination as to whether a juvenile's waiver of counsel was voluntary, knowing, and intelligent is reviewed de novo on the record for an abuse of discretion.
2. **Juvenile Courts: Judgments: Appeal and Error.** In reviewing questions of law in cases arising under the Nebraska Juvenile Code, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Juvenile Courts: Minors: Right to Counsel: Waiver.** Whether a juvenile has knowingly, voluntarily, and intelligently waived the right to counsel is to be determined from the totality of the circumstances.
4. ____: ____: ____: _____. The circumstances considered in a totality of the circumstances analysis of a juvenile's waiver of counsel include the age, intelligence, and education of the juvenile; the juvenile's background and experience generally, and more specifically, in the court system; the presence of the juvenile's parents; the language used by the court in describing the juvenile's rights; the juvenile's conduct; the juvenile's emotional stability; and the intricacy of the offense.
5. **Juvenile Courts: Minors: Right to Counsel: Waiver: Confessions: Proof.** Where a juvenile waives his or her right to counsel, the burden lies with the State, by a preponderance of the evidence, to show that the waiver was knowingly, intelligently, and voluntarily made. Courts should take special care in scrutinizing a purported confession or waiver by a child.
6. **Juvenile Courts: Minors: Right to Counsel: Waiver.** In explaining to a juvenile his or her right to counsel, courts should take care to employ language that the juvenile can understand and should take the time necessary to conduct a sufficient inquiry into the juvenile's understanding of the right to counsel and waiver thereof.
7. **Juvenile Courts: Minors.** The requirement of a written finding, under Neb. Rev. Stat. § 43-284 (Reissue 2004), that continuation in the home would be contrary to the health, safety, or welfare of a juvenile and that reasonable efforts to preserve and reunify the family have been made is not applicable to proceedings pursuant to an adjudication under Neb. Rev. Stat. § 43-247(1) (Reissue 2004).

Appeal from the County Court for Platte County: PATRICK R. McDERMOTT, Judge. Affirmed.

Terry L. Haddock, of Raynor, Rensch & Pfeiffer, and William J. Neiman for appellant.

Sandra Allen, Deputy Platte County Attorney, for appellee.

Jason D. Mielak, of Fehringer, Mielak & Fehringer, P.C., L.L.O., guardian ad litem for Dalton S.

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

McCORMACK, J.

NATURE OF CASE

Following a dispositional hearing, Dalton S., represented at the dispositional hearing by counsel and a guardian ad litem (GAL), was placed in the custody of the Nebraska Department of Health and Human Services, Office of Juvenile Services (OJS), in a treatment foster home. Dalton asserts that the court erred in placing him outside his uncle's home, where he had been residing, without a written determination expressly finding that continuation in the home would be contrary to Dalton's health, safety, or welfare and that reasonable efforts to preserve and unify the family had been made. Dalton's main contention, however, is that he did not intelligently, voluntarily, and understandingly waive his right to counsel in a previous adjudication hearing which placed Dalton under the juvenile court's jurisdiction pursuant to Neb. Rev. Stat. § 43-247(1) (Reissue 2004).

BACKGROUND

Dalton, born May 24, 1995, has been diagnosed as being mildly mentally handicapped and suffering from bipolar disorder, attention deficit disorder, and posttraumatic stress syndrome. On March 22, 2005, the Deputy Platte County Attorney filed a petition in the juvenile court alleging that Dalton had violated a city ordinance prohibiting disorderly conduct and was a juvenile within the meaning of § 43-247(1). The allegation stemmed from an incident at an elementary school in which Dalton allegedly hit another student and then knocked over some chairs. Although the county attorney had informed Dalton's parents that he would likely be eligible for diversion because he had no prior convictions or adjudications, this option was apparently not pursued.

A hearing on the petition was conducted on April 4, 2005. Dalton was present with his mother. He was not represented by an attorney or a GAL at that time. The court informed Dalton

of what he was being charged with and explained that if the allegations were found to be true, then the juvenile court would have jurisdiction over him to enter any order in his best interests. The court explained that such an order could range from “just telling you don’t do this again to placing you under some level of supervision by a probation officer.” The court further explained:

There are certain cases where children can be removed from home and placed in public or private institutions for their care. That can include hospitals, treatment centers, group or foster homes, places like Girls and Boys Town of Omaha and the like. And if there aren’t any other resources available to a juvenile court, a child can be placed in the custody of [OJS] for commitment to the Youth Rehabilitation and Treatment Center in Kearney, Nebraska for boys. The law further provides that rehabilitation of juveniles take place in their own home whenever possible and removal from home is only allowed in cases where a successful rehabilitation cannot be accomplished at home.

Dalton affirmed that he understood the possible consequences of being adjudicated to be under the jurisdiction of the juvenile court.

The court then continued to inform Dalton of his right that the charge against him be proved beyond a reasonable doubt. The court explained his right to confront witnesses, which the court explained meant “to see and hear and ask questions of any witness that the State calls.” The court explained to Dalton that he had a right to present witnesses and to subpoena witnesses if they were unwilling to come voluntarily. The court explained that “a subpoena is nothing more than an order that’s entered by a Court directed to a particular person and tells that person that they have to come to court and testify.” The court informed Dalton of his right to remain silent and the consequences of choosing to testify or remain silent. The court explained Dalton’s right to a speedy trial and his right to appeal if he was dissatisfied with the court’s judgment. Dalton affirmed that he understood all these rights.

Finally, the court explained to Dalton his right to counsel:

[Y]ou have a right to be represented by an attorney at every stage of the proceedings. You and your family would be free to hire an attorney of your choice or if you wish to be represented by counsel, and your family doesn't have enough money to go out and hire an attorney right now, you can ask the Court to appoint an attorney for you at the public expense. To be considered for a court appointed attorney, your family would have to complete a financial affidavit so I can determine whether or not you meet the current guidelines of the Court for appointed counsel. On the other hand, you can waive or give up your right to have an attorney and just go ahead today with your mother. Did you want to have a lawyer represent you in this court?

Dalton's mother told Dalton, "You don't need a lawyer. Say no. Say it." Dalton responded, "No." The court again asked, "You understood that right and you're telling me that you just want to go ahead with your mom today and not have a lawyer here, is that right?" Dalton's mother and Dalton responded, in turn, affirmatively. The court then addressed Dalton's mother more directly, "Is that all right with you, ma'am, that we'd proceed today . . . without counsel?" Dalton's mother responded that it was.

The court found that "the child with the concurrence of his mother freely, voluntarily and knowingly waives his right to counsel." The court then explained the rules of pleading and explained in detail the meaning and consequences of pleading guilty. Dalton affirmed that he understood, and more questions were presented by the court to determine the voluntariness of Dalton's plea.

The court accepted Dalton's admission that he committed the offense of disorderly conduct on February 24, 2005. A factual basis for the petition was presented to the court, which the court accepted. The court adjudicated Dalton to be within § 43-247(1), but deferred disposition until a predisposition study could be conducted. In the meantime, Dalton was to continue living with his mother.

On June 13, 2005, Dalton and his mother again appeared before the juvenile court. Dalton still did not have an attorney at that time. After a short discussion with the mother and Dalton,

the court continued disposition until further assessments could be conducted.

On July 25, 2005, Dalton appeared before the court with his mother, his grandfather, and his uncle. Also present was an attorney who was appearing as Dalton's court-appointed GAL. The court again continued disposition in order to complete a psychological assessment that was underway.

Another hearing was conducted on October 31, 2005, in which disposition was again continued, this time at the request of Dalton, through the GAL. The GAL explained that Dalton had been living with his uncle, who was present at the hearing, and that although Dalton's mother was not present that day, it was expected that she would consent to the nomination of Dalton's uncle as his guardian. The evidence indicated that Dalton's mother had a live-in boyfriend who was physically abusive toward both Dalton and his mother but that at some point, she had discontinued the relationship. There was also evidence that Dalton's mother had a drinking problem. Dalton's mother voluntarily placed Dalton with his uncle because she was having trouble coping with Dalton's behaviors at home.

On December 12, 2005, the juvenile court held another hearing in which Dalton, the GAL, Dalton's mother, and Dalton's uncle were present. Pursuant to the GAL's request and with Dalton's mother's consent, the court issued a temporary order naming Dalton's uncle as his guardian. The matter of permanent guardianship and further disposition was set for hearing on February 6, 2006.

On February 6, 2006, a short hearing was held which was attended only by Dalton's uncle and the GAL. Dalton's father also appeared and stated his intent to object to the proposed dispositional order prepared by the GAL. Dalton's father explained that he was in the process of acquiring an attorney, and the court granted another continuance. Dalton's father did not appear before the court again.

A hearing was held on March 27, 2006, on the State's request for an OJS evaluation before final disposition. Dalton, his uncle, and the GAL were present at the hearing. The county attorney explained that some events had recently occurred which resulted in the State's no longer wanting to continue

the guardianship of Dalton's uncle. The record indicates that concerns had arisen with respect to Dalton's placement with his uncle because Dalton admitted to two episodes of improper physical sexual contact with his 4-year-old female cousin, the daughter of Dalton's uncle. Dalton's uncle stated that he did not have any objections to the requested evaluation, and the court ordered the evaluation be conducted and continued disposition.

The next hearing before the juvenile court was on June 5, 2006. Dalton was present and, in addition to the GAL, was also represented for the first time by an attorney retained on Dalton's behalf by Dalton's uncle. The court granted a motion by Dalton's attorney for a continuance.

The dispositional hearing was finally conducted on June 19, 2006. Dalton and his uncle were present, as were Dalton's GAL and attorney. The State argued that the OJS evaluation supported its contention that out-of-home treatment would be in Dalton's best interests, as well as in the best interests of the 4-year-old victim. Dalton's attorney, in contrast, argued that Dalton should remain with his uncle as long as a safety plan for Dalton's cousin was in place. Alternatively, the attorney expressed the willingness of Dalton's grandparents to take him in and asked for an investigation to see if the grandparents' home would be an appropriate placement.

A comprehensive child and adolescent assessment conducted by OJS indicated that Dalton's mother was no longer drinking and had ceased her relationship with the abusive boyfriend. She was having supervised visitation with Dalton. Dalton was evaluated as being at least a moderate risk to reoffend against other children. It was noted that there were at least three inappropriate incidents with his cousin, at least one of which was after a safety plan had been implemented to prevent such an incident. Although Dalton's behavior had improved since living with his uncle, the assessment recommended that due to the abuse concerns with Dalton's cousin, Dalton be placed in treatment foster care.

The court found that it would be in Dalton's best interests to be placed in the care, custody, and control of OJS for appropriate residential placement in a treatment foster home. The court noted that the assessments reflected a complex diagnosis for

such a young child, and the court concluded that the number and complexity of the diagnoses mandated “intense treatment” and were “beyond the capability of probably any family to manage.” The court also expressed its concern that Dalton and his young victim not be living in the same home and that Dalton be in an environment where “silence is not valued.” Dalton timely filed his notice of appeal from the court’s dispositional order.

ASSIGNMENTS OF ERROR

Dalton assigns as error that the juvenile court abused its discretion in accepting Dalton’s plea because (1) it failed to adequately advise Dalton of his right to counsel, (2) it failed to conduct a thorough inquiry into Dalton’s intelligence or capacity to understand that right, (3) it failed to advise Dalton or his mother of Dalton’s right to counsel at every stage of the proceedings, and (4) the totality of the circumstances reflected in the record does not support a finding of waiver.

Dalton also asserts that the juvenile court erred by entering a dispositional order removing Dalton from his uncle’s home without making a written determination, as mandated by Neb. Rev. Stat. § 43-284 (Reissue 2004), that continuation in the uncle’s home would be contrary to the health, safety, or welfare of Dalton and that reasonable efforts to preserve and unify the family had been made.

STANDARD OF REVIEW

[1] The juvenile court’s determination as to whether a juvenile’s waiver of counsel was voluntary, knowing, and intelligent is reviewed *de novo* on the record for an abuse of discretion.¹

[2] As to the issue presented regarding the applicability of § 43-284, this presents a question of law. In reviewing questions of law in cases arising under the Nebraska Juvenile Code, an appellate court reaches a conclusion independent of the lower court’s ruling.²

¹ See *In re Interest of J.K.*, 265 Neb. 253, 656 N.W.2d 253 (2003) (juvenile court’s decision regarding appointment of special counsel is reviewed *de novo* on record for abuse of discretion).

² See *In re Interest of Veronica H.*, 272 Neb. 370, 721 N.W.2d 651 (2006).

ANALYSIS

WAIVER OF COUNSEL

We first consider Dalton's assertion that he did not intelligently, voluntarily, and understandingly waive his right to counsel in the adjudication hearing which placed Dalton under the juvenile court's jurisdiction pursuant to § 43-247(1).

Dalton does not contest the fact that the juvenile court conducted the colloquy required by statute for informing a juvenile of the right to counsel and for acceptance of a juvenile's plea without counsel.³ Section 43-272(1) states in relevant part:

When any juvenile shall be brought without counsel before a juvenile court, the court shall advise such juvenile and his or her parent or guardian of their right to retain counsel and shall inquire of such juvenile and his or her parent or guardian as to whether they desire to retain counsel. The court shall inform such juvenile and his or her parent or guardian of such juvenile's right to counsel at county expense if none of them is able to afford counsel.

Section 43-279(1) provides that the court shall inform the parties of the nature of the proceedings and possible consequences or dispositions, the juvenile's right to counsel, the privilege against self-incrimination, the right to confront witnesses, the right to compel witnesses to testify, the right to a speedy adjudication hearing, the right to appeal, and the right to a transcript for appeal. After giving such warnings and admonitions:

[T]he court may accept an in-court admission by the juvenile of all or any part of the allegations in the petition if the court has determined from examination of the juvenile and those present that such admission is intelligently, voluntarily, and understandingly made and with an affirmative waiver of rights and that a factual basis for such admission exists.⁴

Dalton asserts that despite conducting the statutory colloquy, the record does not support the juvenile court's determination that Dalton intelligently, voluntarily, and understandingly

³ See Neb. Rev. Stat. §§ 43-272 and 43-279(1) (Reissue 2004).

⁴ § 43-279(1).

waived his right to counsel. Dalton correctly points out that the issue of how precisely a juvenile court is to make the determination of whether a juvenile has intelligently, voluntarily, and understandingly waived his or her right to counsel is one of first impression for this court.

The U.S. Supreme Court in *In re Gault*⁵ reversed a delinquency determination because the juvenile court did not inform the juvenile or his parents of a right to counsel. The Court in *In re Gault* established that a juvenile in delinquency proceedings which could result in the curtailment of the juvenile's freedom has a due process right to counsel under the 14th Amendment.⁶ Dalton argues that his 14th Amendment rights were violated and that thus, the adjudication order and all dispositional orders issued under the jurisdiction acquired by the adjudication order must be vacated. For the reasons that will be explained below, we find that Dalton's due process right to counsel was not violated in this case.

We first address Dalton's argument that he was inadequately informed of his right to counsel. Dalton asserts that in addition to the colloquy set forth by statute, the court must inform of the "dangers and disadvantages of self-representation"⁷ in order for its advisement to be sufficient under the 14th Amendment.

In *In re Gault*, the Court explained that it was necessary to adequately inform the juvenile and his mother of the right to counsel regardless of evidence that the mother knew she could have appeared with counsel. The Court explained:

They had a right expressly to be advised that they might retain counsel and to be confronted with the need for specific consideration of whether they did or did not choose to waive the right. If they were unable to afford to employ counsel, they were entitled in view of the seriousness of the

⁵ *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

⁶ See, *In re Interest of J.K.*, *supra* note 1; *In re Interest of Torrey B.*, 6 Neb. App. 658, 577 N.W.2d 310 (1998).

⁷ Brief for appellant at 19.

charge and the potential commitment, to appointed counsel, unless they chose waiver.⁸

The concept of being advised of the “dangers and disadvantages of self-representation” is not mentioned in *In re Gault*. That concept is derived from *Faretta v. California*,⁹ wherein the Court stated, in the context of an adult criminal defendant’s waiver of counsel, that the defendant “should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that ‘he knows what he is doing and his choice is made with eyes open.’” Advising of the dangers and disadvantages of self-representation goes beyond advising of the seriousness of the charge and the potential commitment. It has been said to encompass, more specifically, an explanation of the facts that technical rules govern trials and that a layperson may be at a disadvantage in maneuvering through trial.¹⁰

However, the U.S. Supreme Court has not “prescribed any formula or script to be read to a defendant.”¹¹ We have held, in the context of an adult criminal defendant, that a specific warning of the dangers and disadvantages of self-representation is not strictly required.¹² A voluntary, knowing, and intelligent waiver of counsel can be found in the absence of a warning if the record viewed as a whole shows such a waiver.¹³

⁸ *In re Gault*, *supra* note 5, 387 U.S. at 42.

⁹ *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

¹⁰ See, *U.S. v. McDowell*, 814 F.2d 245 (6th Cir. 1987); *People v. Goodwillie*, 147 Cal. App. 4th 695, 54 Cal. Rptr. 3d 601 (2007); *State v. Strain*, 585 So. 2d 540 (La. 1991); *State v. Johnson*, 944 So. 2d 864 (La. App. 2006); *State v. Crisafi*, 128 N.J. 499, 608 A.2d 317 (1992); *State v. Martin*, 103 Ohio St. 3d 385, 816 N.E.2d 227 (2004); *Johnson v. State*, 760 S.W.2d 277 (Tex. Crim. App. 1988).

¹¹ *Iowa v. Tovar*, 541 U.S. 77, 88, 124 S. Ct. 1379, 158 L. Ed. 2d 209 (2004).

¹² See, *State v. Gunther*, 271 Neb. 874, 716 N.W.2d 691 (2006); *State v. Delgado*, 269 Neb. 141, 690 N.W.2d 787 (2005); *State v. Green*, 238 Neb. 328, 470 N.W.2d 736 (1991).

¹³ *State v. Green*, *supra* note 12.

We decline to adopt a position in the context of juvenile proceedings that would preclude a finding of a knowing and intelligent waiver in the absence of *Faretta* admonishments. Indeed, at least one court has decided that warnings regarding the dangers and disadvantages of self-representation are unneeded in the context of a defendant charged with a misdemeanor offense who does not contest the charge.¹⁴ Many juvenile proceedings, such as the one before us, involve simple matters in which there is no dispute. In such cases, there is little in the way of intricacies of the offense, technical rules of evidence, or rules relating to the examination of witnesses, which would need to be described as dangers and disadvantages of self-representation.

Here, the juvenile court informed Dalton of the seriousness of the charge against him and the potential commitment, as mandated by *In re Gault*. The court stated that it had the power to issue any order in Dalton's best interests. This could include hospitals, treatment centers, and group or foster homes. It is undisputed that the court satisfied the detailed colloquy mandated by statute. We find no reversible error based on an alleged lack of adequate advisement. We now turn to whether the juvenile court abused its discretion in its determination that Dalton understood his right to counsel and knowingly and intelligently waived that right.

[3] We hold that whether a juvenile has knowingly, voluntarily, and intelligently waived the right to counsel is to be determined from the totality of the circumstances. We note that because the juvenile in *In re Gault* was never advised of a right to counsel, the court in that case did not specify how that right could be effectively waived. Subsequent cases from other jurisdictions have adopted varying frameworks for this determination, but the most common approach is to consider the totality of the circumstances.¹⁵ We have adopted this approach for determining, in both adult and juvenile contexts, whether there has been an effective waiver of *Miranda* rights.¹⁶ And the totality

¹⁴ *Hatten v. State*, 71 S.W.3d 332 (Tex. Crim. App. 2002).

¹⁵ Annot., 101 A.L.R.5th 351 (2002).

¹⁶ See, e.g., *State v. Garner*, 260 Neb. 41, 614 N.W.2d 319 (2000).

of the circumstances approach, in the *Miranda* context, has been explicitly approved by the U.S. Supreme Court.¹⁷

[4] The circumstances considered in a totality of the circumstances analysis include the age, intelligence, and education of the juvenile¹⁸; the juvenile's background and experience generally, and more specifically, in the court system¹⁹; the presence of the juvenile's parents²⁰; the language used by the court in describing the juvenile's rights²¹; the juvenile's conduct²²; the juvenile's emotional stability²³; and the intricacy of the offense.²⁴

[5,6] It is generally accepted that where a juvenile waives his or her right to counsel, the burden lies with the State, by a preponderance of the evidence, to show that the waiver was knowingly, intelligently, and voluntarily made.²⁵ Courts should take special care in scrutinizing a purported confession or waiver by a child.²⁶ Courts should also take care to employ language that the juvenile can understand and to take the time necessary to conduct a sufficient inquiry into the juvenile's understanding of the right to counsel and waiver thereof.

¹⁷ See *Fare v. Michael C.*, 442 U.S. 707, 99 S. Ct. 2560, 61 L. Ed. 2d 197 (1979).

¹⁸ See, e.g., *People v Bingaman*, 144 Mich. App. 152, 375 N.W.2d 370 (1984).

¹⁹ See, e.g., *Matter of Maricopa County Juv. Action*, 165 Ariz. 226, 798 P.2d 364 (1990).

²⁰ See, e.g., *Huff v. K. P.*, 302 N.W.2d 779 (N.D. 1981).

²¹ See, e.g., *Sutton v. Mt. Sinai Med. Ctr.*, 102 Ohio App. 3d 641, 657 N.E.2d 808 (1995).

²² See, e.g., *In re D.L.*, 999 S.W.2d 291 (Mo. App. 1999).

²³ See *In re Johnson*, 106 Ohio App. 3d 38, 665 N.E.2d 247 (1995).

²⁴ See, e.g., *G.E.F. v. State*, 782 So. 2d 951 (Fla. App. 2001). See, also, generally, Annot., 101 A.L.R.5th, *supra* note 15; 47 Am. Jur. 2d *Juvenile Courts, Etc.* § 87 (2006) (citing cases).

²⁵ See *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). See, also, *State v. Wilson*, 252 Neb. 637, 564 N.W.2d 241 (1997).

²⁶ *In re Manuel R.*, 207 Conn. 725, 543 A.2d 719 (1988). See, also, *In re B. M. H.*, 177 Ga. App. 478, 339 S.E.2d 757 (1986).

Here, Dalton was only 9 years old and mildly mentally handicapped. He apparently had no previous experience in court proceedings. But Dalton's mother was present, and she was actively involved in Dalton's waiver.²⁷ While his mother's involvement would be given little weight if she had a conflict with Dalton's best interests,²⁸ we are unconvinced by Dalton's assertions that such a conflict of interest existed in this case. The mere fact that Dalton's mother had demonstrated some failings in caring for Dalton or that she did not pursue the diversion offered by the county attorney does not demonstrate a conflict of interest.²⁹

Nor do we accept Dalton's contention that for Dalton's mother's acquiescence to be given any weight, the record must affirmatively show a meaningful consultation between them.³⁰ This apparently would entail, according to Dalton, evidence of a separate colloquy between the mother and Dalton explaining to him the right to counsel. In this case, Dalton and his mother were present together before the court when it gave, in plain language, an explanation of the right to counsel. Dalton and his mother were obviously free to speak to each other during this time. Dalton's mother told Dalton that he did not need a lawyer.

Dalton now points to his mother's statement, "You don't need a lawyer. Say no. Say it," as demonstrating a lack of meaningful consultation. We find this statement inconsequential. Both Dalton and his mother were repeatedly questioned as to whether they understood the right being explained and whether they wished to waive that right. We find the proceedings sufficient

²⁷ See, e.g., *R. V. P. v. State*, 395 So. 2d 291 (Fla. App. 1981); *K. E. S. v. State of Ga.*, 134 Ga. App. 843, 216 S.E.2d 670 (1975); *In re K.H.*, 718 N.W.2d 575 (N.D. 2006); *Huff v. K. P.*, *supra* note 20; *In re A.M.*, 766 A.2d 1263 (Pa. Super. 2001).

²⁸ See, *In re Shawnn F.*, 34 Cal. App. 4th 184, 40 Cal. Rptr. 2d 263 (1995); *In re Manuel R.*, *supra* note 26.

²⁹ See *In re Manuel R.*, *supra* note 26.

³⁰ See, e.g., *Williams v. State*, 433 N.E.2d 769 (Ind. 1982); *State in the Interest of Jones*, 372 So. 2d 779 (La. App. 1979); *Edward C. v. Collings*, 193 Mont. 426, 632 P.2d 325 (1981).

to give weight to Dalton's mother's presence and to her explicit agreement with Dalton's waiver of counsel.

In considering whether Dalton's 14th Amendment right was violated, we also consider the fact that the offense with which Dalton was charged was disorderly conduct in violation of a city ordinance. The record does not reflect any dispute as to the fact that Dalton hit another student and knocked over some chairs one day at school. Moreover, after the adjudication, Dalton made only one other appearance before the court without counsel, when the court simply decided to continue disposition. By the time of the July 25, 2005, appearance, Dalton had been appointed a GAL, who continued to represent his interests throughout the remaining proceedings. By the time of the dispositional hearing, when the issues had grown in complexity, Dalton's interests were represented by both his GAL and retained counsel.

Viewing the totality of the circumstances, we do not find a violation of Dalton's 14th Amendment rights in the juvenile proceedings. We find no error in failing to continually advise Dalton of his right to counsel once he was represented by a GAL, and we find no due process violation in his lack of advisement in a single hearing resulting in a continuance. Nor do we find the court's probing into Dalton's intelligence or capacity constitutionally insufficient under the circumstances of this case. We find no merit to Dalton's assignments of error relating to his waiver of counsel.

WRITTEN DETERMINATION UNDER § 43-284

Dalton also claims that the juvenile court erred in placing Dalton in a treatment foster home without first making a written determination, under § 43-284, that continuation in the home would be contrary to the health, safety, or welfare of the juvenile and that reasonable efforts to preserve and reunify the family had been made.

[7] The State argues that the requirement for such a written finding is not applicable to juveniles who are adjudicated under § 43-247(1). We agree. By its terms, § 43-284 is the statutory provision regarding disposition of juveniles adjudicated under § 43-247(3), (4), or (9). Neb. Rev. Stat. § 43-286 (Reissue 2004), in contrast, is the applicable section on disposition for juveniles

adjudicated under § 43-247(1), (2), or (4). Section 43-286 speaks of placing the juvenile in a suitable institution or committing the juvenile to OJS, but nowhere refers to a finding that continuation in the home would be contrary to the health, safety, or welfare of the juvenile or that reasonable efforts to preserve and reunify the family have been made.

CONCLUSION

We affirm the judgment of the juvenile court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
 RONNIE THURMAN, APPELLANT.
 730 N.W.2d 805

Filed May 4, 2007. No. S-06-761.

1. **Criminal Law: Sexual Assault: Intent.** First degree sexual assault is a general intent crime, and criminal intent is inferred from the commission of the acts constituting the elements of the crime.
2. **Criminal Law: False Imprisonment: Intent.** First degree false imprisonment is a general intent crime when the defendant is charged with knowingly restraining or abducting another person under terrorizing circumstances or under circumstances which expose the person to the risk of serious bodily injury.
3. **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.
4. **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.
5. **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.
6. **Motions for Continuance: Appeal and Error.** There is no abuse of discretion by the court in denying a continuance unless it clearly appears that the defendant suffered prejudice as a result of that denial.

7. **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 Hall County: JAMES LIVINGSTON, Judge. Affirmed.

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

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

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

HEAVICAN, C.J.

I. BACKGROUND

Defendant Ronnie Thurman was charged with kidnapping, first degree sexual assault, second degree assault, and two counts of use of a weapon to commit a felony. Following a jury trial, Thurman was acquitted of kidnapping, but convicted of the lesser-included offense of first degree false imprisonment. Thurman was also convicted of first degree sexual assault, second degree assault, and two counts of use of a weapon to commit a felony. Thurman was sentenced to terms of imprisonment totaling 51 to 70 years. Thurman appeals. We moved this case to our docket pursuant to our authority to regulate the dockets of this court and the Nebraska Court of Appeals.¹ We affirm Thurman's convictions and sentences.

1. SEPTEMBER 12 THROUGH 13, 2005

At trial, the victim, A.W., testified that on September 12, 2005, while waiting for a friend outside a bar in Grand Island, Nebraska, she was approached by Thurman, with whom she was acquainted. A.W. and Thurman saw each other periodically

¹ See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

throughout that evening. A.W. eventually drove Thurman to his apartment so that she, Thurman, and Thurman's girlfriend, Ethel Hanger, could discuss the possibility of A.W.'s selling her car to the couple.

Upon arriving at his apartment, Thurman left A.W. in the living room while he went into the bedroom to wake Hanger. Hanger then joined A.W. and Thurman in the living room where they discussed the car. Hanger apparently decided that she wanted to purchase the car and handed a bankcard to Thurman. At that point, A.W. indicated that before she sold the car, she ought to speak with the man who had purchased it for her.

According to A.W.'s testimony, at that point, Thurman returned the bankcard to Hanger and Hanger left the room. Thurman then displayed a gun and began waving it around and yelling at A.W. A.W. testified that she tried to leave the premises, but that Thurman came at her, striking the top of her head with the gun. On cross-examination, A.W. testified that Thurman hit her on the head with "his hand, but his hand was holding the gun, back-handed like." A.W. was then asked to clarify:

Q So perhaps the bottom part of his hand holding the gun hit the top of your head, is that right?

A Well, whatever it was it cut the head open.

Q Okay. You don't know if it was the hand or the gun or what it was, but your head got cut open from a blow to the head, right?

A Yeah.

After she was struck, A.W. again indicated that she wanted to leave and began fighting with Thurman in an attempt to get out of the apartment. During the fight, the gun went off. A.W. stated that at first, she continued to fight with Thurman, but soon decided to cooperate due to the fact that she was bleeding heavily.

According to A.W., during the fight, her shirt had been ripped off her body and she had suffered various scratches and injuries in addition to the cut on her head. Thurman indicated to A.W. that she should go into the bathroom and get cleaned up, as she was covered in blood. A.W. testified that Thurman assisted her in removing her remaining clothing and in cleaning some of the blood from her body.

Thurman then made A.W. go into the bedroom, where Thurman tied A.W., naked, to the bed using makeshift restraints torn from a bedsheet. According to A.W.'s testimony, she was tied to the bed for the next 7 or 8 hours. During that time, Thurman attempted to penetrate her vagina with his penis, but was unable to maintain an erection. Various other sex acts were performed on A.W., and she was forced to perform sex acts on both Thurman and Hanger.

A.W. testified that she was allowed to leave after she convinced Thurman that she was pregnant (though, in fact, she was not) and had a doctor's appointment scheduled for the morning of September 13, 2005. Before she was allowed to leave, Thurman made A.W. pose for some photographs in which A.W. appears nude or seminude. According to A.W.'s testimony, the gun was present throughout these events, and on several occasions, Thurman threatened to shoot her.

After Thurman released A.W., she first drove around in her car, then contacted friends. A.W. was eventually convinced to go to a hospital, where officials called the police.

2. TESTIMONY REGARDING PHYSICAL EVIDENCE

Jennifer Galvan, a sexual assault nurse examiner at a local hospital, examined A.W. Galvan testified that A.W. had abrasions to her left shoulder, forehead, and left ankle; cuts on her head; scratches on her chest; and bruises on her left wrist. A rape kit examination was performed on A.W. According to Galvan, there was no injury to A.W.'s vagina, but that such would not be surprising if the penis did not fully penetrate the vagina. Galvan also testified that there was unlikely to be any injury from oral sex. Galvan stated that an ultraviolet light was used on A.W. to look for possible semen or saliva, but that none was detected. However, according to Galvan, if a perpetrator did not ejaculate, the lack of semen would not be unusual.

Several law enforcement officers testified with regard to a search warrant executed at Thurman's residence. Strips of fabric were found at the scene, including two strips tied to a bed, two strips on the floor near the headboard, and others found throughout the apartment. A white or off-white shirt with what appeared to be blood on it in was found in the bathroom. That shirt and a

cross necklace also found at the scene were identified by A.W. as belonging to her.

3. INTERVIEW WITH HANGER

Hanger was separately charged in this incident. The State offered her use immunity pursuant to Neb. Rev. Stat. § 29-2011.02 (Reissue 1995) in return for her testimony against Thurman. In exchange for the immunity, Hanger did testify at trial, but generally testified that she did not remember anything about the incident.

An investigator with the Grand Island Police Department testified regarding an interview he conducted with Hanger following the events in question. During that interview, Hanger acknowledged that A.W. was tied to the bed. Though Hanger initially stated that A.W. had asked to be tied down, she later admitted that it was not a consensual act. During the interview, Hanger also indicated that Thurman threatened to kill A.W. in order to scare her. According to the investigator's testimony, during her interview, Hanger acknowledged that she was taking the medication clonazepam, that she suffered from flashbacks, and that she had spent time at a mental health facility.

II. ASSIGNMENTS OF ERROR

On appeal, Thurman argues, summarized and restated, that the district court erred in (1) upholding the jury verdict of guilty on two counts of use of a weapon to commit a felony, (2) finding that the evidence presented at trial was sufficient to sustain his convictions for first degree sexual assault and second degree assault, (3) denying his motions for continuance to depose Hanger and to obtain Hanger's mental health records, and (4) imposing an excessive sentence.

III. ANALYSIS

1. THURMAN WAS PROPERLY CONVICTED OF USE OF WEAPON TO COMMIT FELONY

In his first assignment of error, Thurman argues that the district court erred in upholding his convictions on two counts of use of a weapon to commit a felony because the underlying felonies were general intent crimes which would not support the use charges. Thurman argues that the underlying felonies, first

degree sexual assault and first degree false imprisonment, while general intent crimes, are not intentional under *State v. Ring*² and *State v. Pruett*.³ The State argues that Thurman confuses specific intent, general intent, and unintentional crimes and that only an unintentional felony would not support a use of a weapon charge.

In *Ring*, this court stated:

The apparent purposes behind § 28-1205 [which criminalizes the use of a weapon to commit a felony] are to discourage individuals from employing deadly weapons in order to facilitate or effectuate the commission of felonies and to discourage persons from carrying deadly weapons while they commit felonies. The statute is designed to regulate the manner in which felonies are committed, i.e., with the use or possession of deadly weapons. . . . It cannot reasonably be said that § 28-1205 will dissuade a person from using a deadly weapon to commit an unintentional felony; the two concepts are logically inconsistent. Thus, in order to interpret § 28-1205 in a manner which is consistent with its objective, we hold that the language “to commit any felony,” as it is used in that section, is synonymous with “for the purpose of committing any felony.”⁴

We thus concluded that motor vehicle homicide was an unintentional crime that would not support a conviction for use of a weapon to commit a felony.⁵ We subsequently held in *Pruett* that manslaughter due to reckless assault was also an unintentional crime which could not support a use of a weapon charge.⁶

² *State v. Ring*, 233 Neb. 720, 447 N.W.2d 908 (1989).

³ *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002).

⁴ *State v. Ring*, *supra* note 2, 233 Neb. at 724, 447 N.W.2d at 911 (citation omitted).

⁵ *State v. Ring*, *supra* note 2.

⁶ *State v. Pruett*, *supra* note 3. See, also, *State v. Rye*, 14 Neb. App. 133, 705 N.W.2d 236 (2005) (terroristic threat committed recklessly is unintentional crime).

(a) Conviction for First Degree Sexual Assault
Supports Use of Weapon Conviction

Thurman argues that because intent is not an element of first degree sexual assault and because a defendant is not entitled to introduce affirmative defenses to negate intent, the crime cannot be considered intentional.

[1] Thurman does not dispute that first degree sexual assault is a general intent crime.⁷ As a general intent crime, criminal intent is inferred from the commission of the acts constituting the elements of the crime of first degree sexual assault.⁸ In order to prove general criminal intent, the State must prove beyond a reasonable doubt that the accused subjected another person to sexual penetration and overcame the victim by force, threat of force, coercion, or deception.⁹

As the State notes, while under *Ring*, a vehicle cannot be used “for the purpose of” unintentionally committing motor vehicle homicide, it would be “absurd” if a weapon could not be used “for the purpose of” subjecting another to sexual penetration through the use of force, threat of force, coercion, or deception.¹⁰ The reasoning expressed in *Ring* simply has no application outside of the context of a purely unintentional crime. The district court did not err in concluding that first degree sexual assault would support a use of a weapon charge.

(b) Conviction for First Degree False Imprisonment
Supports Use of Weapon Conviction

Thurman also argues that the general intent crime of first degree false imprisonment cannot support a use of a weapon conviction. Thurman contends that to convict him of first degree false imprisonment, the State was required to show that he acted knowingly, but not that he acted intentionally.

[2] As relevant to this case, Neb. Rev. Stat. § 28-314 (Cum. Supp. 2006) provides that “[a] person commits false imprisonment in the first degree if he or she knowingly restrains or

⁷ See *State v. Koperski*, 254 Neb. 624, 578 N.W.2d 837 (1998).

⁸ *Id.*

⁹ *Id.*

¹⁰ Brief for appellee at 12.

abducts another person . . . under terrorizing circumstances or under circumstances which expose the person to the risk of serious bodily injury”

“Knowingly” was defined in the jury instructions as “a perception of facts required to make up the crime and may be inferred from the facts and circumstances surrounding the act.” “Intentionally” was defined in those same instructions as “willfully or purposely.” The U.S. Supreme Court has held that “‘the limited distinction between knowledge and purpose has not been considered important since “there is good reason for imposing liability whether the defendant desired or merely knew of the practical certainty of the results.’”¹¹ The Court also noted that “‘purpose’ corresponds loosely with the common-law concept of specific intent, while ‘knowledge’ corresponds loosely with the concept of general intent.”¹²

Given this “limited distinction,” it is clear that since the State must show Thurman acted knowingly in order to show he falsely imprisoned A.W., such a requirement is an indication that first degree false imprisonment as charged in this case is a general intent crime.¹³ As noted above, with a general intent crime, a showing of intent by the State is required, but may be inferred from the commission of the acts constituting the elements of the crime.¹⁴

For the same reasons expressed with respect to first degree sexual assault, it is clear that a conviction for first degree false imprisonment would support a conviction for use of a weapon to commit a felony. It is not inconsistent to find that a defendant could use a weapon “for the purpose of” restraining or abducting someone under circumstances which are terrorizing or which expose someone to the risk of serious bodily injury. The district

¹¹ *United States v. Bailey*, 444 U.S. 394, 404, 100 S. Ct. 624, 62 L. Ed. 2d 575 (1980).

¹² *Id.*, 444 U.S. at 405.

¹³ See, *State v. Robbins*, 253 Neb. 146, 570 N.W.2d 185 (1997); *State v. Miller*, 216 Neb. 72, 341 N.W.2d 915 (1983).

¹⁴ See *State v. Koperski*, *supra* note 7.

court also did not err in finding that first degree false imprisonment would support a use of a weapon conviction.

Thurman's first assignment of error is without merit.

2. EVIDENCE WAS SUFFICIENT TO SUPPORT CONVICTIONS
FOR FIRST DEGREE SEXUAL ASSAULT
AND SECOND DEGREE ASSAULT

[3] In his second assignment of error, Thurman argues that the district court erred in concluding the evidence was sufficient to convict him of first degree sexual assault and of second degree assault. 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.¹⁵

(a) Evidence Was Sufficient to Support
Conviction for First Degree Sexual Assault

Thurman first contends the district court erred in finding there was sufficient evidence to support his conviction for first degree sexual assault. The basis for Thurman's argument is that A.W.'s testimony was not credible, particularly given the lack of physical evidence indicating she was sexually assaulted.

Neb. Rev. Stat. § 28-319 (Reissue 1995) provides that first degree sexual assault is committed when "[a]ny person . . . subjects another person to sexual penetration . . . without consent of the victim . . ." Neb. Rev. Stat. § 28-318(6) (Cum. Supp. 2004) defines sexual penetration as "sexual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the actor's or victim's body or any

¹⁵ *State v. White*, 272 Neb. 421, 722 N.W.2d 343 (2006).

object manipulated by the actor into the genital or anal openings of the victim's body”

A.W. testified that Thurman penetrated her vagina with his penis, that he anally penetrated her, and that he forced her to perform oral sex on him. Viewed in a light most favorable to the State, A.W.'s testimony is sufficient to support Thurman's conviction for first degree sexual assault. That A.W. testified Thurman was unable to maintain an erection is inconsequential as the definition of penetration includes any “intrusion, however slight.”

Moreover, Thurman's contention that A.W.'s testimony is not credible is without merit, as this court does not pass on the credibility of witnesses when assessing the sufficiency of the evidence to support a conviction.¹⁶ Accordingly, we conclude the evidence was sufficient to support Thurman's conviction for first degree sexual assault.

(b) Evidence Was Sufficient to Support
Conviction for Second Degree Assault

Thurman also contends the evidence was insufficient to support his conviction for second degree assault. Thurman argues that the evidence was not sufficient because A.W. testified that she did not know whether the injury to her head was caused by the butt of the gun or by Thurman's hand.

Neb. Rev. Stat. § 28-309 (Cum. Supp. 2006) provides in relevant part that “[a] person commits the offense of assault in the second degree if he or she [i]ntentionally or knowingly causes bodily injury to another person with a dangerous instrument.”

A.W. testified on direct examination that Thurman struck her on the head with the butt of a handgun. On cross-examination, in response to an inquiry as to whether it might have been Thurman's hand that struck her rather than the butt of the gun, A.W. testified that “whatever it was it cut the head open.” Also admitted into evidence was Galvan's testimony that A.W. had cuts to her head and a photograph of the head wound in question.

¹⁶ *Id.*

An appellate court does not pass on the credibility of witnesses.¹⁷ Based upon the evidence presented to it, a jury could have reasonably concluded that A.W.'s head wound was caused by the gun, rather than by Thurman's bare hand. We conclude the evidence was sufficient to support Thurman's conviction for second degree assault.

Thurman's second assignment of error is without merit.

3. DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN
DENYING THURMAN'S MOTIONS FOR CONTINUANCE

[4-6] In his third assignment of error, Thurman contends the district court erred in failing to grant his motion for continuance to depose Hanger and to obtain her medical records. 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.¹⁸ 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.¹⁹ There is no abuse of discretion by the court in denying a continuance unless it clearly appears that the defendant suffered prejudice as a result of that denial.²⁰

(a) District Court Did Not Abuse Its Discretion in Denying
Thurman's Motion for Continuance to Depose Hanger

Thurman first argues that the district court erred in denying his motion for continuance to depose Hanger. One factor this court considers in determining whether a trial court abused its discretion in denying a continuance is whether the party seeking the continuance "exercised diligence in attempting to procure the evidence."²¹ The record before this court indicates Thurman did not exercise diligence.

¹⁷ *Id.*

¹⁸ *State v. Davlin*, 272 Neb. 139, 719 N.W.2d 243 (2006).

¹⁹ *Id.*

²⁰ *State v. Perez*, 235 Neb. 796, 457 N.W.2d 448 (1990).

²¹ *State v. Fleming*, 223 Neb. 169, 180, 388 N.W.2d 497, 505 (1986).

As was noted by the State and the district court, and further conceded by Thurman, Hanger was listed as a witness at all times relevant to this prosecution. Moreover, the district court granted Thurman's discovery request to take depositions of all State witnesses. Thurman argues that Hanger would have invoked her Fifth Amendment right against self-incrimination had he attempted to depose her and that for this reason, it would not have been possible to take Hanger's deposition prior to trial. However, in order to preserve his right to depose Hanger, Thurman should have subpoenaed Hanger and made a record of any invocation of her Fifth Amendment rights. Instead, Thurman made no attempt to depose Hanger until halfway through his trial. The district court did not abuse its discretion in denying this motion for continuance.

(b) District Court Did Not Abuse Its Discretion in Denying
Thurman's Motion for Continuance to Obtain
Hanger's Mental Health Records

Thurman also argues that he was entitled to a copy of Hanger's mental health records under *State v. Trammell*²² and that the district court ought to have granted his motion for a continuance so he could obtain and review those records.

As with the motion relating to Hanger's deposition, Thurman's lack of diligence is fatal. Thurman argues that he was not aware that Hanger, with whom he was in a relationship, had mental health issues until approximately 1 week prior to trial when he received a video recording of Hanger's interview with law enforcement. However, a review of the record suggests Thurman should have had knowledge of Hanger's condition earlier.

Exhibit 25 is a copy of Hanger's statements made to law enforcement shortly after the incident in question. Thurman does not dispute that he was given a copy of these statements at least 5 months prior to trial. This document makes reference to Hanger's being "on medication," "sleeping heavily," "having flashbacks," and being "half out of it."

Even if this report was not sufficient to put Thurman on notice with regard to Hanger's mental health issues, the video

²² *State v. Trammell*, 231 Neb. 137, 435 N.W.2d 197 (1989).

recording provided approximately 1 week before trial should have been sufficient. By Thurman's own admission, it was the receipt of this recording, which makes specific reference to Hanger's taking the medication clonazepam and spending time at a mental health facility, which prompted Thurman's eventual request for the records.

Despite the notice provided by both exhibit 25 and the video recording, Thurman made no attempt to request Hanger's records until halfway through his trial. The district court did not abuse its discretion in denying this motion for continuance.

Thurman's third assignment of error is without merit.

4. THURMAN'S SENTENCES WERE NOT EXCESSIVE

In his fourth and final assignment of error, Thurman argues the district court erred in imposing excessive sentences. Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.²³

[7] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.²⁴

Thurman was convicted of first degree false imprisonment, a Class IIIA felony,²⁵ punishable by up to 5 years' imprisonment²⁶; first degree sexual assault, a Class II felony,²⁷ punishable by up to 50 years' imprisonment²⁸; two counts of use of a weapon to commit a felony, both Class II felonies²⁹; and second degree

²³ *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006).

²⁴ *State v. Marrs*, 272 Neb. 573, 723 N.W.2d 499 (2006).

²⁵ § 28-314(2).

²⁶ Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2006).

²⁷ § 28-319(2).

²⁸ § 28-105(2).

²⁹ Neb. Rev. Stat. § 28-1205(2)(b) (Reissue 1995).

Cite as 273 Neb. 531

assault, a Class IIIA felony.³⁰ Thurman was sentenced to 4 to 5 years' imprisonment for false imprisonment, 15 to 20 years' imprisonment for first degree sexual assault, 15 to 20 years' imprisonment for each count of use of a weapon to commit a felony, and 2 to 5 years' imprisonment for second degree assault, with the sentences to be served consecutively. Thurman could have been sentenced, under the statutory guidelines, to up to 160 years' imprisonment and was actually sentenced to between 51 and 70 years' imprisonment.

Thurman's sentences were well within the statutory guidelines. Our review of the record further indicates that the sentences were not an abuse of discretion. Thurman's final assignment of error is without merit.

IV. CONCLUSION

The judgment of the district court is affirmed.

AFFIRMED.

³⁰ § 28-309(2).

THE NEBRASKA COALITION FOR EDUCATIONAL EQUITY AND
ADEQUACY (COALITION), ON ITS OWN BEHALF AND ON BEHALF
OF ITS MEMBERS, ET AL., APPELLANTS AND CROSS-APPELLEES, V.
DAVID HEINEMAN, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE
STATE OF NEBRASKA, ET AL., APPELLEES AND CROSS-APPELLANTS.

731 N.W.2d 164

Filed May 11, 2007. No. S-05-1357.

1. **Summary Judgment: Motions to Dismiss: Rules of the Supreme Court: Pleadings.** Under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003), 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.
2. **Pleadings.** Matters outside the pleadings include any written or oral evidence in support of or in opposition to the pleading that provides some substantiation for and does not merely reiterate what is said in the pleadings.
3. **Summary Judgment: Motions to Dismiss: Notice.** When receiving evidence that converts a motion to dismiss into a motion for summary judgment, the trial court

- should give the parties notice of the changed status of the motion and a reasonable opportunity to present all material made pertinent to such a motion.
4. ____: ____: _____. A district court's failure to give formal notice that it will treat a motion to dismiss for failure to state a claim as a motion for summary judgment is harmless where the nonmoving party has submitted materials outside of the pleadings in support of its resistance to a motion to dismiss.
 5. **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.
 6. **Claims.** Whether a claim presents a nonjusticiable political question is a question of law.
 7. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion.
 8. **Constitutional Law: Courts.** The political question doctrine of justiciability is primarily a function of the separation of powers doctrine. It arises when a claim implicates the relationship between the judiciary and the coordinate branches of government.
 9. **Declaratory Judgments: Proof.** To obtain declaratory relief, a plaintiff must prove the existence of a justiciable controversy and an interest in the subject matter of the action.
 10. **Justiciable Issues.** A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.
 11. **Constitutional Law: Schools and School Districts: Legislature.** The free instruction clause is directed to the Legislature, and the method and means to be adopted in order to furnish free instruction to the children of the state have been left by the Nebraska Constitution to the Legislature.
 12. **Constitutional Law: Jurisdiction.** Unlike the standing doctrine of justiciability, the political question doctrine is not entangled with subject matter jurisdiction.
 13. **Constitutional Law.** The Nebraska Supreme Court explicitly adopts the U.S. Supreme Court's justiciability tests under the political question doctrine.
 14. _____. The distribution of powers clause of the Nebraska Constitution prohibits one branch of government from exercising the duties of another branch.
 15. **Constitutional Law: Appeal and Error.** The separation of powers principle prevents the Nebraska Supreme Court from hearing a matter the determination of which the Nebraska Constitution entrusts to another coordinate department, or branch, of government.
 16. **Constitutional Law: Legislature: Courts: Appeal and Error.** The Nebraska Supreme Court does not sit as a superlegislature to review the wisdom of legislative acts; that restraint reflects the reluctance of the judiciary to set policy in areas constitutionally reserved to the Legislature's plenary power.
 17. **Constitutional Law: Courts.** Determining that an issue presents a nonjusticiable political question is not an abdication of the judiciary's duty to construct and interpret the Nebraska Constitution.
 18. **Constitutional Law: Supreme Court.** Deciding whether a matter has in any measure been committed by the Nebraska Constitution to another branch of

Cite as 273 Neb. 531

government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation and is a responsibility of the Nebraska Supreme Court as ultimate interpreter of the constitution.

19. **Constitutional Law: Courts.** All doctrines of justiciability—including standing, mootness, ripeness, and political question—are legal principles that arise out of prudential considerations of the proper role of the judiciary in democratic government.
20. **Constitutional Law: Legislature: Courts.** The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the legislative or executive branches of government.
21. **Constitutional Law: Courts.** When a court concludes that an issue presents a nonjusticiable political question, it declines to address the merits of that issue and acknowledges the possibility that a constitutional provision may not be judicially enforceable.
22. ____; _____. The U.S. Supreme Court’s justiciability tests under the political question doctrine are disjunctive, and a court should not dismiss a case for nonjusticiability unless one of the tests is inextricable from the case at bar.
23. **Constitutional Law: Schools and School Districts: Legislature.** The Nebraska Constitution textually commits to the Legislature the duty to adopt the method and means to furnish free instruction and the duty to encourage schools.
24. **Constitutional Law: Schools and School Districts: Legislature: Courts.** There are no qualitative, constitutional standards for public schools that the Nebraska Supreme Court can enforce, apart from the requirements that the education in public schools must be free and available to all children.
25. **Constitutional Law: Schools and School Districts: Legislature.** Nebraska’s constitutional history shows the framers intentionally omitted any language from the free instruction clause that would have placed restrictions or qualitative standards on the Legislature’s duties regarding education.
26. **Constitutional Law: Schools and School Districts: Legislature: Courts.** The Nebraska Supreme Court could not interpret the Legislature’s duty to encourage schools under the religious freedom clause to mean that the Legislature must ensure a “quality” education except by ignoring the people’s clear rejection of that standard.
27. **Schools and School Districts: Legislature.** The relationship between school funding and educational quality requires a policy determination that is clearly for the legislative branch.
28. **Constitutional Law: Legislature.** Fiscal policy issues are decisions that have been left to the Legislature by the Nebraska Constitution.

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

Robert V. Broom, of Broom, Johnson, Clarkson & Lanphier, and David C. Long for appellants.

Jon Bruning, Attorney General, Dale A. Comer, Charles E. Lowe, and Leslie S. Donley, and Mark C. Laughlin, Michael L. Schleich, and Timothy J. Thalken, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellees.

David M. Pedersen, Jill Robb Ackerman, and Elizabeth Eynon-Kokrda, of Baird Holm L.L.P., for amici curiae Douglas County School District 0001 et al.

Rebecca L. Gould for amici curiae Joseph E. Lutjeharms et al.

Jeffery R. Kirkpatrick, of McHenry, Haszard, Hansen, Roth & Hupp, P.C., L.L.O., for amici curiae Nebraska Farmers Union and The South Platte United Chambers of Commerce.

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

CONNOLLY, J.

This appeal presents a constitutional challenge to Nebraska's education funding system. The Nebraska Coalition for Educational Equity and Adequacy and other plaintiffs (collectively the Coalition) filed a declaratory judgment action. It alleged that the funding system does not provide sufficient funds for an "adequate" and "quality" education. It further alleged the funding inadequacy violates the free instruction and religious freedom clauses of the Nebraska Constitution. The Coalition seeks (1) a declaration that Nebraska's Constitution requires "an education which provides the opportunity for each student to become an active and productive citizen in our democracy, to find meaningful employment, and to qualify for higher education"; (2) a declaration that Nebraska's education funding system is unconstitutional; and (3) an injunction enjoining state officials from implementing the system.

The district court determined the Coalition's allegations that the Legislature had failed to provide sufficient funds to provide for an adequate education posed a nonjusticiable political question. We agree with the district court's reasoning and, accordingly, affirm.

I. CONSTITUTIONAL PROVISIONS

The Coalition claims that Nebraska's education funding system violates two separate provisions of the Nebraska Constitution: the religious freedom clause¹ and the free instruction clause.² The Coalition relies on the following sentence in the religious freedom clause: "Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the Legislature to pass suitable laws . . . to encourage schools and the means of instruction."³ The free instruction clause provides in relevant part: "The Legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years."⁴

II. BACKGROUND

The Coalition consists of 43 school districts. The other plaintiffs are two separate school districts in Colfax County, Nebraska, and four individuals in their capacities as taxpayers, school board members or officers, and parents of children in the two school districts. All of the State defendants are named in their official capacities, including: the Governor, the State Treasurer, the Director of Administrative Services, the Property Tax Administrator, the Commissioner of Education, and members of the State Board of Education (collectively the State).

All of the appellant school districts provide free instruction to their students. In the 2002-03 school year, local, state, and federal expenditures on grades K through 12 public education in Nebraska exceeded \$2 billion. In fiscal year 2003-04, the State of Nebraska spent almost \$780 million in direct state aid to education, including special education. This amount comprised almost 29 percent of the total state budget.

1. THE COALITION'S ALLEGATIONS

In its operative complaint, the Coalition alleged that the religious freedom and free instruction clauses had independent

¹ Neb. Const. art. I, § 4.

² Neb. Const. art. VII, § 1.

³ Neb. Const. art. I, § 4.

⁴ Neb. Const. art. VII, § 1.

meaning and that the Legislature's enactments on education were evidence of that meaning. Specifically, the Coalition alleged the Legislature has statutorily set forth the elements of a quality education in its mission statements for public schools⁵ and in its requirements under the Quality Education Accountability Act.⁶

The Coalition alleged that the school funding system⁷ fails to provide sufficient resources for an adequate education; that the school funding system fails to accurately assess the needs of small school districts because it does not reflect the real costs of services or the effects of growth caps on their budget and levy caps; that in 2003, the Legislature shifted more of the burden for funding onto local property tax bases by cutting state aid and increasing the local levy cap; and that because the funding system relies heavily on inadequate property tax bases, the system fails to provide sufficient resources and facilities. It also alleged that unlike services to special education students, services to English language learners and low-income students do not authorize school districts to exceed their budget caps.

To show that the funding was inadequate, the Coalition alleged that the plaintiff districts were unable to (1) adequately pay and retain teachers; (2) purchase necessary textbooks, equipment, and supplies; (3) replace or renovate facilities; and (4) offer college-bound courses, advanced courses for high-ability students, technology, and other extra-curricular courses, or adequate services for special education, English language learners, and vocational programs. The Coalition also alleged that a significant number of students did not graduate and that a significant number were academically deficient, as shown by assessment tests.

The Coalition asked the court to make three declarations. First, it sought a declaration that the religious freedom and free instruction clauses provide a fundamental right "to obtain free instruction which enables each student to become an active and

⁵ See Neb. Rev. Stat. §§ 79-701 and 79-702 (Reissue 2003).

⁶ See Neb. Rev. Stat. §§ 79-757 to 79-762 (Reissue 2003 & Cum. Supp. 2006).

⁷ See Tax Equity and Educational Opportunities Support Act, Neb. Rev. Stat. §§ 79-1001 to 79-1033 (Reissue 2003 & Cum. Supp. 2006).

productive citizen in our democracy, to find meaningful employment, and to qualify for higher education.” Second, it asked the court to declare that the State has violated the plaintiffs’ constitutional rights by implementing an unconstitutional school funding system. Finally, it asked the court to declare that Nebraska’s school funding system is unconstitutional because it (1) fails to provide adequate resources to provide the free education guaranteed by these sections, (2) adversely affects the finances and ability of school districts and their officials to meet their obligation to provide students with a constitutionally required education, (3) causes an unconstitutional expenditure of tax dollars, and (4) violates the rights of school districts and their officials to execute their statutory duties. The Coalition asked the court to enjoin the State from further implementing Nebraska’s school funding system.

2. THE STATE RESPONDS

The State moved to dismiss under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(1) and (6) (rev. 2003). At a hearing on the motion, the State submitted several exhibits. A report from the Board of State Canvassers of the State of Nebraska showed that in 1996, the voters had rejected, by a vote of 506,246 to 146,426, an initiative that, in relevant part, would have amended the Nebraska Constitution. The amendment would have made “‘quality education’ . . . a fundamental constitutional right of each person” and made the “‘thorough and efficient education’ of all persons between the ages of 5 and 21 in the common schools . . . the ‘paramount duty’ of the state.”

A report from the State Department of Education showed that total expenditures for Nebraska public education in the 2002-03 school year was about \$2.15 billion. The State’s biennial budget for fiscal years 2003-04 and 2004-05 showed that the Legislature continued reductions in school aid from the year before through 2007. The budget also shows that without an extension of the changes in the school aid formula, state aid to schools would have increased by \$175 million in fiscal years 2005-06 and 2006-07. Both parties submitted materials on the history of the Nebraska Constitution.

3. DISTRICT COURT'S JUDGMENT

The district court did not address the State's motion to dismiss under rule 12(b)(1), but dismissed the claims under rule 12(b)(6). Because we have jurisdiction, the district court's failure to rule on rule 12(b)(1) is of no consequence to our analysis.⁸ The court determined that the claims presented nonjusticiable political questions. It concluded that "[t]here is a lack of judicially discoverable or manageable standards for resolving the issue of whether the Nebraska school funding system satisfies the constitutional requirements of 'free instruction in [the] common schools' or 'suitable laws.'"

III. ASSIGNMENTS OF ERROR

The Coalition assigns that the district court erred in determining that all the issues presented by the amended complaint were nonjusticiable and therefore failed to state a cause of action.

In its cross-appeal, the State assigns that the district court erred in not dismissing the Coalition's complaint as failing to state a cause of action because (1) the Nebraska Constitution does not contain a qualitative right to an "adequate" or "quality" education, (2) Nebraska's education financing statutes are constitutional, and (3) the Coalition was not entitled as a matter of law to the declaration they sought regarding the Nebraska Constitution. Because we conclude that the case is nonjusticiable, we do not comment on the cross-appeal.

IV. STANDARD OF REVIEW

Because the parties submitted evidence on the State's motion to dismiss, we pause to clarify our standard of review. Dismissal under rule 12(b)(6) should be granted only in the unusual case in which a plaintiff's allegations show on the face of the complaint that there is some insuperable bar to relief.⁹

[1] Both parties, however, submitted evidence in support of or in opposition to the State's motion to dismiss for failure to state a claim. Rule 12(b)(6) provides that when a matter outside

⁸ See *Anderson v. Wells Fargo Fin. Accept.*, 269 Neb. 595, 694 N.W.2d 625 (2005).

⁹ *Johnson v. Johnson*, 272 Neb. 263, 720 N.W.2d 20 (2006); *Spear T Ranch v. Knaub*, 269 Neb. 177, 691 N.W.2d 116 (2005).

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.¹⁰ Rule 12(b) further provides that when a motion under this rule is treated as a motion for summary judgment, "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion [for summary judgment] by statute."

[2-4] "[M]atters outside the pleadings" include "any written or oral evidence in support of or in opposition to the pleading that provides some substantiation for and does not merely reiterate what is said in the pleadings."¹¹ We recently stated that when receiving evidence that converts a motion to dismiss into a motion for summary judgment, the trial court should give the parties notice of the changed status of the motion and a reasonable opportunity to present all material made pertinent to such a motion.¹² However,

"[a] district court's failure to give formal notice that it will treat a motion to dismiss for failure to state a claim as a motion for summary judgment is harmless where the nonmoving party has submitted materials outside of the pleadings in support of its resistance to a motion to dismiss"¹³

[5] We review the court's order as converting the State's motion to dismiss into a motion for 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.¹⁴

¹⁰ *Crouse v. Pioneer Irr. Dist.*, 272 Neb. 276, 719 N.W.2d 722 (2006).

¹¹ *Hamm v. Rhone-Poulenc Rorer Pharmaceuticals, Inc.*, 187 F.3d 941, 948 (8th Cir. 1999).

¹² *Doe v. Omaha Pub. Sch. Dist.*, ante p. 79, 727 N.W.2d 447 (2007), citing *Country Club Estates, L.L.C. v. Town of Loma Linda*, 213 F.3d 1001 (8th Cir. 2000).

¹³ *Hamm*, supra note 11, 187 F.3d at 949.

¹⁴ *City of Lincoln v. Hershberger*, 272 Neb. 839, 725 N.W.2d 787 (2007).

[6,7] And whether a claim presents a nonjusticiable political question is a question of law.¹⁵ When reviewing questions of law, we resolve the questions independently of the lower court's conclusion.¹⁶

V. ANALYSIS

[8] The overarching issue is whether the district court correctly concluded that the Coalition's claims present nonjusticiable political questions. The political question doctrine of justiciability is primarily a function of the separation of powers doctrine. It arises when a claim implicates the relationship between the judiciary and the coordinate branches of government.¹⁷

[9,10] In Nebraska, to obtain declaratory relief, a plaintiff must prove the existence of a justiciable controversy and an interest in the subject matter of the action.¹⁸ A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.¹⁹

I. SUMMARY OF PARTIES' ARGUMENT

The Coalition argues that (1) taken together, the religious freedom and free instruction clauses require the Legislature to provide a free education that "at a minimum, [is] sufficient to allow each student to become an active and productive citizen in our democracy, to find meaningful employment, and to qualify for higher education," and (2) that the Legislature has failed to perform this duty.²⁰

¹⁵ See, *Saldano v. O'Connell*, 322 F.3d 365 (5th Cir. 2003); *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024 (10th Cir. 2001); *Maintenance Serv. v. Kenai Peninsula Bor.*, 850 P.2d 636 (Alaska 1993); *Starr v. Governor*, 154 N.H. 174, 910 A.2d 1247 (2006).

¹⁶ See *State ex rel. Columbus Metal v. Aaron Ferer & Sons*, 272 Neb. 758, 725 N.W.2d 158 (2006).

¹⁷ *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962).

¹⁸ See *Myers v. Nebraska Invest. Council*, 272 Neb. 669, 724 N.W.2d 776 (2006).

¹⁹ *Rath v. City of Sutton*, 267 Neb. 265, 673 N.W.2d 869 (2004).

²⁰ Brief for appellants at 29.

The State contends that despite the lack of qualitative standards in the free instruction clause, the Coalition is asking this court to determine that the plaintiff districts lack adequate funding to provide a quality education. The State argues that (1) this determination would require one district court to examine the adequacy of virtually every educational resource and program of the plaintiff districts and (2) thus, what constitutes adequate funding for education is inherently a political question that is not subject to judicial review.

The Coalition counters that this court, by ruling that the school funding system is unconstitutional, would not violate the separation of powers doctrine. It asks us to follow decisions from other state courts determining that the issue is justiciable. We conclude, however, that those decisions are not helpful either because the plaintiffs based their claims on equal protection or uniformity clauses in their state constitutions²¹ or because their states' constitutional provisions are significantly different from ours.²²

The Coalition contends that if we decide the Legislature is not fulfilling its duty, it would not require us to prescribe the proper means of financing schools. This is correct, but if we were to declare the present funding constitutionally inadequate, we would be passing judgment on the Legislature's spending priorities as reflected in its appropriation decisions. Thus, we believe the critical issue is whether, without violating the separation of powers clause, this court may determine that the Legislature has failed to provide adequate funding for public education.

²¹ See, e.g., *Tennessee Small Schools Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993); *Brigham v. State*, 166 Vt. 246, 692 A.2d 384 (1997).

²² See, e.g., *Lake View Sch. Dist. No. 25 v. Huckabee*, 351 Ark. 31, 91 S.W.3d 472 (2002); *ISEEO v. State*, 132 Idaho 559, 976 P.2d 913 (1998); *Montoy v. State*, 275 Kan. 145, 62 P.3d 228 (2003); *Columbia Falls Elementary School v. State*, 326 Mont. 304, 109 P.3d 257 (2005); *Abbott v. Burke*, 119 N.J. 287, 575 A.2d 359 (1990); *DeRolph v. State*, 78 Ohio St. 3d 193, 677 N.E.2d 733 (1997); *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Seattle School Dist. v. State*, 90 Wash. 2d 476, 585 P.2d 71 (1978); *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979).

2. NEBRASKA CASE LAW UNDER FREE INSTRUCTION CLAUSE

We have stated, “What methods and what means should be adopted in order to furnish free instruction to the children of the state has been left by the constitution to the legislature.”²³ In *State ex rel. Shineman v. Board of Education*,²⁴ the parents of 5-year-old children sought a peremptory writ of mandamus to compel a school district to provide a kindergarten class. The parents claimed that 5-year-olds had a clear right to public education under the free instruction clause and two statutes enacted under its authority. One of the statutes required schools organized in cities of that class to be free to all children between 5 and 21 years of age. The other statute prohibited admission to first grade for children under 5 years of age unless they would turn 6 by a specified date or had completed kindergarten.

[11] Because their children were ineligible for admission to first grade, the parents argued that their 5-year-olds were denied their right to a free education. We stated:

The [free instruction clause] is clearly directed to the Legislature. . . . With reference to this provision we said in *Affholder* . . . that the method and means to be adopted in order to furnish free instruction to the children of the state have been left by the Constitution to the Legislature. Clearly, legislation is necessary to carry into effect the constitutional provision. It is not a self-executing provision. It follows that relators must find statutory authority to sustain their contention.²⁵

In *State ex rel. Shineman*, the parents lacked the authority for a writ of mandamus because the statutes did not mandate that the school districts provide kindergartens. Moreover, another statute gave district school boards discretion to establish a school’s grades.

The State argues that these cases show that the funding required to provide public education remains exclusive with the

²³ *Affholder v. State*, 51 Neb. 91, 93, 70 N.W. 544, 545 (1897).

²⁴ *State ex rel. Shineman v. Board of Education*, 152 Neb. 644, 42 N.W.2d 168 (1950).

²⁵ *Id.* at 647-48, 42 N.W.2d at 170.

Legislature. The Coalition counters that these cases are not controlling because neither case required us to determine whether the Legislature had fulfilled its constitutional responsibilities. However, in *State ex rel. Shineman*, we declined to hold that the free instruction clause provided 5-year-olds with a right to education apart from what the Legislature had statutorily provided.

3. *GOULD v. ORR*

Alternatively, the Coalition argues that in *Gould v. Orr*,²⁶ we implicitly concluded that inadequate school funding is a justiciable issue. The Coalition's argument regarding *Gould* is twofold. First, they contend that the *Gould* court's exercise of jurisdiction shows this court considered the school funding issue to be justiciable because justiciability raises subject matter jurisdiction. Second, the Coalition contends the *Gould* court indicated a claim of inadequate funding that adversely affected a school district would state a cause of action under the Nebraska Constitution.

We agree that the *Gould* court exercised jurisdiction. But, "there is a significant difference between determining whether a . . . court has 'jurisdiction of the subject matter' and determining whether a cause over which a court has subject matter jurisdiction is 'justiciable.'"²⁷ In *Baker v. Carr*,²⁸ the U.S. Supreme Court explained the distinction between "lack of federal jurisdiction" and "inappropriateness of the subject matter for judicial consideration":

In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded. In the instance of lack of jurisdiction the cause either does not "arise under" the Federal Constitution, laws or treaties

²⁶ *Gould v. Orr*, 244 Neb. 163, 506 N.W.2d 349 (1993).

²⁷ *Powell v. McCormack*, 395 U.S. 486, 512, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969), quoting *Baker*, *supra* note 17.

²⁸ *Baker*, *supra* note 17, 369 U.S. at 198.

. . . or is not a “case or controversy” . . . or the cause is not one described by any jurisdictional statute.

[12] Unlike the standing doctrine of justiciability,²⁹ the political question doctrine is not entangled with subject matter jurisdiction.³⁰ Thus, by exercising jurisdiction in *Gould*, the court did not implicitly conclude that the claim was justiciable.

We also disagree with the Coalition’s contention that the *Gould* court recognized a cause of action for inadequate school funding. Like the Coalition, the plaintiffs in *Gould* also argued that the “present statutory structure for funding public schools in Nebraska is unconstitutional and inadequate.”³¹ The district court granted summary judgment for the State. On appeal, the *Gould* majority concluded that the trial court committed plain error in failing to sustain the State’s demurrer because the plaintiffs had not stated a cause of action:

Appellants’ petition clearly claims there is disparity in funding among school districts, but does not specifically allege any assertion that such disparity in funding is inadequate and results in inadequate schooling. While appellants’ petition is replete with examples of disparity among the various school districts in Nebraska, they fail to allege in their petition how these disparities affect the quality of education the students are receiving. In other words, although appellants’ petition alleges the system of funding is unequal, there is no demonstration that the education each student is receiving does not meet constitutional requirements.³²

But the majority also determined that “there appeared no reasonable possibility that the defect could be remedied” and remanded the cause with directions for the district court to dismiss.³³

Contrary to the Coalition’s position, the *Gould* majority’s conclusion that the plaintiffs could not amend their petition to

²⁹ See *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002).

³⁰ See, *Powell*, *supra* note 27; *Baker*, *supra* note 17.

³¹ See *Gould*, *supra* note 26, 244 Neb. at 164, 506 N.W.2d at 350.

³² *Id.* at 168-69, 506 N.W.2d at 353.

³³ *Id.* at 169, 506 N.W.2d at 353.

state a cause of action indicates that it probably determined the claim presented a nonjusticiable issue. However, the majority did not state the reason for its holding. And unlike the plaintiffs in *Gould*, the Coalition argues that the religious freedom clause imposes a qualitative component on the Legislature's duty to provide free instruction. Thus, we do not interpret *Gould* to decide this issue in favor of either party.

Arguably, our decision in *State ex rel. Shineman* could be extended to apply to this case. However, *State ex rel. Shineman* was limited to the right of 5-year-olds to kindergarten, rather than a right to an adequate education that implicates the entire school funding system. Thus, we look for further guidance in the criteria relied on by the district court.

[13] The district court relied upon the U.S. Supreme Court's tests in *Baker v. Carr*,³⁴ for determining whether an issue presents a nonjusticiable political question. Although we have implicitly recognized the political question doctrine,³⁵ we have not previously adopted the U.S. Supreme Court's justiciability tests under that doctrine, which we do now. We begin, however, with an overview of our separation of powers jurisprudence and an explanation of the political question doctrine.

4. THE POLITICAL QUESTION DOCTRINE

(a) Separation of Powers Doctrine in Nebraska

[14-16] In Nebraska, the distribution of powers clause³⁶ prohibits one branch of government from exercising the duties of another branch.³⁷ The separation of powers principle "prevents us from hearing a matter the determination of which the Constitution entrusts to another coordinate department, or branch, of government."³⁸ And, "[t]his court does not sit as a

³⁴ *Baker*, *supra* note 17.

³⁵ See *State ex rel. Steinke v. Lautenbaugh*, 263 Neb. 652, 642 N.W.2d 132 (2002).

³⁶ Neb. Const. art. II, § 1.

³⁷ *State v. Divis*, 256 Neb. 328, 589 N.W.2d 537 (1999).

³⁸ *State ex rel. Spire v. Conway*, 238 Neb. 766, 773, 472 N.W.2d 403, 408 (1991).

superlegislature to review the wisdom of legislative acts.”³⁹ That restraint reflects the reluctance of the judiciary to set policy in areas constitutionally reserved to the Legislature’s plenary power.

(b) The Political Question Doctrine

[17,18] Determining that an issue presents a nonjusticiable political question is not an abdication of the judiciary’s duty to construct and interpret the Nebraska Constitution.⁴⁰ The U.S. Supreme Court described the judiciary’s duty in dealing with nonjusticiable political questions:

Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.⁴¹

“It is emphatically the province and duty of the judicial department to say what the law is.”⁴² “Sometimes, however, the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights.”⁴³

[19,20] All doctrines of justiciability—including standing, mootness, ripeness, and political question—are legal principles that arise out of prudential considerations of the proper role of the judiciary in democratic government.⁴⁴ The political question

³⁹ See, e.g., *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 943, 663 N.W.2d 43, 68 (2003). Accord *State v. Ruzicka*, 218 Neb. 594, 357 N.W.2d 457 (1984).

⁴⁰ See *DeCamp v. State*, 256 Neb. 892, 594 N.W.2d 571 (1999).

⁴¹ *Baker*, *supra* note 17, 369 U.S. at 211.

⁴² *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803).

⁴³ *Vieth v. Jubelirer*, 541 U.S. 267, 277, 124 S. Ct. 1769, 158 L. Ed. 2d 546 (2004).

⁴⁴ See *Allen v. Wright*, 468 U.S. 737, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984).

doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the legislative or executive branches of government.⁴⁵ The doctrine is “designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government.”⁴⁶

[21] “When a court concludes that an issue presents a non-justiciable political question, it declines to address the merits of that issue [and] acknowledges the possibility that a constitutional provision may not be judicially enforceable.”⁴⁷ In *Baker v. Carr*,⁴⁸ the U.S. Supreme Court set out the contours of the political question doctrine.

5. *BAKER* CRITERIA FOR DETERMINING WHETHER
A POLITICAL QUESTION IS PRESENTED

[22] In *Baker*, the Court determined that a claim of discriminatory apportionment of state representatives was justiciable under the Equal Protection Clause. Before *Baker*, the Court had held that a challenge to state action based on the Guaranty Clause,⁴⁹ under which the United States guarantees each state a republican form of government, presented a nonjusticiable political question.⁵⁰ To explain the difference in these outcomes, the Court first reviewed its political question jurisprudence in several areas. It then defined “six independent tests,”⁵¹ for determining whether an issue was nonjusticiable:

Prominent on the surface of any case held to involve a political question is found [(1)] a textually demonstrable

⁴⁵ See *Japan Whaling Assn. v. American Cetacean Soc.*, 478 U.S. 221, 106 S. Ct. 2860, 92 L. Ed. 2d 166 (1986).

⁴⁶ *United States v. Munoz-Flores*, 495 U.S. 385, 394, 110 S. Ct. 1964, 109 L. Ed. 2d 384 (1990).

⁴⁷ *Department of Commerce v. Montana*, 503 U.S. 442, 457-58, 112 S. Ct. 1415, 118 L. Ed. 2d 87 (1992).

⁴⁸ *Baker*, *supra* note 17.

⁴⁹ U.S. Const. art. IV, § 4.

⁵⁰ See *Baker*, *supra* note 17.

⁵¹ *Vieth*, *supra* note 43, 541 U.S. at 277 (discussing *Baker*, *supra* note 17).

constitutional commitment of the issue to a coordinate political department; or [(2)] a lack of judicially discoverable and manageable standards for resolving it; or [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [(4)] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [(5)] an unusual need for unquestioning adherence to a political decision already made; or [(6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence. The doctrine of which we treat is one of "political questions," not one of "political cases." The courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing.⁵²

As set forth, the tests are disjunctive: a court should not dismiss a case for nonjusticiability "[u]nless one of these formulations is inextricable from the case at bar."⁵³

The *Baker* Court explained that claims under the Guaranty Clause were nonjusticiable because they embodied elements that defined a political question. Under the second test—lack of judicially discoverable and manageable standards—the Court could not resolve apportionment claims. It stated that "the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State's lawful government."⁵⁴ In contrast, the equal protection

⁵² *Baker*, *supra* note 17, 369 U.S. at 217.

⁵³ *Id.*

⁵⁴ *Id.* at 223.

claim presented the issue of the consistency of state action and was justiciable. The Court left open the possibility, however, that some 14th Amendment claims would be nonjusticiable because they are too enmeshed with one of the political question tests.⁵⁵

The Coalition, however, argues that the U.S. Supreme Court has rejected the *Baker* tests. But *Baker* is still alive. As recently as 2004, the Court applied the second test to determine that political gerrymandering claims regarding congressional redistricting plans presented nonjusticiable political questions.⁵⁶

6. APPLICATION OF *BAKER* TESTS TO COALITION'S CLAIMS

(a) Textually Demonstrable Constitutional Commitment of Issue to Coordinate Political Department

[23] As discussed, we have already determined that the free instruction “provision is clearly directed to the Legislature” and that the duty to adopt the method and means to furnish free instruction has been left by the state Constitution to the Legislature.⁵⁷ The plain language of the religious freedom clause also textually commits to the Legislature the duty to encourage schools: “it shall be the *duty of the Legislature* to pass suitable laws . . . to encourage schools and the means of instruction.”⁵⁸

However, the U.S. Supreme Court has stated:

[T]he concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving [the second test]; the lack of judicially manageable standards may strengthen the conclusion that there is a textual demonstrable commitment to a coordinate branch.⁵⁹

⁵⁵ *Baker*, *supra* note 17.

⁵⁶ See *Vieth*, *supra* note 43.

⁵⁷ *State ex rel. Shineman*, *supra* note 24, 152 Neb. at 647, 42 N.W.2d at 170.

⁵⁸ Neb. Const. art. I, § 4. Compare, *Lake View Sch. Dist. No. 25*, *supra* note 22; *Seattle School Dist.*, *supra* note 22.

⁵⁹ *Nixon v. United States*, 506 U.S. 224, 228, 113 S. Ct. 732, 122 L. Ed. 2d 1 (1993).

(b) Lack of Judicially Discoverable and Manageable Standards for Resolving Issue

[24] The district court concluded that “[t]here is a lack of judicially discoverable or manageable standards for resolving the issue of whether the Nebraska school funding system satisfies the constitutional requirements of ‘free instruction in common schools’ or ‘suitable laws.’” We agree that under the second *Baker* test, there are no qualitative, constitutional standards for public schools that this court could enforce, apart from the requirements that the education in public schools must be free and available to all children.⁶⁰ Nebraska’s constitutional history shows that the people of Nebraska have repeatedly left school funding decisions to the Legislature’s discretion. Even more illuminating, the people rejected a recent amendment that would have imposed qualitative standards on the Legislature’s duty to provide public education.

(i) *Nebraska’s Constitutional History Regarding Legislature’s Duty to Provide Free Public Schools Shows Qualitative Standards Have Been Omitted*

In Nebraska’s first state Constitution, the framers rejected the “thorough and efficient” language that is found in many other state constitutions. In its cross-appeal, the State correctly points out that the education article in Nebraska’s 1866 territorial constitution contained a more qualitative duty to secure a system of schools. It also referred to the means of financing schools: “The legislature shall make such provisions by taxation or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state”⁶¹ After Nebraska was admitted as a state, however, the 1875 constitution did not contain

⁶⁰ See, *Tagge v. Gulzow*, 132 Neb. 276, 271 N.W. 803 (1937); *State, ex rel. Baldwin v. Dorsey*, 108 Neb. 134, 187 N.W. 879 (1922); *Martins v. School District*, 101 Neb. 258, 162 N.W. 631 (1917).

⁶¹ Nebraska Legislative Reference Bureau & Nebraska State Historical Society, bulletin No. 13, *Nebraska Constitutions of 1866, 1871 & 1875*, at 126, 128 (Addison E. Sheldon ed., 1920).

the “thorough and efficient” language or refer to any means of financing schools.⁶²

Additionally, the framers rejected language that would have required uniformity between schools. Article VII, § 5, of the 1871 proposed state constitution would have included a uniformity clause: “The legislature shall provide by law for the establishment of district schools *which shall be as nearly uniform as practicable*, and such schools shall be free, and without charge for tuition, to all children between the ages of five and twenty-one years.”⁶³ The 1871 constitution, however, was never adopted.⁶⁴ Although the constitutional debates from the 1875 convention have been lost,⁶⁵ there is no uniformity clause in the 1875 constitution.⁶⁶

In 1972, the people explicitly left all funding of public schools to the Legislature’s exclusive discretion. The 1875 constitution contained a separate section requiring “an equitable distribution of the income of the fund set [a]part for the support of the common schools, among the several school districts.”⁶⁷ This provision, however, was omitted from the Nebraska Constitution as part of 1972 amendments “to recodify, revise, and clarify” article VII.⁶⁸ The Nebraska Constitution now provides that all funds “for the support and maintenance of the common schools” shall be used “as the Legislature shall provide.”⁶⁹

Finally, in 1996, voters rejected a constitutional amendment that would have imposed qualitative standards on the type of education the Legislature must provide. The amendment would have made a “‘quality education’ . . . a fundamental

⁶² *Id.* at 125.

⁶³ *Id.* at 124 (emphasis supplied).

⁶⁴ *Id.* at 3.

⁶⁵ See *Jaksha v. State*, 222 Neb. 690, 385 N.W.2d 922 (1986).

⁶⁶ Nebraska Constitutions of 1866, 1871 & 1875, *supra* note 61.

⁶⁷ *Id.* at 127.

⁶⁸ See 1972 Neb. Laws, L.B. 1023.

⁶⁹ Neb. Const. art. VII, § 9.

constitutional right of each person” and a “‘thorough and efficient education’ . . . the ‘paramount duty’ of the state.”

[25] This constitutional history shows that the framers of the 1875 constitution intentionally omitted any language from the free instruction clause that would have placed restrictions or qualitative standards on the Legislature’s duties regarding education. Nor has the Coalition pointed to any history showing that the framers intended the State to make up for funding shortages in individual school districts. We interpret the paucity of standards in the free instruction clause as the framers’ intent to commit the determination of adequate school funding solely to the Legislature’s discretion, greater resources, and expertise.

*(ii) The Religious Freedom Clause Does Not Add
Qualitative Standards to the Legislature’s
Duty to Provide Free Instruction*

Contrary to the Coalition’s argument, the Legislature’s general duty under the religious freedom clause to pass suitable laws to encourage schools does not alter our conclusion that the Nebraska Constitution lacks enforceable standards. The Legislature in 1881 enacted a law establishing a system of public school districts.⁷⁰ But this enactment did not require the Legislature to allocate state revenues for the funding of the districts. Moreover, we have stated: “‘A school district is a creation of the Legislature. Its purpose is to *fulfill* the constitutional duty placed upon the Legislature “to encourage schools and the means of instruction” and it is a governmental subdivision to which authority to levy taxes may properly be delegated under the Constitution.’”⁷¹

[26] Thus, we have not interpreted the religious freedom clause as imposing an affirmative duty on the Legislature to encourage schools beyond the establishment of school districts with authority to raise taxes. We do not question the importance of the Legislature’s duty to encourage schools. But if we

⁷⁰ 1881 Neb. Laws, ch. 78, p. 331-87.

⁷¹ *Banks v. Board of Education of Chase County*, 202 Neb. 717, 719-20, 277 N.W.2d 76, 79 (1979) (emphasis supplied), quoting *Campbell v. Area Vocational Technical School No. 2*, 183 Neb. 318, 159 N.W.2d 817 (1968).

interpreted that duty to mean that the Legislature must ensure the “quality” education the Coalition seeks, we would be ignoring the people’s clear rejection of that standard in 1996.⁷² Nor do we believe that the Legislature’s authority to provide state aid to school districts is subject to the judiciary’s intervention.

(c) Impossibility of Deciding Issue Without Making
Policy Determinations Clearly Requiring
Nonjudicial Discretion

Any judicial standard effectively imposing constitutional requirements for education would be subjective and unreviewable policymaking by this court. As the Illinois Supreme Court stated:

It would be a transparent conceit to suggest that whatever standards of quality courts might develop would actually be derived from the constitution in any meaningful sense. Nor is education . . . a subject within the judiciary’s field of expertise Rather, the question of educational quality is inherently one of policy involving philosophical and practical considerations that call for the exercise of legislative and administrative discretion.

To hold that the question of educational quality is subject to judicial determination would largely deprive the members of the general public of a voice in a matter which is close to the hearts of all individuals in Illinois. . . . In contrast, an open and robust public debate is the lifeblood of the political process in our system of representative democracy. Solutions to problems of educational quality should emerge from a spirited dialogue between the people of the State and their elected representatives.⁷³

[27] We conclude that the relationship between school funding and educational quality requires a policy determination that is clearly for the legislative branch. Although an overall goal of state aid to schools is to reduce reliance on property tax,

⁷² See *Pony Lake Sch. Dist. v. State Committee for Reorg.*, 271 Neb. 173, 710 N.W.2d 609 (2006).

⁷³ *Committee for Educational Rights v. Edgar*, 174 Ill. 2d 1, 28-29, 672 N.E.2d 1178, 1191, 220 Ill. Dec. 166, 179 (1996).

there are a multitude of policy decisions that go into state funding decisions, including consideration of federal mandates, the school district's local efforts and ability to support its schools, and the State's ability to provide funding.⁷⁴ In brief, it is beyond our ken to determine what is adequate funding for public schools. This court is simply not the proper forum for resolving broad and complicated policy decisions or balancing competing political interests.

(d) Impossibility of Resolving Issue Without Disregarding
Legislature's Exclusive Authority

The fourth *Baker* test is the impossibility of a court's deciding an issue without expressing lack of the respect due coordinate branches of government.⁷⁵ The State correctly points out that we have stated: "'[T]he control of the purse strings of government is a legislative function.'"⁷⁶

[28] Fiscal policy issues are the very decisions that have been left to the Legislature by the Nebraska Constitution.⁷⁷ We could not hold that the Legislature's expenditures were inadequate without invading the legislative branch's exclusive realm of authority. In effect, we would be deciding what spending issues have priority. The Florida Supreme Court came to the same conclusion:

"To decide such an abstract question of 'adequate' funding, the courts would necessarily be required to subjectively evaluate the Legislature's value judgments as to the spending priorities to be assigned to the state's many needs, education being one among them. In short, the Court would have to usurp and oversee the appropriations power, either directly or indirectly, in order to grant the relief sought by Plaintiffs. While Plaintiffs assert that they do not ask the

⁷⁴ See, § 79-1002, *supra* note 7; Floor Debate, L.B. 540, Committee on Education, 98th Leg., 1st Sess. (Apr. 24, 2003).

⁷⁵ See *Baker*, *supra* note 17.

⁷⁶ *State ex rel. Meyer v. State Board of Equalization & Assessment*, 185 Neb. 490, 498, 176 N.W.2d 920, 925 (1970), quoting *Colbert v. State*, 86 Miss. 769, 39 So. 65 (1905).

⁷⁷ See Neb. Const. art. III, § 25.

Court to compel the Legislature to appropriate any specific sum, but merely to declare that the present funding level is constitutionally inadequate, what they seek would nevertheless require the Court to pass upon those legislative value judgments which translate into appropriations decisions.”⁷⁸

(e) Courts’ Inability to Immediately Resolve
School Funding Disputes

As noted, a justiciable issue must be susceptible to immediate resolution and capable of present judicial enforcement.⁷⁹ But courts have been unable to immediately resolve school funding disputes. For example, after a decade of litigating the constitutionality of the state’s school funding system and despite legislative enactments in the interim, the Arkansas Supreme Court affirmed the trial court’s determination that the system was inadequate. The court stayed its mandate, however, to give the legislature an opportunity to implement appropriate changes.⁸⁰ When the legislature did not comply, the court recalled its mandate and appointed a master three separate times, despite dissents that the court had no jurisdiction to recall its mandate to examine subsequent legislation or to give orders to the legislature.⁸¹

A similar history occurred in Kansas. The Kansas Supreme Court first reversed the trial court’s dismissal of the case.⁸² Two years later, it affirmed the trial court’s judgment that the school funding system was constitutionally inadequate and required increased funding. The Kansas court also retained jurisdiction to allow the legislature time to correct the constitutional

⁷⁸ *Coalition for Adequacy v. Chiles*, 680 So. 2d 400, 406-07 (Fla. 1996).

⁷⁹ *Rath*, *supra* note 19.

⁸⁰ *Lake View Sch. Dist. No. 25*, *supra* note 22.

⁸¹ *Lake View Sch. Dist. No. 25 v. Huckabee*, 364 Ark. 398, 220 S.W.3d 645 (2005); *Lake View School Dist. No. 25 v. Huckabee*, 362 Ark. 520, 210 S.W.3d 28 (2005); *Lake View School Dist. No. 25 v. Huckabee*, 355 Ark. 617, 142 S.W.3d 643 (2004).

⁸² *Montoy*, *supra* note 22.

deficiencies.⁸³ Six months later, the court held that the new school financing scheme also failed to pass constitutional muster and ordered \$285 million in additional appropriations for the next school year while the legislature made further corrections.⁸⁴ In 2006, the court finally dismissed the case after the state showed it had increased total funding to schools by an estimated \$755.6 million.⁸⁵

Other states have entertained continuous appeals and ordered appropriations from state legislatures as judicial remedies. For example, the Texas Supreme Court has addressed the constitutionality of the state's school funding system six times since 1989.⁸⁶ The Alabama Supreme Court, "after issuing four decisions in this case over the past nine years," conceded that "the pronouncement of a specific remedy 'from the bench' would necessarily represent an exercise of the power of that branch of government charged by the people of the State of Alabama with the sole duty to administer state funds to public schools: the Alabama Legislature."⁸⁷

The New Jersey Supreme Court first struck down the state's funding system in 1973.⁸⁸ A generation later, the court had decided a string of cases on the issue and struck down three enactments as unconstitutional.⁸⁹

In *Abbott by Abbott*,⁹⁰ the New Jersey Supreme Court ordered the state to increase funding to special needs districts by an

⁸³ See *Montoy v. State*, 278 Kan. 769, 102 P.3d 1160 (2005).

⁸⁴ *Montoy v. State*, 279 Kan. 817, 112 P.3d 923 (2005).

⁸⁵ *Montoy v. State*, 282 Kan. 9, 138 P.3d 755 (2006).

⁸⁶ See, *Neeley v. West Orange-Cove*, 176 S.W.3d 746 (Tex. 2005); *West Orange-Cove Consol. I.S.D. v. Alanis*, 107 S.W.3d 558 (Tex. 2003); *Edgewood Independent Sch. Dist. v. Meno*, 917 S.W.2d 717 (Tex. 1995); *Carrollton-Farmers v. Edgewood Independent*, 826 S.W.2d 489 (Tex. 1992); *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491 (Tex. 1991); *Edgewood Indep. School Dist.*, *supra* note 22.

⁸⁷ *Ex parte James*, 836 So. 2d 813, 816-17 (Ala. 2002).

⁸⁸ See *Robinson, et al. v. Cahill, et al.*, 62 N.J. 473, 303 A.2d 273 (1973).

⁸⁹ See *Abbott by Abbott v. Burke*, 149 N.J. 145, 693 A.2d 417 (1997).

⁹⁰ *Id.*

amount that would equalize the average per-pupil expenditures in those districts with the average per-pupil expenditures in wealthier districts. The dissent noted that since 1990, the state had increased school funding to special needs districts by \$850 million and estimated that the majority's ordered expenditures would amount to at least \$248 million more.⁹¹ Since 1997, the court has decided three additional appeals.⁹² "The volume of litigation and the extent of judicial oversight provide a chilling example of the thickets that can entrap a court that takes on the duties of a Legislature."⁹³

The landscape is littered with courts that have been bogged down in the legal quicksand of continuous litigation and challenges to their states' school funding systems. Unlike those courts, we refuse to wade into that Stygian swamp.

VI. CONCLUSION

The Nebraska Constitution commits the issue of providing free instruction to the Legislature and fails to provide judicially discernible and manageable standards for determining what level of public education the Legislature must provide. This court could not make that determination without deciding matters of educational policy in disregard of the policy and fiscal choices that the Legislature has already made. Nor could we impose a constitutional standard of a "quality" education without ignoring the people's clear rejection of that standard in 1996. We conclude, as the district court did, that the claims therefore present nonjusticiable political questions.

AFFIRMED.

⁹¹ *Id.* (Garibaldi, J., dissenting).

⁹² *Abbott ex rel. Abbott v. Burke*, 177 N.J. 578, 832 A.2d 891 (2003); *Abbott ex rel. Abbott v. Burke*, 170 N.J. 537, 790 A.2d 842 (2002); *Abbott by Abbott v. Burke*, 153 N.J. 480, 710 A.2d 450 (1998).

⁹³ *City of Pawtucket v. Sundlun*, 662 A.2d 40, 59 (R.I. 1995) (discussing New Jersey cases).

THOMAS P. McNALLY, TRUSTEE, AND SHIRLEY J. McNALLY,
TRUSTEE, APPELLANTS, V. CITY OF OMAHA AND CITY
OF OMAHA BOARD OF REVIEW, APPELLEES.
731 N.W.2d 573

Filed May 18, 2007. No. S-05-1022.

1. **Administrative Law.** When a board or tribunal is required to conduct a hearing and receive evidence, it exercises judicial functions in determining questions of fact.
2. **Municipal Corporations: Pleadings.** Claims under Neb. Rev. Stat. § 14-804 (Reissue 1997) are claims filed with the city comptroller seeking monetary compensation.
3. **Jurisdiction.** Compliance with Neb. Rev. Stat. §§ 25-1903 and 25-1905 (Reissue 1995) is jurisdictional.
4. **Administrative Law: Final Orders: Appeal and Error.** It is an administrative body's pronounced vote that is the final order to be appealed from, not any entry of that vote on the record.
5. **Administrative Law: Time: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 25-1905 (Reissue 1995), filing of the praecipe for transcript with the clerk of the district court satisfies the 30-day appeal requirement, even if the tribunal does not timely prepare and furnish the transcript to the appellants for filing with the clerk of the district court.
6. **Administrative Law: Jurisdiction: Appeal and Error.** In reviewing an administrative decision on a petition in error, both the district court and the appellate court review the decision of the tribunal to determine whether it acted within its jurisdiction and whether the decision of the tribunal is supported by sufficient relevant evidence.
7. **Administrative Law: Evidence.** The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it.
8. **Administrative Law.** The interpretation of administrative regulations presents a question of law.
9. **Municipal Corporations: Ordinances: Statutes.** A municipality's police powers can operate only within legislative limits because the power of a municipality to enact and enforce any ordinance must be authorized by state statute.
10. **Statutes.** Absent anything to the contrary, statutory language is to be given its plain meaning, and a court will not look beyond the statute or interpret it when the meaning of its words is plain, direct, and unambiguous.
11. **Municipal Corporations: Public Utilities: Licenses and Permits: Words and Phrases.** The use of the term "exclusive" in Neb. Rev. Stat. § 14-815 (Reissue 1997) plainly means that a city cannot share with a municipal utilities district the power granted to the district to inspect and issue permits for gas furnaces.
12. **Municipal Corporations: Public Utilities.** To the extent that Neb. Rev. Stat. § 14-102(33) (Cum. Supp. 2006) grants a city authority over heating appliances, it does so only as to those heating appliances that are not for gas on the premises of consumers.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Affirmed in part, and in part reversed.

Andrew D. Strotman and Stanton N. Beeder, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellants.

Alan M. Thelen, Assistant Omaha City Attorney, for appellees.

Daniel G. Crouchley, Susan E. Prazan, and Patrick L. Tripp for amicus curiae Metropolitan Utilities District of Omaha.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ., and CASSEL, Judge.

McCORMACK, J.

I. NATURE OF CASE

Thomas P. McNally and Shirley J. McNally appeal from the Douglas County District Court, which affirmed a decision of the City of Omaha Building Board of Review (the Board) denying the McNallys' challenge of a "Notice of Violation" (violations notice) issued by the City of Omaha code inspectors on a rental property.

II. BACKGROUND

The McNallys own a duplex in Omaha, Nebraska, which they rent out to tenants. On April 22, 2004, the City of Omaha Planning Department sent the McNallys a violations notice. The violations notice was accompanied by a violations list. The notice stated that the duplex was in violation of the Omaha Municipal Code (the Code) and was declared to be unsafe, unfit for human occupancy, or unlawful, because of the violations designated in the violations list. The McNallys were ordered to repair or cure the violations by June 24 or else the property would be placarded and occupancy would be prohibited until the violations were cured and released.

There were seven specified aspects of the duplex which the city alleged were in violation of city ordinances: (1) the fact that the furnaces were installed without City of Omaha permits or inspections; (2) large cracks in the brick exterior walls on the north and east sides; (3) an upheaved sidewalk from the front

door to the driveway; (4) unpainted stucco where doors were removed on the east side of the second floor; (5) a window at the second floor, west side, not “painted in [a] workman like [sic] manner”; (6) tuck-pointing at the front entry stairs not done in a “workman like [sic] manner”; and (7) loose and missing glazing putty on all sides.

The McNallys appealed the designation to the Board, although the McNallys eventually agreed to repair the loose and missing glazing putty. Mike Johnson, a housing code inspector, responded with a case analysis for the Board which described the reasons Johnson thought the relief requested in the McNallys’ appeal should be denied. A hearing was conducted before the Board. Johnson and Kevin J. Denker, the chief code inspector, presented various photographs of the duplex and made their arguments to the Board. Thomas McNally also presented his evidence and argument.

With regard to violations (4) through (6), the evidence presented to the Board showed that a front upper-level paned glass casement window had paint on the glass resulting from painting the trim. Photographs demonstrated that various cracks in the masonry sidewall of the front stoop were repaired by tuck-pointing, but that the mortar used was uneven in its application. The unpainted stucco violation stemmed from the fact that a back upper door opening onto an awning roof had been cemented in, and the stucco finishing on the cement was never painted to match the rest of the house.

The unpainted stucco, the poorly painted window trim, and the “unworkmanlike” tuck-pointing were alleged to violate § 303.2 of the 2000 International Property Maintenance Code (IPMC), “Protective treatment” (see Omaha Mun. Code, ch. 48, art. I, §§ 48-111 and 48-112 (2003)), and Omaha Mun. Code, ch. 48, art. I, § 48-15 (2003), “Workmanship.” At the hearing before the Board, however, the city made it clear that it lacked any evidence that these three elements violated § 303.2. Denker and Johnson admitted that the poorly painted window trim, the poor tuck-pointing, and the unpainted stucco were cosmetic issues. They asserted that such cosmetic issues violated § 48-15.

Section 48-15 states: “Repairs, maintenance work, alterations or installations which are caused directly or indirectly by the

enforcement of this code shall be executed and installed in a workmanlike manner and installed in accordance with the manufacturer's installation instructions." Denker later explained: "It's not necessarily a notice of violation, it's just that we're saying the work was done poorly and probably should have been done better and needs to be addressed."

As evidence of the exterior cracks in the north and east walls of the duplex, photographs were presented to the Board showing areas where the mortar was cracked and where the bricks lay askew. Denker explained to the Board that these cracks appeared to him to be structural and that it was his opinion that there was a possibility of partial collapse. Denker also explained that in his opinion, the loose masonry could fall onto someone walking alongside the property. The exterior cracks were stated to be "unsafe structures" in violation of Omaha Mun. Code, ch. 48, art. I, § 48-71(1) (2003), which states in part:

An unsafe structure is one that is found to be dangerous to the life, health, property or safety of the public or the occupants of the structure by not providing minimum safeguards to protect or warn occupants in the event of fire, or because such structure contains unsafe equipment or is so damaged, decayed, dilapidated, structurally unsafe, or of such faulty construction or unstable foundation, that partial or complete collapse is possible.

The violations list, referring to § 303.6 of the IPMC, specified that the McNallys were required to obtain a structural review of the walls by a registered engineer-architect. Denker explained to the Board that the city was requiring some directive by a licensed structural engineer to opine with precision as to what the structural danger was and what needed to be done to fix it.

With regard to the two gas furnaces located in the basement of the duplex, the city argued that the furnaces fell under the definition of "unsafe structures" in § 48-71(1), for the sole reason that they had not been inspected by the city. They also were alleged to violate Omaha Mun. Code, ch. 40, art. II, § 40-106 (2003), which provides that "[t]he installation, alteration, repair or replacement of any air conditioning/air distribution system or exhaust system shall not be undertaken within the jurisdiction of the city without a permit issued by the permits and inspections

division prior to said installation.” Omaha Mun. Code, ch. 40, art. II, § 40-117 (2003), similarly states: “It shall be unlawful for any person to operate any air conditioning/air distribution or ventilating system installed, altered or repaired until such systems have been inspected and approved by the permits and inspections division.”

The McNallys countered with evidence that the furnaces had passed inspection by the Metropolitan Utilities District (MUD). The chief mechanical inspector with the city explained that under the Code, it is required that the city make an inspection of the furnace regardless of whether the furnace has been inspected by MUD. The inspector explained that it was not customary for the city to recognize a MUD inspection in lieu of a city inspection, and evidence was presented that each entity had different inspection criteria.

Evidence regarding the sidewalk violation showed that a portion of the sidewalk had an approximate 1-inch variance at the joint between two sections. The sidewalk was cited as being in violation of § 302.3 of the IPMC. The commentary to that section states:

Sidewalks and driveways. All sidewalks, walkways, stairs, driveways, parking spaces and similar areas shall be kept in a proper state of repair, and maintained free from hazardous conditions.

. . . The code official is authorized to require that all sidewalks, walkways, stairs, driveways, parking spaces, etc., are usable and kept in proper repair. Walking surfaces that have deteriorated to a condition that presents a hazard to pedestrians must be repaired or replaced to eliminate the hazard and thus reduce the potential for accidents or injuries.

Denker explained to the Board that the sidewalk presented a tripping hazard.

At the end of the hearing, the Board voted to deny the McNallys’ requests for relief as to the items described above. The McNallys appealed to the district court, which affirmed the decision of the Board. The McNallys now appeal to this court.

III. ASSIGNMENTS OF ERROR

The McNallys assert, consolidated and restated, that the district court erred in affirming the Board's decision because (1) its determination that there were violations was not supported by competent evidence; (2) if any applicable ordinance or other provision establishes a workmanship standard based on appearance, then such provision is unconstitutional because it is vague, bears no reasonable relation to public health or safety, and is arbitrary; (3) the city lacks authority to require permits and inspections of the furnaces because Neb. Rev. Stat. § 14-815 (Reissue 1997) gives unfettered, exclusive, and paramount powers to MUD; (4) the city lacks authority to order the McNallys to obtain a structural review by a registered engineer or architect with respect to the cracked masonry in the north and east walls of the property; and (5) the Board's decision was erroneous and illegal because it was not issued in writing as required by Omaha Mun. Code, ch. 43, art. I, § 43-65 (2003).

IV. ANALYSIS

1. PROPER MODE OF APPEAL

Before reaching the McNallys' assignments of error, we first consider which statute controls the McNallys' appeal. The resolution of this question determines the jurisdictional prerequisites for perfecting the appeal, as well as the applicable standard of review. The history of this case presents some confusion as to whether the appeal from the Board was brought pursuant to Neb. Rev. Stat. § 14-813 (Reissue 1997), Neb. Rev. Stat. § 25-1901 (Cum. Supp. 2006), or even the catchall provision, Neb. Rev. Stat. § 25-1937 (Reissue 1995). We conclude that the McNallys' appeal is controlled by § 25-1901.

[1] Section 25-1901 states in relevant part that “[a] judgment rendered or final order made by any tribunal, board, or officer exercising judicial functions and inferior in jurisdiction to the district court may be reversed, vacated, or modified by the district court” Accordingly, where a board or tribunal decides no question of adjudicative fact and no statute requires it to act in a judicial manner, the orders are not “judicial” and

are not reviewable by error proceedings.¹ But, when the board or tribunal is required to conduct a hearing and receive evidence, it exercises “judicial functions” in determining questions of fact.²

As relevant to this case, § 43-65 of the Code, “Conduct of hearing,” states in part that “[t]he board shall hear all arguments and review all evidence submitted by the applicant, the building official, and any other person(s) interested in the case, and shall render its opinion.” Thus, § 43-65 required the Board to conduct a hearing and receive evidence. The Board did, in fact, receive photographs and other evidence concerning the alleged violations of the McNallys’ duplex. The Board also considered the statements of Thomas McNally and of city officials before making its determination of whether violations were in fact presented. We conclude that the Board exercised “judicial functions.”

[2] While we have said that a petition in error may not be applicable where the Legislature has adopted another specific method for appeal,³ we find that § 14-813 does not apply to the McNallys’ appeal. Section 14-813 describes the mode of appeal for claims against the city that are described by Neb. Rev. Stat. § 14-804 (Reissue 1997). Claims under § 14-804 are claims filed with the city comptroller seeking monetary compensation.⁴ The McNallys simply appealed a determination by the city that they were in violation of the Code. This is not a claim under § 14-804.⁵

[3] In order to perfect a petition in error, Neb. Rev. Stat. § 25-1903 (Reissue 1995) directs the petitioner to file the petition to the district court setting forth the errors complained of.

¹ See, *Nicholson v. Red Willow Cty. Sch. Dist. No. 0170*, 270 Neb. 140, 699 N.W.2d 25 (2005); *Hawkins v. City of Omaha*, 261 Neb. 943, 627 N.W.2d 118 (2001).

² See, *Douglas Cty. Bd. of Comrs. v. Civil Serv. Comm.*, 263 Neb. 544, 641 N.W.2d 55 (2002); *Abboud v. Lakeview, Inc.*, 237 Neb. 326, 466 N.W.2d 442 (1991); *Andrews v. City of Fremont*, 213 Neb. 148, 328 N.W.2d 194 (1982).

³ See *Mogensen v. Board of Supervisors*, 268 Neb. 26, 679 N.W.2d 413 (2004).

⁴ See *Schmitt v. City of Omaha*, 191 Neb. 608, 217 N.W.2d 86 (1974).

⁵ See *Adams v. City of Omaha*, 179 Neb. 684, 139 N.W.2d 885 (1966).

In addition, Neb. Rev. Stat. § 25-1905 (Reissue 1995) directs the petitioner to “file with his or her petition a transcript of the proceedings or a praecipe directing the tribunal, board, or officer to prepare the transcript of the proceedings.” We have held that compliance with §§ 25-1903 and 25-1905 is jurisdictional.⁶ Under Neb. Rev. Stat. § 25-1931 (Cum. Supp. 2006), the filings required by §§ 25-1903 and 25-1905 must be made within “thirty days after the rendition of the judgment or making of the final order complained of.”

[4,5] While the parties debate whether a written order was rendered by the Board, we have repeatedly held that it is the administrative body’s pronounced vote that is the final order to be appealed from, not any entry of that vote on the record.⁷ The record shows that within 30 days of the Board’s pronouncement, the McNallys filed with the district court a praecipe for a transcript directing the Omaha city clerk and the Board to prepare a transcript of the Board’s proceedings. In *River City Life Ctr.*,⁸ we explained: “After the 1991 amendment [to § 25-1905], filing of the praecipe for transcript with the clerk of the district court satisfied the 30-day appeal requirement, even if the tribunal did not timely prepare and furnish the transcript to the appellants for filing with the clerk of the district court.” We determine that the jurisdictional requirements for the timely filing of a petition in error were met for the McNallys’ appeal to the district court, and this court has jurisdiction over the McNallys’ timely appeal from the district court.

2. SUFFICIENCY OF VIOLATIONS EVIDENCE

[6-8] We now consider the McNallys’ assignments of error. In reviewing an administrative decision on a petition in error, both

⁶ See, e.g., *River City Life Ctr. v. Douglas Cty. Bd. of Equal.*, 265 Neb. 723, 658 N.W.2d 717 (2003).

⁷ See, *McCorison v. City of Lincoln*, 218 Neb. 827, 359 N.W.2d 775 (1984); *In re Covault Freeholder Petition*, 218 Neb. 763, 359 N.W.2d 349 (1984); *Marcotte v. City of Omaha*, 196 Neb. 217, 241 N.W.2d 838 (1976); *Brown v. City of Omaha*, 179 Neb. 224, 137 N.W.2d 814 (1965).

⁸ *River City Life Ctr. v. Douglas Cty. Bd. of Equal.*, *supra* note 6, 265 Neb. at 727, 658 N.W.2d at 721.

the district court and the appellate court review the decision of the tribunal to determine whether it acted within its jurisdiction and whether the decision of the tribunal is supported by sufficient relevant evidence.⁹ The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it.¹⁰ The interpretation of administrative regulations presents a question of law.¹¹

(a) Cracked Brick Walls

With regard to the cracked brick walls, the McNallys argue that the evidence was insufficient to support the alleged dangerous condition because the city stated only that collapse was “possible” and that this “possibility” was not based upon any specified evidence.¹² In support of this contention, the McNallys point to Denker’s statement that the structural integrity of the masonry “should be evaluated by somebody that is professionally educated and trained to do so.” The McNallys argue that the city essentially shifted its burden of proof to the McNallys to disprove the mere allegation of structural damage. The McNallys also argue that, regardless, the city was generally without authority to require the opinion of a structural engineer at the McNallys’ expense.

The city, in contrast, asserts that the demand for a structural engineer’s professional opinion was not in the context of the inspector’s uncertainty that a dangerous condition existed, but only with regard to the details of how such condition should be repaired. We agree and find that the evidence was sufficient to support the Board’s finding that the cracked brick walls constituted “unsafe structures” in violation of § 48-71(1).

Referring to various pictures of the exterior of the duplex, Denker explained to the Board that it was his opinion that the

⁹ See *Barnett v. City of Scottsbluff*, 268 Neb. 555, 684 N.W.2d 553 (2004).

¹⁰ *Id.*

¹¹ *Fraternal Order of Police v. County of Douglas*, 259 Neb. 822, 612 N.W.2d 483 (2000).

¹² Brief for appellants at 21.

cracks appeared structural and that there was a possibility of partial collapse. Denker further explained that the loose masonry could fall onto somebody walking alongside the property. A structural engineer was required to set forth the danger with more precision and to specify what would need to be done to fix it. The city points out that Omaha Mun. Code, ch. 48, art. I, § 48-43 (2003), provides in part:

Whenever there is insufficient evidence of compliance with the provisions of this code, or evidence that a material or method does not conform to the requirements of this code, or in order to substantiate claims for alternative materials or methods, the code official shall have the authority to require tests to be made as evidence of compliance at no expense to the city.

As already set forth, an “unsafe structure” under § 48-71(1) of the Code includes one where “partial or complete collapse is *possible*.” (Emphasis supplied.) There was sufficient relevant evidence to support a violation of § 48-71(1). We find nothing in the record to indicate that it is illegal for the city to impose the burden on the homeowner to employ the proper experts in the repair of a proven violation. The district court was thus correct in affirming the Board’s decision that the cracked mortar constituted a violation under the Code and its decision to uphold the requirement for a structural review by a registered engineer or architect.

(b) Sidewalk

We next consider the sidewalk violation. Pictures presented to the Board show that a portion of the sidewalk has an approximate 1-inch variance at the joint between two sections of the sidewalk. Denker stated that this was a tripping hazard. We find the evidence was sufficient to support the Board’s finding that the sidewalk violated § 302.3 of the IPMC, because it presented a hazard to pedestrians.

(c) Furnaces

With regard to the furnace violations, we note that the city did not allege any violation relating to the ductwork or other air distribution structural elements of the home. It construed §§ 40-106 and 40-117 of the Code to require the city inspection

of the gas furnaces connecting into those systems. Even though the furnaces were already inspected by MUD, the city points out that its furnace inspections have different elements than the MUD inspections. The McNallys argue that there was no competent evidence that the furnaces in the duplex were dangerous. They assert that there can be no violation simply on the basis of an ordinance mandating routine city inspection and permits for gas furnace installation, because any such ordinance is preempted by statutory law giving this power exclusively to MUD. We agree that there was no showing that the furnaces were dangerous and that the application of the municipal ordinance inspection and permit requirements in this case is not authorized by statute. As such, there was insufficient evidence to support a finding that the furnaces were in violation of the Code.

First, there was no showing that the gas furnaces were unsafe equipment as alleged in the violations list. Section 48-71(2) of the Code, “[u]nsafe equipment,” provides that unsafe equipment includes any heating equipment “which is in such disrepair or condition that such equipment is a hazard to life, health, property or safety of the public or occupants of the premises or structure.” The city inspectors admitted to the Board that since the furnaces had not been inspected, they could not affirmatively say they were dangerous. In contrast, the McNallys presented evidence that the furnaces had passed inspection by MUD.

[9] Nor can a violation be premised simply in the McNallys’ failure to adhere to §§ 40-106 and 40-117 insofar as the city construes these as requiring separate city inspections and permits of the furnaces. A municipality’s police powers can operate only within legislative limits because the power of a municipality to enact and enforce any ordinance must be authorized by state statute.¹³ The plain meaning of the applicable statutes grants to MUD exclusive authority over the routine inspection of gas furnaces. It follows that if the Legislature granted this power exclusively to MUD, then the city lacked statutory authority over the same matter.

¹³ See, *Dean v. Yahnke*, 266 Neb. 820, 670 N.W.2d 28 (2003); *Village of Winside v. Jackson*, 250 Neb. 851, 553 N.W.2d 476 (1996).

Section 14-815, titled “Utilities district; powers and duties exclusive,” states:

Nothing in sections *14-101 to 14-138*, 14-201 to 14-229, 14-360 to 14-376, 14-501 to 14-556, 14-601 to 14-609, 14-702, 14-704, and 14-804 to 14-816 shall be construed so as to interfere with the powers, duties, authority, and privileges that are conferred and imposed upon the metropolitan utilities district as prescribed by law, but all matters relating to the powers, duties, authority, and privileges of such metropolitan utilities district so far as elsewhere conferred, imposed, and defined by law *shall be exclusive and paramount*.

(Emphasis supplied.) Elsewhere, Neb. Rev. Stat. § 14-2124 (Reissue 1997) confers upon the board of directors of a metropolitan utilities district the power to “adopt rules and regulations, in the interest of public health and safety and the conservation of gas, relating to the use, installation, and maintenance of piping, equipment, and appliances for gas on the premises of consumers.” There is no dispute that pursuant to this section, MUD adopted a rule relating to permits and inspections of gas furnaces, under which the McNallys’ furnaces were inspected in this case.

[10,11] Absent anything to the contrary, statutory language is to be given its plain meaning, and a court will not look beyond the statute or interpret it when the meaning of its words is plain, direct, and unambiguous.¹⁴ We cannot escape the plain language used in § 14-815 that the power, duties, authority, and privileges of a metropolitan utilities district “shall be exclusive.” The term “exclusive” is defined as “excluding or not admitting other things” and “restricted or limited to the person, group, or area concerned.”¹⁵ The term has been described as precluding any idea of coexistence.¹⁶ The use of the term “exclusive” in

¹⁴ *DLH, Inc. v. Lancaster Cty. Bd. of Comrs.*, 264 Neb. 358, 648 N.W.2d 277 (2002).

¹⁵ Concise Oxford American Dictionary 311 (2006).

¹⁶ See *Desousa, et al. v. Z. H. B. Whitehall Twp.*, 19 Pa. Commw. 367, 339 A.2d 650 (1975).

§ 14-815 plainly means that the city cannot share with MUD the power granted to MUD to inspect and issue permits for gas furnaces.

The city argues that Neb. Rev. Stat. § 14-102(33) (Cum. Supp. 2006) expresses the Legislature's intent that this inspection and permitting power not be exclusive to MUD. Section 14-102(33) grants the city authority and the power to enact "[b]uilding regulations" to "prevent the dangerous construction and condition of chimneys, fireplaces, hearths, stoves, stovepipes, ovens, boilers, and *heating appliances* used in or about any building or a manufactory and to cause the same to be removed or placed in safe condition when they are considered dangerous." (Emphasis supplied.)

[12] Section 14-102(33) is specifically referenced by § 14-815 as not to interfere with MUD's exclusive powers. Moreover, we find that because § 14-102(33) refers to the more generic term "heating appliances," it does not create any ambiguity in the statutory scheme in which § 14-815 gives exclusive powers to MUD over the more specific realm of gas appliances and equipment. Even assuming a gas furnace could otherwise be considered a "heating appliance," to the extent that § 14-102(33) grants the city authority over "heating appliances," it does so only as to those heating appliances that are not for "gas on the premises of consumers."¹⁷ Rules and regulations "relating to the use, installation, and maintenance of piping, equipment, and appliances for gas on the premises of consumers" are, according to the Legislature, a power "exclusive" to the metropolitan utilities districts.¹⁸

The city also relies on Neb. Rev. Stat. § 18-2314 (Reissue 1997) and points out that, unlike § 14-102, § 18-2314 is not listed as expressly preempted by § 14-815. This lack of specific mention in § 14-815 notwithstanding, we find nothing in the language of § 18-2314 that changes the unambiguous grant in § 14-815 of exclusive power to MUD. Section 18-2314 deals with the authority of the city to employ inspectors to work for

¹⁷ § 14-2124.

¹⁸ *Id.* See, also, § 14-815.

the “air conditioning air distribution board.” It does not specifically grant the city power to inspect and permit gas furnaces, nor could it. To the extent that any of the other provisions of chapter 18, article 23, of the Nebraska Revised Statutes allow for city “furnace” inspectors, they do not specify “gas” furnaces. The provisions of chapter 18, article 23, must likewise be read in conjunction with the plain mandate of § 14-815, making “exclusive” the power granted to MUD in sections such as § 14-2124.

(d) Stucco, Tuck-Pointing, and Window Paint

Finally, we address the three cosmetic issues found by the Board to be in violation of the workmanlike manner of § 48-15. Because Denker and Johnson admitted to the Board that these aspects of the duplex were really appearance issues and that they had never inspected them closely enough to know if there were any protective treatment violations, there is clearly insufficient evidence that these items were in any other way unsafe, unfit, or unlawful under the Code.

Section 48-15 states: “Repairs, maintenance work, alterations or installations which are caused directly or indirectly by the enforcement of this code shall be executed and installed in a workmanlike manner and installed in accordance with the manufacturer’s installation instructions.” Workmanlike is defined elsewhere in the commentary to the IPMC as:

Executed in a skilled manner; e.g., generally plumb, level, square, in line, undamaged and without marring adjacent work.

. . . To be workmanlike, maintenance or repair work must be performed in a manner consistent with work done by a skilled craftsman. In general, floors should be level, walls plumb and square, and windows installed so that they operate easily and fit within the rough opening to exclude the elements. The use of proper tools, methods, and materials is usually necessary for workmanlike repairs.

Whether or not the unattractiveness of the repairs could fall under this definition of “workmanlike,” the McNallys argue that § 48-15 is inapplicable. The McNallys point out that none of the items were “caused directly or indirectly by the enforcement of

this code.”¹⁹ Instead, the window trim painting, the stucco, and the tuck-pointing were repairs which the McNallys conducted on their own accord. We agree that § 48-15 is inapplicable in this case because the ordinance clearly limits the “workmanlike” mandate to situations where the work is conducted pursuant to enforcement of the Code.

The McNallys also argue that if § 48-15 were interpreted to mean that the city could pass out violations notices for “unworkmanlike” repairs done on the owner’s own accord when there is no danger presented by the repairs, then the ordinance would be unconstitutional. Having already determined that § 48-15 does not in fact grant such authority and that no violation was shown as to these items, we do not reach this issue.

(e) Failure to Render Decision in Writing

The McNallys assign as error that the Board failed to render a decision in writing. This, argue the McNallys, was contrary to § 43-65 of the Code, and therefore, its decision is void. Because the record contains a copy of the minutes reflecting the Board’s decision at the hearing, we find no merit to this argument.

V. CONCLUSION

We affirm the district court’s decision with regard to the cracked exterior walls and the upheaved sidewalk as being in violation of the Code. We reverse the district court’s decision as to the violations stemming from the unpainted stucco, the poorly painted window, the unsightly tuck-pointing, and the furnaces.

AFFIRMED IN PART, AND IN PART REVERSED.

WRIGHT, J., not participating.

¹⁹ Brief for appellants at 27.

TIMOTHY BRUMMELS, APPELLANT AND CROSS-APPELLEE, V.
TOM TOMASEK AND MJR ENTERPRISES, INC., DOING
BUSINESS AS TAX AND BUSINESS CONSULTANTS,
APPELLEES AND CROSS-APPELLANTS, AND ROGER DAVIS
AND BANK OF BENNINGTON, APPELLEES.

731 N.W.2d 585

Filed May 18, 2007. No. S-05-1548.

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. **Attorney Fees: Appeal and Error.** On appeal, a trial court's decision allowing or disallowing attorney fees under Neb. Rev. Stat. § 25-824 (Reissue 1995) for frivolous or bad-faith litigation will be upheld in the absence of an abuse of discretion by the trial court.
3. **Pleadings: Proof.** A complaint will not be dismissed 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. **Pleadings: Appeal and Error.** 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.
5. **Fraud: Pleadings.** In order to state a claim for fraudulent misrepresentation, a plaintiff must allege (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) that the representation was made with the intention that the plaintiff should rely on it; (5) that the plaintiff did so rely on it; and (6) that the plaintiff suffered damage as a result.
6. **Negligence: Fraud: Liability.** Under a claim for negligent misrepresentation, the liability of the supplier of false information is limited to the person who receives the information or one of a limited group of persons for whose benefit and guidance the supplier intends to supply the information or knows that the recipient intends to supply it.
7. **Fraud: Pleadings.** In order to assert a claim for fraudulent concealment, a plaintiff must allege that (1) the defendant had a duty to disclose a material fact; (2) the defendant, with knowledge of the material fact, concealed the fact; (3) the material fact was not within the plaintiff's reasonably diligent attention, observation, and judgment; (4) the defendant concealed the fact with the intention that the plaintiff act in response to the concealment or suppression; (5) the plaintiff, reasonably relying on the fact or facts as the plaintiff believed them to be as the result of the concealment, acted or withheld action; and (6) the plaintiff was damaged by the plaintiff's action or inaction in response to the concealment.
8. **Conspiracy: Liability.** A conspiracy is not a separate and independent tort in itself, but, rather, is dependent upon the existence of an underlying tort. Without such an underlying tort, there can be no claim for relief for a conspiracy to commit the tort.

Appeal from the District Court for Douglas County: PATRICIA A. LAMBERTY, Judge. Affirmed.

Gregory C. Scaglione and Heather S. Voegelé, of Koley Jessen, P.C., L.L.O., for appellant.

P. Shawn McCann, of Sodoro, Daly & Sodoro, P.C., for appellees Tom Tomasek and MJR Enterprises, Inc.

James J. Niemeier and Michael T. Eversden, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellee Bank of Bennington.

Betty L. Egan and Kylie A. Wolf, of Valentine, O'Toole, McQuillan & Gordon, for appellee Roger Davis.

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

MILLER-LERMAN, J.

I. NATURE OF CASE

Timothy Brummels, appellant, filed his third amended complaint in the district court for Douglas County against Tom Tomasek; MJR Enterprises, Inc., doing business as Tax and Business Consultants (MJR); Dennis L. Carlson; Roger Davis; and the Bank of Bennington, appellees. In his operative complaint, Brummels set forth four separate claims for relief entitled "Fraud," "Negligent Misrepresentation," "Fraudulent Concealment," and "Conspiracy." Brummels alleged, *inter alia*, that appellees had prepared and submitted false information to the Internal Revenue Service (IRS), allegedly involving Brummels' misappropriation of funds and unreported income, and that appellees concealed exonerating information from the IRS. Brummels alleged that the actions of appellees resulted in an IRS audit of Brummels. Brummels further alleged that the IRS ultimately cleared him of any liability but that he sustained damages as a result of appellees' actions. In response to Brummels' allegations, appellees each filed rule 12(b)(6) motions to dismiss, asserting that the complaint failed to state a claim upon which relief could be granted. See Neb. Ct. R.

of Pldg. in Civ. Actions 12(b)(6) (rev. 2003). The district court sustained appellees' motions and did not grant leave to replead. Brummels appeals. Tomasek and MJR cross-appeal from the district court's order denying their motion for attorney fees under Neb. Rev. Stat. § 25-824 (Reissue 1995). We find no merit to either the appeal or the cross-appeal and accordingly affirm.

II. STATEMENT OF FACTS

Brummels initiated this action on January 18, 2005. On June 2, he filed his amended complaint naming appellees as the defendants. Appellees Tomasek, MJR, Davis, and the Bank of Bennington each filed rule 12(b)(6) motions to dismiss Brummels' amended complaint. The district court sustained appellees' motions but granted Brummels leave to replead. On July 25, Brummels filed his second amended complaint, to which appellees each filed rule 12(b)(6) motions to dismiss. The district court sustained appellees' motions and again granted Brummels leave to replead.

On October 7, 2005, Brummels filed his third amended complaint, the operative complaint for purposes of this appeal (hereafter complaint). Because the district court in this case sustained appellees' rule 12(b)(6) motions to dismiss the complaint, this statement of facts is taken from the facts alleged in Brummels' complaint.

According to the complaint, in October 1997, Brummels and Larry Welchert incorporated Welchert Construction, Inc. (the corporation), and formed Welchert Enterprises, L.L.C. (the LLC). Brummels and Welchert were equal owners of the LLC, and Brummels and Welchert, together with their spouses, were equal owners of the corporation. Brummels and Welchert retained Tomasek, Carlson, and MJR to provide financial reporting and tax preparation services for the corporation and the LLC. The corporation and the LLC also formed loan and other contractual relationships with the Bank of Bennington and the bank's employee Davis. In April 2000, Brummels ceased any management relationship with either the corporation or the LLC. We note that Brummels does not allege in his complaint that he ceased to be an owner of either the corporation or the LLC.

In his complaint, Brummels alleged that after he ceased his management role in the corporation and the LLC, disputes arose between Brummels and Welchert regarding their respective wages, salaries, benefits, “draws,” and distributions. Brummels alleged that in 2001, Welchert and appellees conferred and mutually agreed to materially and falsely alter the business records, reports, and general ledgers of the corporation and the LLC in such a way as to falsely exaggerate the amount of income attributed to Brummels and reduce the amount attributed to Welchert for the years 1997 through 2000. Appellees then allegedly reported this false financial information to the IRS. Brummels also asserted that appellees “advised and convinced” the IRS that Brummels had misappropriated money from the corporation and the LLC. Brummels further alleged that appellees had access to facts and documents that showed the information they were reporting to the IRS was false, but that appellees intentionally failed to provide such information to the IRS and never advised the IRS of such exonerating facts and documents.

Brummels alleged that appellees’ false reporting to the IRS prompted the IRS to institute an audit of Brummels in 2002 for unreported income. As a result of the IRS’ action, Brummels retained accounting, tax, and legal counsel to assist him in responding to the audit. In October 2003, the IRS completed its audit and determined that Brummels was not liable for unreported income and misappropriated funds. In his complaint, Brummels asserted that the audit cost him substantial amounts in fees for accountants and attorneys as well as lost wages and opportunities.

As a result of appellees’ alleged actions, Brummels set forth four separate claims for relief against appellees: fraud, negligent misrepresentation, fraudulent concealment, and conspiracy. During appellate oral argument in this case, counsel for Brummels acknowledged that the fraud claim was a claim for fraudulent misrepresentation, which title we use hereafter. In his complaint, Brummels sought damages against appellees for the costs he incurred as part of the IRS’ audit, as well as damages for injury to his reputation, business relationships, and credit.

Appellees each filed rule 12(b)(6) motions to dismiss Brummels' complaint, all to the effect that the complaint failed to state a claim for which relief could be granted. In their motion to dismiss, Tomasek and MJR also moved for attorney fees pursuant to § 25-824, claiming that Brummels' complaint was frivolous. On November 21, 2005, the district court entered an order sustaining appellees' motions to dismiss and dismissing Brummels' complaint. In its order, the district court did not grant leave to replead. On December 19, the district court entered an order denying Tomasek and MJR's motion for attorney fees. Brummels appeals. Tomasek and MJR cross-appeal from the district court's order denying their motion for attorney fees.

We note that as a result of a settlement reached between Brummels and Carlson after Brummels had filed the instant appeal, Brummels and Carlson stipulated that Carlson should be dismissed as a party to the appeal. That stipulation was approved, and on June 2, 2006, Carlson was ordered dismissed from the appeal with prejudice. Accordingly, further references in this opinion to appellees exclude Carlson.

III. ASSIGNMENTS OF ERROR

On appeal, Brummels assigns numerous errors, all of which can be summarized as claiming that the district court erred in determining that Brummels' complaint failed to state a claim for relief for fraudulent misrepresentation, negligent misrepresentation, fraudulent concealment, and conspiracy.

For their cross-appeal, Tomasek and MJR claim, restated, that the district court erred in failing to award Tomasek and MJR attorney fees pursuant to § 25-824.

IV. STANDARDS OF REVIEW

[1] An appellate court reviews de novo a lower court's dismissal of a complaint for failure to state a claim. *Ichertz v. Orthopaedic Specialists of Neb.*, ante p. 466, 730 N.W.2d 798 (2007).

[2] On appeal, a trial court's decision allowing or disallowing attorney fees under § 25-824 for frivolous or bad-faith litigation will be upheld in the absence of an abuse of discretion by the trial court. *Myers v. Nebraska Equal Opp. Comm.*, 255 Neb. 156, 582 N.W.2d 362 (1998).

V. ANALYSIS

1. APPEAL: THE DISTRICT COURT DID NOT ERR IN DISMISSING BRUMMELS' COMPLAINT

Brummels asserts on appeal that the district court erred in dismissing his complaint. In summary, he argues that he adequately stated claims against appellees for fraudulent misrepresentation, negligent misrepresentation, fraudulent concealment, and conspiracy. We determine that Brummels has failed to state a claim against appellees under any of his asserted claims for relief, and we therefore conclude that the district court did not err in dismissing Brummels' complaint.

[3,4] Our consideration of Brummels' arguments on appeal is guided by the rules governing rule 12(b)(6) motions to dismiss. A complaint will not be dismissed 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. *Johnston v. Nebraska Dept. of Corr. Servs.*, 270 Neb. 987, 709 N.W.2d 321 (2006). An appellate court reviews de novo a lower court's dismissal of a complaint for failure to state a claim. *Ichertz v. Orthopaedic Specialists of Neb.*, *supra*. 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) Fraudulent Misrepresentation

[5] We have stated that in order to state a claim for fraudulent misrepresentation, a plaintiff must allege (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) that the representation was made with the intention that the plaintiff should rely on it; (5) that the plaintiff did so rely on it; and (6) that the plaintiff suffered damage as a result. See, *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005); *Freeman v. Hoffman-La Roche, Inc.*, 260 Neb. 552, 618 N.W.2d 827 (2000).

In his complaint, Brummels alleges that appellees made representations to the IRS that they knew were false. Brummels

further alleges that appellees made the representations intending that the IRS would rely on them and that the IRS did rely upon appellees' representations, leading to the IRS' audit of Brummels and causing him damage. In his complaint, Brummels does not allege that appellees made false representations to him, intending that he rely upon them. As noted above, an element of a fraudulent misrepresentation claim is that allegedly false representations were made to the plaintiff, with the intention that the plaintiff relied upon them. See, e.g., *Foiles v. Midwest Street Rod Assn. of Omaha*, 254 Neb. 552, 557, 578 N.W.2d 418, 422 (1998) (discussing in case involving fraudulent misrepresentation claim whether plaintiff would be "justified in relying upon a representation made to him"). Thus, Brummels has failed to allege a necessary element for a fraudulent misrepresentation claim. See *Eicher v. Mid America Fin. Invest. Corp.*, *supra*. In the absence of an allegation of a representation to Brummels, Brummels has failed to state a claim for fraudulent misrepresentation, and the district court did not err in sustaining appellees' motions to dismiss Brummels' fraudulent misrepresentation claim.

(b) Negligent Misrepresentation

[6] In *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 370, 518 N.W.2d 910, 921 (1994), this court adopted the definition of negligent misrepresentation found in the Restatement (Second) of Torts § 552 (1977), which provides as follows:

"(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

"(2) Except as stated in Subsection (3) [discussing the liability of individuals who are under a public duty to disseminate information] the liability stated in Subsection (1) is limited to loss suffered

"(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the

information or knows that the recipient intends to supply it; and

“(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.”

Accord *Agri Affiliates, Inc. v. Bones*, 265 Neb. 798, 660 N.W.2d 168 (2003). Thus, under a claim for negligent misrepresentation, § 552 of the Restatement specifically limits the liability of a supplier of false information to the person who receives the information “or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it.” *Id.* at 127. By its terms, § 552 contemplates liability to third parties only if the supplier intends for the misinformation to ultimately reach the third party or if the supplier knows that the recipient will pass the misinformation on to the third party.

In support of his negligent misrepresentation claim, Brummels relies on the reasoning of the New Jersey Superior Court, Appellate Division, which extended the supplier’s potential liability to third persons who were not the recipient of the negligent misrepresentation. See *Singer v. Beach Trading Co., Inc.*, 379 N.J. Super. 63, 876 A.2d 885 (2005). Brummels suggests we adopt this reasoning.

We have not been directed to any cases where this court has extended negligent misrepresentation claims to permit those purported claims to be brought by individuals who have not received and have not been guided by the allegedly false information. In connection with our consideration of the reasoning urged by Brummels, we note that a comment to § 552 specifically provides that

[t]he maker of the negligent misrepresentation is subject to liability to only those persons for whose guidance he knows the information to be supplied, and to them only for loss incurred in the kind of transaction in which it is expected to influence them, or a transaction of a substantially similar kind.

Id., comment *i.* at 136-37. We are guided by this comment and its indication of the limitations of § 552. Given our existing jurisprudence and the confines of § 552, we do not think

it prudent to extend the scope of negligent misrepresentation claims as suggested by Brummels and, accordingly, we reject Brummels' invitation to do so.

As noted above, Brummels alleges in his complaint that appellees made false representations to the IRS. Brummels fails to allege, however, that appellees made such misrepresentations to him or that appellees supplied the information for Brummels' guidance. Accordingly, Brummels failed to state a claim for negligent misrepresentation, see *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 518 N.W.2d 910 (1994), and the district court did not err in sustaining appellees' motions to dismiss Brummels' negligent misrepresentation claim.

(c) Fraudulent Concealment

[7] In order to assert a claim for fraudulent concealment, a plaintiff must allege that

“(1) the defendant had a duty to disclose a material fact; (2) the defendant, with knowledge of the material fact, concealed the fact; (3) the material fact was not within the plaintiff's reasonably diligent attention, observation, and judgment; (4) the defendant concealed the fact with the intention that the plaintiff act in response to the concealment or suppression; (5) the plaintiff, reasonably relying on the fact or facts as the plaintiff believed them to be as the result of the concealment, acted or withheld action; and (6) the plaintiff was damaged by the plaintiff's action or inaction in response to the concealment.”

Streeks v. Diamond Hill Farms, Inc., 258 Neb. 581, 589, 605 N.W.2d 110, 118 (2000).

In his complaint, Brummels alleged that appellees suppressed or concealed information with the intention that the IRS would act in response to the concealment or suppression. There is no allegation, however, that appellees suppressed information so that Brummels would be misled. In the absence of an allegation that appellees concealed information with the intention that Brummels would act in response to the concealment or suppression, Brummels has failed to state a claim for fraudulent concealment. See *Streeks v. Diamond Hill Farms, Inc.*, *supra*. The district court did not err in sustaining appellees' motions to dismiss Brummels' claim for fraudulent concealment.

(d) Conspiracy

[8] In his complaint, Brummels alleges that appellees formed a conspiracy to harm him by developing an agreement or understanding between themselves to inflict a wrong or an injury against him. We have previously stated that a “conspiracy” is not a separate and independent tort in itself, but, rather, is dependent upon the existence of an underlying tort. *Hatcher v. Bellevue Vol. Fire Dept.*, 262 Neb. 23, 628 N.W.2d 685 (2001). Without such an underlying tort, there can be no claim for relief for a conspiracy to commit the tort. *Id.* As set forth above, we have determined that the district court did not err in dismissing Brummels’ claims against appellees for fraudulent misrepresentation, negligent misrepresentation, and fraudulent concealment. In the absence of any of these underlying tort claims, Brummels cannot state a claim for conspiracy. The district court did not err in sustaining appellees’ motions to dismiss Brummels’ conspiracy claim.

We have reviewed de novo the district court’s dismissal of Brummels’ complaint for failure to state a claim. See *Ichertz v. Orthopaedic Specialists of Neb.*, ante p. 466, 730 N.W.2d 798 (2007). Accepting the complaint’s factual allegations as true and construing them in the light most favorable to Brummels, we determine that on the face of his complaint, Brummels has failed to state a claim for fraudulent misrepresentation, negligent misrepresentation, fraudulent concealment, or conspiracy. See *id.* The controlling complaint was the fourth complaint filed by Brummels, and in its order, the district court did not grant leave to replead. We find no error in the district court’s ruling, and, accordingly, we affirm the district court’s order sustaining appellees’ rule 12(b)(6) motions to dismiss and dismissing Brummels’ complaint.

2. CROSS-APPEAL: THE DISTRICT COURT DID NOT ERR IN DENYING TOMASEK AND MJR’S MOTION FOR ATTORNEY FEES

For their cross-appeal, Tomasek and MJR claim that the district court erred in denying their motion for attorney fees pursuant to § 25-824. Section 25-824 provides generally that the district court can award reasonable attorney fees and court costs against any attorney or party who has brought or defended

a civil action that alleges a claim or defense that a court determines is frivolous or made in bad faith. See *Stewart v. Bennett*, ante p. 17, 727 N.W.2d 424 (2007).

The district court in the instant case denied Tomasek and MJR's motion, effectively determining that Brummels' claims in the instant case were not frivolous or made in bad faith. We review such ruling for an abuse of discretion. See *Myers v. Nebraska Equal Opp. Comm.*, 255 Neb. 156, 582 N.W.2d 362 (1998). In connection with his negligent misrepresentation claim, Brummels proposed a plausible, albeit unsuccessful, extension of the law of negligent misrepresentation based on authority from another jurisdiction. Reviewing the entire procedural history of this case, we conclude that the district court did not abuse its discretion in denying Tomasek and MJR's motion for attorney fees, and we affirm the district court's decision.

VI. CONCLUSION

For the reasons discussed above, we conclude that the district court did not err in sustaining appellees' rule 12(b)(6) motions to dismiss and in dismissing Brummels' complaint. We further conclude that the district court did not abuse its discretion in denying Tomasek and MJR's motion for attorney fees. The decisions of the district court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, v.
ZACHARY D. MERRILL, APPELLEE.
731 N.W.2d 570

Filed May 18, 2007. No. S-06-081.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. ____: _____. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Criminal Law: Judgments: Jurisdiction: Appeal and Error.** Absent specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case.

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

Susan P. Buettner, Deputy Lancaster County Attorney, and Jeremy Lavene for appellant.

Kurt P. Leffler for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

In this criminal case, the State of Nebraska appeals an order of the district court for Lancaster County directing the clerk of the district court to return bond money to Richard Andersen, the grandfather of Zachary D. Merrill, the defendant in this case. We dismiss this appeal for lack of jurisdiction.

STATEMENT OF FACTS

Merrill was arrested on November 13, 2004, and was charged with felony child abuse and other crimes. On November 15, bond was set in the amount of \$150,000. Bond was subsequently reduced to \$100,000 and later to \$50,000. On March 2, 2005, Andersen, Merrill's grandfather, posted bond money of \$5,000 on behalf of Merrill.

On March 22, 2005, Merrill filed an "Assignment of Rights" in which he stated that he assigned "whatever rights [he] may have, if any, to the \$5,000 bond money posted in the above captioned matter" to Andersen and that he authorized the court to return the bond money to Andersen.

On March 24, 2005, the State filed an "Affidavit of Lien for Child Support" in this criminal case. The affidavit was filed by a deputy Lancaster County Attorney who stated that she was appearing on behalf of the State "solely for the purpose of collecting child support." She stated that in a separate civil case, Merrill had been ordered to pay child support, and that as of March 18, child support of \$17,669.72 including interest was due. The deputy county attorney further stated that "she has good reason to and does believe the Clerk of the District Court

of Lancaster County, Nebraska has property in the form of bond money of . . . Merrill in its possession.”

After Merrill was convicted and sentenced to imprisonment, Andersen filed a bond refund request with the clerk of the district court. The clerk’s office declined and provided Andersen a letter dated August 4, 2005, stating, “On March 24, 2005, the County Attorneys [sic] Office filed a lien against the bond money for child support owed in [civil case] 572-300. The bond money will not be returned to . . . Merrill.”

On August 30, 2005, Merrill filed a motion in this criminal case asking the court to “Order the Clerk of the District Court to return the \$5,000 bail bond money posted in this matter to . . . Anders[e]n.” A hearing was held on the request on September 1. The deputy county attorney who filed the March 24 affidavit appeared on behalf of the State. She stated at the hearing that a garnishment had been filed in the civil child support case. The court discussed with the parties the status of the garnishment in the child support case and whether the issues in that proceeding should be considered at the September 1 hearing. After such discussion, the court stated that “we will just be proceeding today in the criminal case found at CR04-937.”

On December 15, 2005, the court entered an order in this criminal case ruling on Merrill’s request to direct the clerk to return the bail bond money. The court rejected the State’s various arguments to the effect that the State had a lien on the bond money and concluded that Merrill’s request for an order directing that the bond money be returned to Andersen should be granted. On December 15, the court ordered the clerk of the district court “to return the posted bond money to . . . Andersen . . . thirty-one days after the date of this order, unless the state has filed a notice of appeal from this order.”

The State filed a notice of appeal of the December 15, 2005, order.

ASSIGNMENT OF ERROR

The State asserts that the district court erred in rejecting its arguments claiming a lien and in granting Merrill’s request for an order directing the clerk to return the bail bond money to Andersen.

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. *State v. Hudson*, ante p. 42, 727 N.W.2d 219 (2007).

ANALYSIS

[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. *Id.* We conclude that the State was not authorized to appeal the December 15, 2005, order in this criminal case and that therefore, this court lacks jurisdiction over this appeal.

We note that the order being appealed by the State was entered following a hearing on a defendant's motion in a criminal case. At the September 1, 2005, hearing the court noted that elsewhere, the State was simultaneously seeking garnishment in a child support civil case, and the court clarified that it and the parties would "just be proceeding today in the criminal case found at CR04-937." On December 15, the court entered the challenged order in this criminal case.

[3] Absent specific statutory authorization, the State, as a general rule, has no right to appeal an adverse ruling in a criminal case. *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006). We have found such specific statutory authorizations to include error proceedings authorized under Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 2006), see *State v. Contreras*, 268 Neb. 797, 688 N.W.2d 580 (2004), and appeals of sentences as excessively lenient authorized under Neb. Rev. Stat. § 29-2320 et seq. (Reissue 1995 & Cum. Supp. 2006), see *State v. Rice*, 269 Neb. 717, 695 N.W.2d 418 (2005).

The State asserts in its brief that "[t]his appeal is pursuant to Neb. Rev. Stat. §25-1301 [(Cum. Supp. 2006)] and §25-1911 [(Reissue 1995)]." Such statutes are statutes of general application found in chapter 25 of the Nebraska Revised Statutes relating to civil procedure. We do not find such statutes to be specific statutory authorization for the appeal by the State in this criminal case.

As noted by the district court at the hearing in this criminal case, the State is seeking to enforce whatever lien it may have on

the bond money through a garnishment proceeding in the child support case. The district court correctly noted that the State's remedy is in the civil case. Regardless of the status of that civil proceeding, the State has no specific statutory authorization to appeal the December 15, 2005, order entered in this criminal case directing the clerk to return the posted bond money to Andersen.

CONCLUSION

We conclude that the State has no specific statutory authorization to appeal the December 15, 2005, order entered in this criminal case. This court therefore lacks jurisdiction over this appeal, and we dismiss the appeal.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, v.
JENNIFER SOMMER, APPELLANT.
731 N.W.2d 566

Filed May 18, 2007. No. S-06-832.

1. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Speedy Trial.** Neb. Rev. Stat. § 29-1207 (Reissue 1995) requires that a defendant be 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.
3. _____. If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he or she shall be entitled to an absolute discharge from the offense charged.
4. _____. To calculate the time for speedy trial purposes, a court must exclude the day the information was filed, count forward 6 months, back up 1 day, and then add any time excluded under Neb. Rev. Stat. § 29-1207(4) (Reissue 1995) to determine the last day the defendant can be tried.
5. **Speedy Trial: Proof.** The burden of proof is upon the State that one or more of the excluded time periods under Neb. Rev. Stat. § 29-1207(4) (Reissue 1995) are applicable when the defendant is not tried within 6 months.
6. _____. To overcome a defendant's motion for discharge on speedy trial grounds, the State must prove the existence of an excludable period by a preponderance of the evidence.
7. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not needed to adjudicate the controversy before it.

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

Thomas P. Strigenz, Sarpy County Public Defender, Patrick J. Boylan, and Matthew Klahn, Senior Certified Law Student, 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.

NATURE OF CASE

Jennifer Sommer appeals the denial of her motion for discharge based upon the State's alleged failure to provide her with a speedy trial in violation of her statutory and constitutional rights.

BACKGROUND

On September 27, 2004, an information was filed against Sommer charging her with one count of abuse of a vulnerable adult. Beginning in October 2004, Sommer filed several motions to continue, which were all granted by the district court. On November 3, Sommer filed a plea in abatement, which was denied on December 20. On April 4, 2005, Sommer's counsel filed a motion to withdraw, which was granted on April 15. Sommer's case was initially set for trial on July 18. On July 6, the district court, on its own motion, continued the trial to August 10. Sommer waived her right to a jury trial on August 10, and her trial was then set for September 27. On September 12, Sommer filed a motion to discharge on the grounds that her statutory and constitutional rights to a speedy trial had been denied. Sommer's motion to discharge was denied on September 26.

Sommer appealed the denial of her motion to discharge, and the Nebraska Court of Appeals remanded the matter with directions for the district court to determine whether the State proved by a preponderance of the evidence that the time attributable to the continuance of the jury trial on the district court's own

motion from July to August 2005 was excludable for good cause and to make specific findings. See *State v. Sommer*, 14 Neb. App. xlvi (No. A-05-1179, Mar. 8, 2006). On July 14, 2006, the district court entered another order overruling Sommer's motion to discharge. Pursuant to the mandate of the Court of Appeals, the district court determined that the continuance of Sommer's trial on the court's own motion was excludable for good cause. The district court found that on July 18, 2005, a double homicide case, *State v. Golka*, Sarpy County District Court, docket CR 04, page 717, was set for trial as the primary case and Sommer's case was set as the backup case. The court stated that on July 5, the defendant in the double homicide case waived his right to a jury trial. *State v. Golka* remained set for trial on July 18 and 19 as a bench trial, rather than the primary jury case. The court further stated that on July 6, it continued Sommer's case to August 10 in order to facilitate the double homicide trial which was the primary jury case for July 18 and 19 and that Sommer's case was moved from a secondary position for the July jury term to the primary case for the August term, which was the next available jury panel date. Sommer timely appeals the district court's July 14, 2006, order.

ASSIGNMENTS OF ERROR

Sommer assigns that the district court erred in determining that (1) Sommer was not denied her statutory right to a speedy trial, because, on remand, the district court failed to determine whether the State proved by a preponderance of the evidence that the time attributable to the continuance of the jury trial on the court's own motion from July to August 2005 was excludable for good cause and failed to make specific findings as required by the order on remand, and (2) Sommer was not denied her constitutional right to a speedy trial.

STANDARD OF REVIEW

[1] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.¹

¹ *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005).

ANALYSIS

STATUTORY SPEEDY TRIAL

Sommer asserts that the district court erred in overruling her motion to discharge because the continuance of her jury trial from July 18 to August 10, 2005, was not excludable for good cause under Neb. Rev. Stat. § 29-1207(4)(f) (Reissue 1995).

[2-4] Section 29-1207 requires that a defendant be 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.² If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he or she shall be entitled to an absolute discharge from the offense charged.³ To calculate the time for speedy trial purposes, a court must exclude the day the information was filed, count forward 6 months, back up 1 day, and then add any time excluded under § 29-1207(4) to determine the last day the defendant can be tried.⁴

The information was filed against Sommer on September 27, 2004. If there were no time periods excludable under § 29-1207(4), the last day the State could have brought Sommer to trial would have been March 27. The district court found that a total of 119 days was excludable under § 29-1207(4) between October 4, 2004, and April 15, 2005, for numerous motions to continue, a plea of abatement, and a motion to withdraw. Sommer does not dispute the 119 days excluded by the district court. Accordingly, absent any other excludable time periods, the last day the State could have brought Sommer to trial before the expiration of the speedy trial period specified in § 29-1207(4) was July 24, 2005.

Section 29-1207(4)(f) provides for the exclusion of “[o]ther periods of delay not specifically enumerated herein, but only if the court finds that they are for good cause.”⁵ The district court

² *State v. Cox*, 10 Neb. App. 501, 632 N.W.2d 807 (2001).

³ *State v. Baker*, 264 Neb. 867, 652 N.W.2d 612 (2002).

⁴ *Id.*

⁵ *State v. Covey*, 267 Neb. 210, 214, 673 N.W.2d 208, 211 (2004).

found that an additional 22 days were excludable for good cause under § 29-1207(4) as a result of the continuance of Sommer's trial from July to August 2005, on the court's own motion. Upon remand by the Court of Appeals, the district court specifically found that it continued Sommer's trial until August 10 to facilitate a double homicide trial, which was the primary case for July 18 and 19, and that Sommer's case was moved to the primary case for the August term.

[5,6] The burden of proof is upon the State that one or more of the excluded time periods under § 29-1207(4) are applicable when the defendant is not tried within 6 months.⁶ To overcome a defendant's motion for discharge on speedy trial grounds, the State must prove the existence of an excludable period by a preponderance of the evidence.⁷

We have stated that docket congestion can be a "good cause" for delay in speedy trial calculations. In *State v. Alvarez*,⁸ we found that the Legislature intended to include docket congestion in excusable delays and to exclude periods attributable thereto from the statutory 6-month period. We have also held that the substantial preponderance of the evidence must support a court's finding of good cause.⁹ In the instant case, the record before the district court did not establish good cause by a substantial preponderance of the evidence. The only evidence is a certified copy of three journal entries from the case of *State v. Golka*, Sarpy County District Court, docket CR 04, page 717. The journal entries reveal that the defendant in that case waived his right to a jury trial and that a trial to the court was scheduled on July 18 and 19, 2005. The journal entries further reveal that on July 13, the defendant in that case entered guilty pleas and sentencing was deferred to September 9. This evidence simply does not indicate that Sommer's case could not have been tried prior to July 24, the final trial date for speedy trial purposes.

⁶ *State v. Schmader*, 13 Neb. App. 321, 691 N.W.2d 559 (2005).

⁷ *Id.*

⁸ *State v. Alvarez*, 189 Neb. 281, 202 N.W.2d 604 (1972).

⁹ *Id.*

Because the evidence before this court is insufficient to prove that the 22 days excluded as a result of the district court's continuance of Sommer's trial until August 10, 2005, were excludable for good cause under § 29-1207(4)(f), we find that the district court erred in excluding this period. Having so concluded, we determine that Sommer was not brought to trial within the time specified under § 29-1207.

CONSTITUTIONAL SPEEDY TRIAL

[7] Sommer also argues that her constitutional right to a speedy trial was violated. Because an appellate court is not obligated to engage in an analysis that is not needed to adjudicate the controversy before it,¹⁰ we do not address this issue.

CONCLUSION

For the reasons discussed above, we conclude that Sommer is entitled to discharge under Neb. Rev. Stat. § 29-1208 (Reissue 1995) because the State has failed to meet its burden of showing that Sommer was brought to trial within the statutory deadline imposed by § 29-1207.

REVERSED.

¹⁰ *Gary's Implement v. Bridgeport Tractor Parts*, 270 Neb. 286, 702 N.W.2d 355 (2005).

STATE OF NEBRASKA, APPELLEE, V.
 JERRY DEAN MORROW, SR., APPELLANT.
 731 N.W.2d 558

Filed May 18, 2007. No. S-06-866.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
2. _____. When 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.
3. **Rules of Evidence: Hearsay: Impeachment.** Under Neb. Rev. Stat. § 27-806 (Reissue 1995), the declarant of a hearsay statement may be impeached by the introduction of a prior or subsequent statement made by the declarant that is inconsistent with the hearsay statement already admitted at trial.

4. **Hearsay.** If an out-of-court statement is not offered for the purpose of proving the truth of the facts asserted, it is not hearsay.
5. **Evidence.** Evidence that is not relevant is not admissible.
6. **Trial: Rules of Evidence: Probable Cause.** Existence of probable cause, as a prerequisite determinant for admissibility of evidence obtained by a search or arrest, is a preliminary question for a court as a judicial function without intervention of a jury.
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.** In a harmless error review, an appellate court looks at the evidence upon which the jury 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 guilty verdict rendered in the trial was surely unattributable to the error.
10. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.
11. **Criminal Law: Evidence: New Trial: Appeal and Error.** Upon finding error in a criminal trial, the reviewing court must determine whether the evidence presented by the State was sufficient to sustain the conviction before the cause is remanded for a new trial.
12. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid a retrial so long as the sum of the evidence offered by the State and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Reversed and remanded for a new trial.

Gerard A. Piccolo, Hall County Public Defender, and Jeff E. Loeffler 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

Jerry Dean Morrow, Sr., was convicted of one count of possession of a controlled substance, a Class IV felony. See Neb.

Rev. Stat. § 28-416(3) (Cum. Supp. 2004). At trial, the State offered in evidence certain out-of-court statements made by an unavailable witness. Morrow sought to impeach such statements with other out-of-court statements from the same witness. The district court denied admission of the out-of-court statements offered by Morrow. For the reasons set forth herein, we reverse the judgment of conviction and remand the cause for a new trial.

SCOPE OF REVIEW

[1] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. Kuehn*, ante p. 219, 728 N.W.2d 589 (2007).

FACTS

An officer of the Grand Island Police Department was on patrol during the late afternoon on July 30, 2005. The officer testified that he observed a car failing to yield to oncoming traffic at an intersection and that he initiated a traffic stop by turning on his patrol unit's emergency overhead lights. The driver saw the officer but continued traveling for about 2½ blocks. The officer observed "a lot of movement inside the vehicle from all the occupants." The driver pulled over to the roadside after the officer activated his siren.

The driver of the car was identified as Morrow. Nancy Sensenbach was sitting in the front passenger seat, and Shelli Ballou was sitting behind Morrow. After collecting Morrow's driver's license and vehicle documentation, the officer returned to his patrol unit and wrote out a traffic citation. He again observed movement inside the car. The officer returned to Morrow's car and explained the citation to Morrow.

Morrow then consented to the officer's request to search Morrow's car. The passengers exited, and the officer searched the interior of the car. He found a disposable coffee cup wedged between the front passenger seat and the center console of the car. The cup contained a small glass pipe with a burned residue substance in it and a baggie containing a crystal substance, which later was determined to be methamphetamine. Morrow denied

having knowledge of the cup. The officer had Morrow sit in the back of the patrol unit while he questioned the passengers.

Upon cross-examination, the officer stated that he told the passengers Morrow would be arrested unless one of them admitted to owning the items found in the cup. On redirect examination, the State elicited testimony from the officer that both Sensenbach and Ballou “denied ownership” of the cup and its contents. On recross-examination, the officer said that he asked Ballou if she was responsible for the items in the cup and that she denied responsibility.

Both Sensenbach and Ballou were called to testify at trial. Sensenbach appeared, but Ballou did not. During the State’s case, the defense cross-examined Sensenbach. She said that after Morrow was arrested and driven away by the police, she talked to Ballou about what had happened. Defense counsel then attempted to elicit from Sensenbach what Ballou told Sensenbach about the cup and the methamphetamine. The district court sustained the State’s hearsay objection to such questioning.

After the prosecution rested, the defense called Sensenbach in order to present an offer of proof concerning Ballou’s statements to Sensenbach. Out of the jury’s presence, Sensenbach testified that she and Ballou conversed as Morrow was “pulling over” his vehicle, with the patrol unit behind them. Sensenbach testified that Ballou was concerned a warrant might have been issued for her arrest and that Ballou said, “‘Well, if I do go to jail or if I do get arrested, then don’t do my stuff that’s in the cup.’”

The defense offered Ballou’s statement to Sensenbach as a statement against penal interest, an exception to the hearsay rule. See Neb. Rev. Stat. § 27-804(2)(c) (Reissue 1995). The defense asserted that the statement tended to expose Ballou (an unavailable declarant) to criminal liability and that it was offered to exculpate Morrow (the accused). See *id.* Alternatively, the defense offered the statement for the purpose of impeaching the credibility of Ballou’s statement to the officer, in which she had denied responsibility for the items in the cup, that had already been admitted in evidence. See Neb. Rev. Stat. § 27-806 (Reissue 1995).

The district court denied admission of the out-of-court statement Ballou allegedly made to Sensenbach claiming responsibility for the “‘stuff’” in the cup. The jury found Morrow guilty of possessing a controlled substance, and Morrow appealed.

ASSIGNMENT OF ERROR

Morrow claims the district court erred in not allowing in evidence Ballou’s statement to Sensenbach.

ANALYSIS

In an offer of proof by Morrow, Sensenbach testified that Ballou said, “‘Well, if I do go to jail or if I do get arrested, then don’t do my stuff that’s in the cup.’” Morrow offered the statement under §§ 27-804(2)(c) and 27-806. The district court refused to admit the statement in evidence.

ADMISSIBILITY UNDER § 27-806

Section 27-806 provides in relevant part:

When a hearsay statement . . . has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain.

Morrow argues that Sensenbach should have been permitted to testify about Ballou’s statement so that Morrow could impeach Ballou’s credibility. During the State’s case, the officer testified that Ballou had denied ownership of the items in the cup.

The State claims that Morrow failed to preserve his § 27-806 argument for appeal. The record indicates that when defense counsel called Sensenbach to testify in order to present an offer of proof, he included both §§ 27-804(2)(c) and 27-806 as bases for admissibility. His theory under § 27-806 was that Ballou’s statement to the officer denying responsibility for the methamphetamine was a statement by a coconspirator, which, along with a hearsay statement, is contemplated in § 27-806. After a recess, defense counsel asked to amend his § 27-806 argument and labeled Ballou’s statement to the officer as a hearsay

declaration. Defense counsel proposed to make another offer of proof, but the State stipulated that Morrow had adequately preserved the issue for appeal. Thus, the State's claim of procedural waiver is without merit.

[2] This court has not previously applied § 27-806, which is substantially the same as rule 806 of the Federal Evidence Rules. When 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. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006).

Under § 27-806, if a hearsay statement is admitted in evidence, a party may discredit the out-of-court declarant by utilizing recognized methods of impeachment. The rationale behind this rule has been described in the following manner: "The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment . . . as though he had in fact testified." *U.S. v. Trzaska*, 111 F.3d 1019, 1024 (2d Cir. 1997) (quoting Fed. R. Evid. 806 advisory committee's notes).

[3] Under § 27-806, the declarant of a hearsay statement may be impeached by the introduction of a prior or subsequent statement made by the declarant that is inconsistent with the hearsay statement already admitted at trial. See *Trzaska*, *supra*. See, also, *Carver v. United States*, 164 U.S. 694, 17 S. Ct. 228, 41 L. Ed. 602 (1897) (inconsistent hearsay statement admissible to impeach dying declaration already admitted). When this impeachment method is used, no opportunity to deny or explain the inconsistency need be given to the declarant. See § 27-806.

[4] Section 27-806 does not provide for impeachment, however, if the previously admitted out-of-court statement was non-hearsay. See 2 McCormick on Evidence § 324.2 (Kenneth S. Broun et al., 6th ed. 2006). See, also, *U.S. v. Paulino*, 445 F.3d 211, 217 (2d Cir. 2006) (noting "clearly established" principle that statement not offered to prove truth of matter asserted may not be impeached under Fed. R. Evid. 806). If an out-of-court statement is not offered for the purpose of proving the truth of the facts asserted, it is not hearsay. See *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006).

In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. Kuehn*, ante p. 219, 728 N.W.2d 589 (2007). Section 27-806 is not discretionary. If hearsay has been admitted, then the credibility of the declarant may be attacked. Thus, we must determine whether Ballou's statement made to the officer was hearsay. In other words, was the statement offered to prove that the contraband in the coffee cup did not belong to Ballou?

Unlike cases in which a trial court has determined that a statement was hearsay, in this case, Morrow did not object to the admission of Ballou's statement denying responsibility for the items in the cup. When Morrow introduced Ballou's statement that the items were her "'stuff,'" he asserted that Ballou's statement to the officer, already admitted in evidence, was hearsay, subject to impeachment under § 27-806. The district court noted Morrow's § 27-806 argument but excluded Ballou's statement to Sensenbach. No determination was made as to whether Ballou's statement of denial to the officer was hearsay.

The question is, For what purpose was Ballou's out-of-court statement to the officer offered? The only relevant purpose for introducing Ballou's statement of denial was to prove the truth of the matter asserted. If the jury believed that the items did not belong to Ballou or Sensenbach (Sensenbach testified that the items were not hers), the jury could conclude that the items belonged to Morrow, the only other person in the car. The statement was hearsay. Therefore, under § 27-806, the credibility of Ballou (the declarant) could be impeached by the introduction of an inconsistent statement.

The State argues that Ballou's statement denying responsibility for the items in the cup was nonhearsay. The State claims it offered the statement to explain the officer's actions. More specifically, the State claims the statement was introduced to show why the officer did not search Sensenbach and Ballou and why the officer arrested Morrow, the person who the officer believed he had probable cause to arrest.

We have reviewed the officer's testimony in order to put Ballou's statement of denial in context. The record does not

support the State's claim that Ballou's statement to the officer was introduced to show why he decided against searching the passengers. Ballou made the statement to the officer after he had already decided not to search the passengers, not before. The officer testified he did not search Sensenbach and Ballou "[w]hen they got out" of the car because they had not consented to a search and he "had no reason [to search them] at that time." According to the officer, this took place *before Morrow was placed in the patrol unit*. The officer said that Sensenbach and Ballou denied responsibility for the contraband *after Morrow was placed in the patrol unit*. Thus, Ballou's statement of denial could not have been the reason the officer decided not to search Sensenbach and Ballou.

[5,6] The State also suggests that it introduced Ballou's statement to the officer for the nonhearsay purpose of showing that the officer believed he had probable cause to arrest Morrow. The problem with this theory is that if the State indeed offered Ballou's statement of denial for that purpose, the evidence would be irrelevant. Evidence that is not relevant is not admissible. See Neb. Rev. Stat. § 27-402 (Reissue 1995). What the officer believed with regard to arresting Morrow was not relevant because that issue was not for the jury to decide. Existence of probable cause, as a prerequisite determinant for admissibility of evidence obtained by a search or arrest, is a preliminary question for a court as a judicial function without intervention of a jury. *State v. Salamon*, 241 Neb. 878, 491 N.W.2d 690 (1992). We have stated:

Under [Neb. Rev. Stat. § 27-104 (Reissue 1995)], a trial court makes preliminary determinations in relation to constitutional protection from unreasonable searches and seizures; therefore, whether police had reasonable or probable cause to believe that a felony had been committed or was being committed [is a] preliminary [question] of fact to be decided by a judge, who makes the final decision on admissibility outside the hearing of the jury and preferably, even sometimes necessarily, before trial.

Salamon, 241 Neb. at 888-89, 491 N.W.2d at 697.

Even if the State's purported nonhearsay purposes for introducing Ballou's statement of denial were relevant and supported

by the record, we note that no instruction was given limiting the statement's use by the jury. In order for the State's nonhearsay argument to prevail, an instruction limiting Ballou's statement to the nonhearsay purpose was required. See 2 McCormick on Evidence § 324.2 (Kenneth S. Broun et al., 6th ed. 2006).

In *U.S. v. Burton*, 937 F.2d 324 (7th Cir. 1991), the government enlisted the aid of an informant to catch members of a theft ring. The informant helped the FBI tape several conversations that were admitted in evidence against the defendants. The informant did not testify at the defendants' trial, but the tapes that included the informant's statements were admitted in their entirety, without any instruction to the jury limiting the use of such statements. The defendants later sought to impeach the credibility of the informant under Fed. R. Evid. 806. The government argued that the informant's remarks had been offered not to prove the truth of the matter asserted but to provide context to the conversations in which the defendants participated.

The Seventh Circuit concluded as follows:

In the absence of any limiting instruction directing the jurors to use [the informant's] statements only to put [the defendants'] statements in context, [the informant's] statements must be taken as hearsay testimony admitted against defendants which they had a right to impeach . . . under Rule 806. . . . The jurors were free to take [the informant's] statements as substantive evidence rather than as mere filler. Once [the informant's] statements were admitted without qualification, the defendants had a right to impeach his credibility.

Burton, 937 F.2d at 327-28.

Applying the reasoning of *Burton*, we conclude that Ballou's statement of denial made to the officer must be taken as hearsay testimony against Morrow, testimony that he had a right to impeach under § 27-806. Thus, the district court erred in refusing to permit Morrow to introduce Ballou's inconsistent statement for the purpose of impeaching her credibility under § 27-806.

[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). 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. *Id.* In a harmless error review, we look at the evidence upon which the jury 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 guilty verdict rendered in the trial was surely unattributable to the error. *State v. McKinney*, ante p. 346, 730 N.W.2d 74 (2007).

The evidence at trial showed that two other people besides Morrow had been riding in his car when the police officer discovered the methamphetamine. Sensenbach denied responsibility for the methamphetamine. And as a witness, she was subjected to cross-examination. The jury also heard, by means of a hearsay statement, that Ballou had denied responsibility for the illegal drug. Ballou was, in effect, a witness. Her credibility was subject to impeachment as if she had testified. See *U.S. v. Trzaska*, 111 F.3d 1019 (2d Cir. 1997). Morrow was not allowed to impeach her credibility with an inconsistent statement under § 27-806. We cannot say that exclusion of the inconsistent statement by Ballou was harmless error. One person allegedly made inconsistent statements concerning ownership of the methamphetamine. The contraband was in a location where it could have been placed by anyone in the car. No other evidence established ownership. We cannot say that the guilty verdict was unattributable to the exclusion of the evidence with which Morrow sought to impeach Ballou's credibility. Therefore, we conclude that it was prejudicial error for the district court to prevent Morrow from introducing the inconsistent statement in order to attack Ballou's credibility in accordance with § 27-806.

ADMISSIBILITY UNDER § 27-804(2)(C)

[10] Because we have concluded that Ballou's statement to Sensenbach was admissible under § 27-806, we need not address Morrow's alternate argument that the statement was admissible under § 27-804(2)(c). An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate

the case and controversy before it. *State v. King*, 269 Neb. 326, 693 N.W.2d 250 (2005).

SUFFICIENCY OF EVIDENCE

[11,12] Upon finding error in a criminal trial, the reviewing court must determine whether the evidence presented by the State was sufficient to sustain the conviction before the cause is remanded for a new trial. *State v. Anderson*, 258 Neb. 627, 605 N.W.2d 124 (2000). The Double Jeopardy Clause does not forbid a retrial so long as the sum of the evidence offered by the State and admitted by the trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict. *Id.* We conclude that the evidence was sufficient to sustain Morrow's conviction. As a result, the cause may be remanded for a new trial.

CONCLUSION

The district court erred in refusing to permit Morrow to introduce Ballou's inconsistent statement for the purpose of impeaching her credibility under § 27-806. We conclude that the evidence was sufficient to support the conviction, but for the reasons set forth above, we reverse Morrow's conviction and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

PLATTE VALLEY NATIONAL BANK & TRUST COMPANY,
SPECIAL ADMINISTRATOR OF THE ESTATE OF ROBERT P.
ANDERSON, APPELLEE, v. BARBARA J. LASEN AND
PAUL S. LASEN, WIFE AND HUSBAND, APPELLANTS.

732 N.W.2d 347

Filed May 25, 2007. No. S-05-1073.

1. **Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decision made by the lower court.
2. **Jurisdiction: Final Orders: Appeal and Error.** An appellate court is without jurisdiction to entertain appeals from nonfinal orders.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.

Cite as 273 Neb. 602

4. **Actions: Abatement, Survival, and Revival.** A pending action that survives a party's death must be revived in the manner provided by statute.
5. **Judgments: Final Orders.** A judgment rendered by the district court that is merely a step or proceeding within the overall action is not a special proceeding within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995).
6. **Actions: Statutes.** Special proceedings entail civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes.
7. **Final Orders.** An order is not final when the substantial rights of the parties involved in the action remain undetermined and when the cause is retained for further action.
8. **Actions: Abatement, Survival, and Revival: Final Orders: Appeal and Error.** An order reviving an action, whether the order was entered in proceedings under Neb. Rev. Stat. § 25-322 (Cum. Supp. 2006) or under Neb. Rev. Stat. §§ 25-1403 to 25-1420 (Reissue 1995 & Cum. Supp. 2006), is not a final order from which an appeal may immediately be taken. The order may be reviewed after final judgment in the case.

Appeal from the District Court for Scotts Bluff County:
 RANDALL L. LIPPSTREU, Judge. Appeal dismissed.

Larry L. Miller, of Curtiss, Moravek, Curtiss, Margheim & Miller, P.C., L.L.O., for appellants.

John A. Selzer, of Simmons Olsen Law Firm, P.C., for appellee.

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

WRIGHT, J.

I. NATURE OF CASE

This action was originally brought by Platte Valley National Bank & Trust Company (Platte Valley), as the *conservator* for Robert P. Anderson, to recover money and real property from Barbara J. Lasen and Paul S. Lasen. While the case was awaiting trial, Anderson died. The case was revived in the name of Platte Valley as *special administrator* of Anderson's estate. From the order of revivor, the Lasens appeal. The issue presented is whether an order of revivor is a final order from which an appeal can immediately be taken.

II. SCOPE OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an

appellate court to reach a conclusion independent of the decision made by the lower court. See *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006).

III. FACTS

In an earlier case, the county court for Scotts Bluff County appointed Platte Valley as Anderson's conservator because he suffered from mental and physical disabilities that left him unable to manage his property and personal affairs. Anderson's adult daughter, Barbara Lasen, appealed and contended that she should have been appointed conservator. We determined it was in Anderson's best interests to have a disinterested third party appointed as his conservator and affirmed the judgment of the county court. See *In re Conservatorship of Anderson*, 262 Neb. 51, 628 N.W.2d 233 (2001).

In December 2001, Platte Valley, as conservator, filed the current action against the Lasens in the district court for Scotts Bluff County to recover money and real property the Lasens allegedly had improperly transferred to themselves and members of their family from Anderson's assets. Before the action could be tried, Anderson died on February 22, 2003. Anderson's grandchildren by his deceased son asked the county court to probate a will Anderson had executed in 1997. Attorneys for Platte Valley and the Lasens advised the district court of the will proceedings and requested that their action be stayed, pending the resolution of the probate case.

Barbara Lasen filed an objection to probate of the 1997 will and offered for probate wills that were allegedly executed by Anderson in 1998. A jury found that Anderson's 1997 will was valid and that the two 1998 wills offered by Barbara Lasen were the result of undue influence exerted upon Anderson by the Lasens.

On July 15, 2005, the county court entered an order admitting the 1997 will to formal probate. In that same order, the court found as follows:

Now that the Will Contest has been resolved, and the . . . 1997 Will has been determined to be the valid last Will of the decedent, a general Personal Representative should be appointed for the decedent's estate and such Personal

Representative should be authorized to be substituted as Plaintiff in the District Court case brought against the Lasens. The appointment of a Personal Representative for this purpose should not be further delayed.

The county court then appointed Platte Valley as personal representative of Anderson's estate.

On July 19, 2005, Anderson's grandchildren by his deceased son moved the county court to amend its order and appoint Barbara Lasen's nominee as general personal representative of the estate on the condition that Platte Valley be appointed as special administrator for the purpose of maintaining the claims against the Lasens. The court sustained the motion, and Platte Valley was appointed special administrator.

On July 21, 2005, Platte Valley filed in the district court a motion to revive the action against the Lasens in the name of Platte Valley as special administrator of Anderson's estate. The motion was served on the Lasens' attorney. Platte Valley then filed a motion to amend the pleadings along with an attached amended complaint, which included in the caption the name of Platte Valley as "[s]pecial [a]dministrator." The Lasens objected to Platte Valley's motion to revive. A hearing was held on Platte Valley's motion to revive and motion for leave to file an amended pleading. Both parties appeared by their attorneys and offered evidence that was received by the district court.

On August 26, 2005, the district court entered an order reviving the action in the name of Platte Valley, as special administrator of Anderson's estate. The Lasens appealed from this order. This court transferred the appeal to its docket in accordance with its authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

IV. ASSIGNMENTS OF ERROR

The Lasens claim, restated, that the district court erred (1) in reviving the action when more than 1 year had passed since the order of revivor could have first been entered, (2) in determining that the Lasens consented to revivor by filing the joint stipulation after Anderson died, (3) in finding that the court had personal jurisdiction over the Lasens, and (4) in reviving the

action solely in the name of Platte Valley as special administrator when the action involved real property.

V. ANALYSIS

[2,3] Platte Valley argues that this court is without jurisdiction over the Lasens' appeal because the district court's order substituting the party plaintiff and reviving the action was not a final, appealable order. An appellate court is without jurisdiction to entertain appeals from nonfinal orders. *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006). 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. *Id.*

1. TWO METHODS FOR REVIVING ACTIONS IN NEBRASKA

[4] A pending action that survives a party's death must be revived in the manner provided by statute. *Fox v. Nick*, 265 Neb. 986, 660 N.W.2d 881 (2003). Nebraska law provides for two coexisting methods by which an action may be revived. The statutory procedures for revivor are set forth in Neb. Rev. Stat. §§ 25-1403 to 25-1420 (Reissue 1995 & Cum. Supp. 2006) and in Neb. Rev. Stat. § 25-322 (Cum. Supp. 2006). See *Fox v. Nick*, *supra*.

Under the first method of revival, a conditional order may be made on the motion of the representative or successor of the party who died. See §§ 25-1406 and 25-1407. This method contemplates that a hearing will be held on the conditional order of revivor and that if "sufficient cause be not shown against the revivor, the action shall stand revived." See § 25-1408.

Section 25-322 provides the alternate and independent method by which an action may be revived. See, *Fox v. Nick*, *supra*; *Hayden v. Huff*, 62 Neb. 375, 87 N.W. 184 (1901). Under § 25-322, when a party dies, "the court may allow the action to continue by or against his or her representative or successor in interest." This section confers authority upon the court to allow the action to be prosecuted by the representatives of the deceased party. For this purpose, supplemental pleadings may be filed and summons served as in the commencement of the action. *Rakes v. Brown*, 34 Neb. 304, 51 N.W. 848 (1892).

2. APPELLATE REVIEW OF ORDER REVIVING ACTION

(a) Appealability of Revivor Orders Under Existing Approach in Nebraska

In the case at bar, the Lasens argue that the order of revivor was immediately appealable because Platte Valley sought to revive the action under the method prescribed in §§ 25-1403 to 25-1420. Conversely, Platte Valley argues that the order was not immediately appealable because it claims to have revived the action under § 25-322.

This court has held that when the method of revivor set forth in §§ 25-1403 to 25-1420 is followed, a conditional order of revivor made absolute is a final order and appealable. See *Levin v. Muser*, 107 Neb. 230, 185 N.W. 431 (1921). In *Levin v. Muser*, on the plaintiff's motion, a conditional order of revivor was entered, and in pursuance of that order, the court revived the action after finding that no sufficient cause had been shown against the revivor. The defendant immediately appealed.

On appeal, the issue arose whether the revivor order was final and appealable. Based on our statutory definition of a final order found in Rev. Stat. § 8176 (1913) (now Neb. Rev. Stat. § 25-1902 (Reissue 1995)), this court concluded that the order was appealable, even though it neither terminated the action nor constituted a final disposition of the case, because it was made in a special proceeding and it affected a substantial right.

We stated that in cases

where the special statutory method of revivor [i.e., §§ 25-1403 to 25-1420] is followed, as distinguished from the procedure to revive by the filing of supplemental pleadings and the issuance of summons . . . and where the conditional order is made and, in pursuance thereof, an absolute order of revivor entered . . . the absolute order conclusively adjudicates the matters regarding the right of revivor, and those questions cannot then be later tried along with the merits of the case, nor reviewed on an appeal from the final judgment.

Levin v. Muser, 107 Neb. at 232, 185 N.W. at 432. This revivor method was considered to be an independent and special

proceeding rather than a provisional remedy that was merely incidental to and a part of the main case.

(b) Appealability of Revivor Orders
in Other Jurisdictions

As described above, this court has held (at least under one revivor method) that a revivor order is immediately appealable. See *Levin v. Muser*, *supra*. Among other states that have addressed this issue, there is variance among the decisions as to whether an order granting revival of an action upon the death of a party is a final order from which an appeal may immediately be taken. See Annot., 167 A.L.R. 261 (1947).

An order reviving an action is immediately appealable in a few states other than Nebraska. See, *National Council K. and L. of S. v. Weisler*, 131 Minn. 365, 155 N.W. 396 (1915); *Missouri Slope Livestock Auction, Inc. v. Wachter*, 113 N.W.2d 222 (N.D. 1962); *Voss v. Stoll*, 141 Wis. 267, 124 N.W. 89 (1910).

Other states hold that an order reviving an action is merely interlocutory and not appealable before a final disposition of the case upon a final judgment. See, *Land v. Cooper*, 244 Ala. 141, 12 So. 2d 410 (1943); *Blum v. Pulaski County*, 92 Ark. 101, 122 S.W. 109 (1909); *Ray v. Anderson*, 117 Ga. 136, 43 S.E. 408 (1903), *overruled in part on other grounds*, *Southern Ry. Co. v. Atlanta Stove Works*, 128 Ga. 207, 57 S.E. 429 (1907); *Ware's Admr. v. Wilson*, 3 Ky. Op. 478 (1870); *Arthur v. Griswold et al.*, 60 N.Y. 143 (1875); *Squire v. Gdn. Tr. Co.*, 147 Ohio St. 1, 68 N.E.2d 312 (1946); *Tallarico v. Autenreith et al. (KERR, Aplnt.)*, 343 Pa. 325, 22 A.2d 700 (1941).

(c) Revivor Order Not Final and Appealable

In *Squire v. Gdn. Tr. Co.*, *supra*, the Ohio Supreme Court found that an order of revivor was not an order affecting a substantial right made in a special proceeding and thus was not immediately appealable. The court explained:

Such order is interlocutory in character and amounts to no more than a substitution of one party for another as an incident in the original cause. An order of revivor does not in effect determine the action and prevent a judgment.

As we view the matter, the order of revivor does no more than bring before the court a person who is responsible for

costs and who is capable of prosecuting or defending the action. The action in all essential respects remains the same and goes on to final hearing as if the death had not occurred. There is no decision of the court except that the action stand revived and no adjudication as to the rights of the parties; there is merely an order that the representative of the deceased party take the latter's place in the action. The revivor in no sense represents the commencement of a new action but is simply a phase in the old one made necessary by the death of one of the parties.

Id. at 3-4, 68 N.E.2d at 313.

In *Blum v. Pulaski County*, 92 Ark. at 102, 122 S.W. at 110, the Supreme Court of Arkansas stated that an order of revival is not final in the sense that it concludes the rights of the parties to the action, and . . . the appeal in this case is premature. The order does not end the action, even if it be erroneous, for the action is still pending. The error of reviving the action, if error it be, is like any other erroneous ruling of the court, to be reviewed on appeal from the final decree in the cause.

See, also, *Mackaye v. Mallory*, 79 F. 1, 2 (2d Cir. 1897) (stating that revivor order "does not finally dispose of the cause, and can be reviewed . . . by an appeal from the final decree therein"); *Ware's Admr. v. Wilson*, 3 Ky. Op. at 479 (stating that revivor order "settles no rights in litigation in the original suit").

Our case law suggests that while an order of revivor under §§ 25-1403 to 25-1420 is directly appealable, a similar order under § 25-322 is not. See *Levin v. Muser*, 107 Neb. 230, 185 N.W. 431 (1921). With this distinction, whether an order of revivor is directly appealable may change from case to case, depending on the appellate court's determination of which revival path was taken. In our opinion, this distinction is an artificial one. A revivor order under either method serves the same purpose—it substitutes a party plaintiff or party defendant and allows the action to continue following the death of a party if the action does not abate by death.

When the Ohio Supreme Court determined that a revivor order was not final and appealable in *Squire v. Gdn. Tr. Co.*, 147 Ohio St. 1, 68 N.E.2d 312 (1946), Ohio's statutory scheme

provided methods for reviving actions that were similar to those currently found in this state. See *Squire v. Guardian Trust Co.*, 84 N.E.2d 99, 102 (Ohio Com. Pl. 1945) (stating that Ohio “legislature provided two methods of reviving a dormant action,” and describing methods which are similarly found in Nebraska). See, also, *Fox v. Abbott*, 12 Neb. 328, 11 N.W. 303 (1882) (describing that Nebraska’s revivor methods were similar to those found in Ohio).

Whereas this court has in the past differentiated between the two methods with regard to the appealability of a revivor order, the Ohio Supreme Court has not. The action in *Squire v. Gdn. Tr. Co.*, *supra*, was revived under the conditional order method of revival, the same method before this court in *Levin v. Muser*, *supra*. The Ohio court held that the revivor order was interlocutory and not immediately appealable. Nothing in that court’s opinion suggested the holding would have differed if the case had been revived under the alternative, supplemental pleading method.

Today, we disapprove previous decisions of this court holding that an order of revivor is a final, appealable order if rendered under §§ 25-1403 to 25-1420. In *Levin v. Muser*, *supra*, this court concluded that a revivor order under the predecessor to §§ 25-1403 to 25-1420 was made in a special proceeding and affected a substantial right. But subsequent jurisprudence of this court has shown that neither of those conclusions was correct. We conclude that an order reviving an action, regardless of the method under which revivor was sought, is not a final order and cannot be appealed until a final judgment in the case is rendered.

[5,6] An order of revivor is not made in a special proceeding. A judgment rendered by the district court that is merely a step or proceeding within the overall action is not a special proceeding within the meaning of § 25-1902. *Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004). Moreover, both methods of revivor are set forth in the civil procedure statutes of chapter 25 of the Nebraska Revised Statutes. And we have found that special proceedings entail civil statutory remedies *not encompassed* in chapter 25. See, e.g., *In re Estate of Rose*, *ante* p. 490, 730 N.W.2d 391 (2007).

An order reviving an action also does not affect a substantial right. It simply substitutes “one party for another as an incident in the original cause.” See *Squire v. Gdn. Tr. Co.*, 147 Ohio St. at 3-4, 68 N.E.2d at 313. Once a case is revived, a representative takes the place of the deceased party and the action continues. The fact that an order of revivor may move the case forward to trial does not mean that the order affects a substantial right of the opposing party. Ordinary burdens of trial do not necessarily affect a substantial right. See *Hart v. Ronspies*, 181 Neb. 38, 146 N.W.2d 795 (1966).

[7] A revivor order “is not final in the sense that it concludes the rights of the parties to the action.” See *Blum v. Pulaski County*, 92 Ark. 101, 102, 122 S.W. 109, 110 (1909). An order is not final when the substantial rights of the parties involved in the action remain undetermined and when the cause is retained for further action. *Lund v. Holbrook*, 157 Neb. 854, 62 N.W.2d 112 (1954). We have held that an order substituting a party is generally not an appealable order because it does not determine the rights of the parties in the cause. See *Hall v. Vanier*, 7 Neb. 397 (1878). We have also held that an order granting a motion to bring an additional party into a case is not a final or an appealable order. See *Lund v. Holbrook*, *supra*.

An order reviving an action is similar to other orders that are not directly appealable because they are merely steps within the overall action. For example, the denial of a summary judgment motion is not a final order and thus is not appealable. *Cerny v. Longley*, 266 Neb. 26, 661 N.W.2d 696 (2003). Neither is an order granting partial summary judgment immediately appealable; while such order resolves certain issues, others are left unresolved, and the order does not dispose of the whole case. See *O’Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998). An order overruling a motion for default judgment is also not a final, appealable order. *Mumin v. Dees*, 266 Neb. 201, 663 N.W.2d 125 (2003).

[8] We now hold that an order reviving an action, whether the order was entered in proceedings under § 25-322 or under §§ 25-1403 to 25-1420, is not a final order from which an appeal may immediately be taken. The order may be reviewed after final judgment in the case. To the extent that *Willis v. Rose*, 223

Neb. 49, 388 N.W.2d 101 (1986); *Keefe v. Grace*, 142 Neb. 330, 6 N.W.2d 59 (1942); *Levin v. Muser*, 107 Neb. 230, 185 N.W. 431 (1921); *Missouri P. R. Co. v. Fox*, 56 Neb. 746, 77 N.W. 130 (1898); and *Hendrix v. Rieman*, 6 Neb. 516 (1877), hold otherwise, they are disapproved.

3. REQUEST FOR ATTORNEY FEES

Platte Valley contends that the Lasens brought this appeal merely to delay the proceedings against them and requests this court to award it attorney fees and costs for the appeal under Neb. Rev. Stat. § 25-824(4) (Reissue 1995). We decline to do so.

VI. CONCLUSION

Because the district court's order reviving the action was not a final, appealable order, this court is without jurisdiction to address the substantive issue of whether revival was proper. Therefore, we dismiss the Lasens' appeal.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, v.

DAVID L. ARCHIE, APPELLANT.

733 N.W.2d 513

Filed May 25, 2007. No. S-05-1145.

1. **Appeal and Error.** An appellate court does not consider errors which are argued but not assigned.
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. **Judgments: Jurisdiction: Appeal and Error.** The determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion.
4. **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.
5. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
6. **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.

7. **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.
8. **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.
9. **Constitutional Law: Criminal Law: Statutes.** The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.
10. **Constitutional Law: Statutes: Standing.** To have standing to assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly prohibited by the questioned statute and cannot maintain that the statute is vague when applied to the conduct of others.
11. ____: ____: _____. Conduct which is clearly proscribed by a statute will not support a vagueness challenge (1) because the statute is not vague as to the party challenging the statute and (2) because the court will not examine the vagueness of the law as it might apply to the conduct of persons not before the court.
12. ____: ____: _____. The test for standing to assert a vagueness challenge is the same whether the challenge asserted is facial or as applied.
13. **Criminal Law: Verdicts: Juries: Appeal and Error.** Harmless error exists in a jury trial of a criminal case when the court makes an erroneous evidentiary ruling which, on review of the entire record, did not materially influence the jury in a verdict adverse to the defendant.
14. **Verdicts: Juries: Appeal and Error.** In a harmless error review, an appellate court looks at the evidence upon which the jury 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 guilty verdict rendered in the trial was surely unattributable to the error.
15. **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.
16. _____. Consideration of plain error occurs at the discretion of an appellate court.
17. **Courts: Minors: Witnesses.** A trial court has wide discretion in fashioning procedures and modifying standard trial practices to accommodate the special needs of child witnesses.
18. **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.
19. **Verdicts: Jury Instructions.** Objections to the verdict form should be made at the jury instruction conference or at the time the verdict is returned.
20. **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.

21. **Sexual Assault: Proof: Words and Phrases.** The slightest intrusion into the genital opening is sufficient to constitute penetration, and such element may be proved by either direct or circumstantial evidence.
22. **Judges: Motions for New Trial: Evidence: Witnesses: Verdicts.** A trial judge is accorded significant discretion in granting or denying a motion for new trial, because the trial judge sees the witnesses, hears the testimony, and has a special perspective on the relationship between the evidence and the verdict.
23. **Motions for New Trial: Appeal and Error.** When the granting of a new trial requires a consideration of conflicting evidence, the findings of the trial court thereon will not ordinarily be disturbed on appeal.
24. **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.
25. **Sentences: Appeal and Error.** When a sentence imposed within statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying these factors as well as any applicable legal principles in determining the sentence to be imposed.

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

Dennis R. Keefe, Lancaster County Public Defender, and Christopher Eickholt for appellant.

David L. Archie, pro se.

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.

David L. Archie, the appellant, was convicted of one count of first degree sexual assault on a child¹ and one count of incest² in connection with the sexual abuse of Archie's 6-year-old step-daughter. Archie was sentenced to 25 to 30 years' imprisonment for first degree sexual assault on a child, and a concurrent term

¹ See Neb. Rev. Stat. § 28-319 (Reissue 1995).

² See Neb. Rev. Stat. § 28-703(1) (Reissue 1995).

of 10 to 20 years' imprisonment for incest. Archie appeals. For the reasons that follow, we affirm the judgment of the district court.

BACKGROUND

The victim in this case, D.W., was born January 20, 1998, and was 7 years old at the time of trial. Archie was born on August 6, 1969, and was 35 years old at the time of trial. Miranda S., D.W.'s mother, married Archie on February 14, 2004. Miranda had two other children, both boys, who were respectively 1 year old and 4 years old at the time of trial. Archie is the biological father of the younger boy, but not of the older boy or D.W.

In the summer of 2004, Miranda, Archie, and the three children were living together in a home in Lincoln, Nebraska. Miranda admitted that she and Archie "hadn't been getting along" for "quite a while that summer" and that she was not very happy with their marriage. Miranda was working morning shifts at a local restaurant, but Archie was not working at the time. Archie watched the children while Miranda was at work. D.W., then 6 years old, was in kindergarten.

At some point during the summer of 2004, D.W. told Miranda that "'Daddy sexed with me,'" and that it hurt. "Daddy" was what D.W. called Archie. Miranda confronted Archie about D.W.'s statement, and Archie said that D.W. was lying. Some time later, D.W. made a similar claim. Miranda brought the matter up with Archie again and told Archie that they needed to have a conversation with D.W. because "this is serious, you know." The next day, D.W. told Miranda that she had been lying. However, Miranda testified that she had been to work that day, so Archie had the opportunity to talk to D.W. about the matter earlier. "[A] few weeks, maybe a month" later, Miranda and D.W. had another conversation with Archie. D.W. repeated to Archie everything she had said to Miranda. Miranda testified that Archie accused D.W. of lying and that D.W. responded, "'No, Daddy, you're lying.'"

Because of what D.W. had said, Miranda took her to see Dr. Derrick Anderson, a family practitioner, on August 19, 2004. Miranda said that before taking D.W. to the doctor, she had examined D.W.'s genitals and concluded that D.W. "looked

a little red, like un-normal.” Miranda testified that she “told [Anderson] that [D.W.] looked a little red down there, and that was it, pretty much, that she was just reddish. That’s what she was being seen for.”

Dr. Anderson observed D.W.’s vaginal area and saw mild redness and irritation, but no frank evidence of trauma. Anderson made external observations of D.W.’s vagina, but did not conduct an internal examination. Anderson discussed possible causes of the irritation with Miranda, including soaps and bubble baths, and suggested that if D.W. had any further problems, Miranda should bring D.W. back to be reevaluated.

On September 6, 2004, after Miranda came home from work, she, Archie, and the children went to a park. Eventually, they went home, and while Archie was playing basketball across the street, Miranda played with the children, then bathed D.W. Miranda noticed what appeared to be blood in D.W.’s underwear. Miranda asked D.W. if it was blood or if she had spilled Kool-Aid on herself. D.W. was reluctant to answer the question, and Miranda waited until D.W. was out of the bath to ask again. Miranda had a conversation with D.W. in D.W.’s bedroom and decided to make a doctor’s appointment for D.W. Miranda told Archie about the situation, and according to Miranda, Archie replied that “it wasn’t really necessary to make her [a doctor’s appointment]. Kids fall all [the] time. He said his two older girls bumped and fall [sic], and they had blood in their panties before. It’s — it was pretty much nothing to worry about.” But the next day, Miranda made the doctor’s appointment anyway.

The appointment was made for September 7, 2004, at 3 p.m., with Dr. Anderson. Miranda came home from work early that day, but according to Miranda, Archie determined that the doctor’s appointment was less important than visiting an insurance company to obtain coverage so Miranda could get her driver’s license reinstated. As a result, they missed the doctor’s appointment. Miranda rescheduled the appointment for the next day, with Joan George, a nurse practitioner and physician’s assistant. Miranda took D.W. to the rescheduled appointment. George spoke with D.W. while Miranda was out of the room, and after Miranda returned, George called the police.

George testified that she saw D.W. in the late afternoon on September 8, 2004, and “[t]he information on the schedule said that she had had blood in her panties.” George conducted a physical examination of D.W. and noticed irritation that she thought was out of the ordinary. George testified that

[u]sually, on a six-year-old, the folds of tissue over the vaginal opening are together. They’re not apart. They’re — kind of leaf over each other. Hers were separated a little bit and there was some redness. That can be a normal variance, but it also can be a result of some type of penetration.

George said she asked D.W., “‘What do you think caused the bleeding, the blood in your panties?’” D.W. “said that Daddy put his wiener down there and it hurt and it caused the blood.” George asked D.W. when it had happened, and D.W. said, “‘When Mommy was at work on Monday.’” George asked D.W. how old she had been when this had first happened, and D.W. replied that she had been 5 years old. George said that D.W. did not seem to be afraid or in any acute physical distress and that D.W. was upset “[j]ust when she told me what had happened. She said that it hurt and she — you know, that that — she was upset.” George said that when she told Miranda what D.W. had said, Miranda acted surprised. George consulted with Anderson, then contacted Child Protective Services, the Child Advocacy Center (Center), and the police.

After speaking on the telephone with a police officer, Miranda took D.W. to a police station, where she met Investigator Deanna Hager of the Lincoln Police Department, with whom she had spoken. The police referred Miranda to the Center, which Miranda described as “a place where children or young people go to when somebody sexually abuses them or hurts them in any way.” Miranda and D.W. went to the Center, where they met Hager and a social worker from the Department of Health and Human Services. Miranda spoke to a Center counselor, Hager, and the social worker, then Hager spoke to D.W. privately.

Hager testified at trial regarding her interview of D.W.; the substance of that testimony is set forth in more detail in our analysis. Summarized, Hager testified regarding the procedure

used to interview D.W., but did not testify about what D.W. told her. Hager was cross-examined about her failure to administer an interview procedure intended to establish that a child knows the difference between the truth and a lie. On redirect examination, Hager explained that that procedure is only necessary when there is a concern that a child is lying, and Hager had no concerns during this interview that D.W. was not telling the truth.

Miranda was asked to consent to a search of the residence she shared with Archie, and Miranda signed a consent form. Miranda was also asked to take D.W. to an emergency room for examination. Miranda took D.W. and her other children to an emergency room, where they met Hager and a Center counselor.

Patricia Hesel, a women's health nurse practitioner, was on duty at the hospital where D.W. was taken. Hesel is certified as a "Sexual Assault Nurse Examiner." She interviewed D.W. and conducted an examination. Hesel collected swabs of vaginal and anal secretions and saliva and took pictures of the opening of the vagina and the anal area. Hesel said that there was "a little redness at one area around the vaginal opening" and "above her anus, on her back, there was [sic] a couple little abrasions." But there was no tearing, bruising, or scarring on D.W.'s vagina, and Hesel agreed that D.W. was talkative, pleasant, and "acting like a normal child."

Hesel testified that the redness between D.W.'s vagina and anus could have been caused by sexual penetration, but admitted on cross-examination that it could have been caused by "numerous things," including a fall. Similarly, although Hesel testified that D.W.'s hymen was open, and could have been opened by sexual penetration, there were no tears or lacerations, and Hesel admitted that a hymen can be open for several reasons, including rough play, a fall, or congenitally.

Dr. Jeffrey David, a private practice pediatrician with specialized training in child sexual abuse, volunteered at the Center. David examined D.W. on September 20, 2004. David's examination of D.W.'s genitals revealed nothing abnormal, except for a "nonspecific notch" on D.W.'s hymen that David said "you see in 20 percent of normal kids as well." David's examination of D.W.'s anus and perianal area revealed nothing abnormal. However, David testified that there are signs of physical injury

in less than 10 percent of verified cases of child sexual abuse. David said that one “rarely” sees tearing, trauma, or scarring on a person who claims to have been sexually assaulted and only occasionally sees bruising. David also testified that it was not normal for a 6-year-old girl to be bleeding from her vagina.

Dr. David examined the photographs that had been taken of D.W. in the emergency room on September 8, 2004. David testified that girls can injure their genital area by falling down, causing a “straddle injury,” characterized by bruises to the skin and even abrasions or tears. However, David opined that there was no indication of a straddle injury in the emergency room photographs of D.W.

Officers of the Lincoln Police Department were assigned by Hager to go to Archie and Miranda’s residence, arrest Archie, and search the residence. They took Archie into custody and searched the residence, while Miranda and the children were still at the hospital, looking for particular items Hager had directed them to find. Hager testified that she instructed police to look in Archie and Miranda’s bedroom for items D.W. had described during the interview: a pair of young girls’ underwear, a bottle of lotion, and tissues.

At trial, Miranda testified about several photographs taken of the inside of her residence by police during their search. In a photograph of the master bedroom, Miranda identified a bottle of white lotion on the dresser. Miranda testified that normally, that bottle of lotion had been kept on the ground floor of the residence, instead of upstairs in the bedroom. Miranda said she had first noticed that the lotion had been moved from downstairs on September 6, 2004, “the night [D.W.] mentioned to me about what had happened,” 2 days before the search was conducted. The lotion was taken as evidence.

D.W.’s underwear, in which Miranda had seen what she believed to be bloodstains, was sitting on a shoe box in the master bedroom. Miranda testified that she had left the underwear in a laundry hamper near the bathroom but that Archie had told her he looked at the underwear and moved it to the bedroom. The underwear was taken as evidence.

A roll of toilet paper was on a bedside stand in the master bedroom. Miranda testified that it was not normal for a roll of

toilet paper to be beside the bed. A quantity of crumpled toilet paper was in a blue plastic basket, also sitting on the bedside stand. Miranda said that she had not seen the toilet paper on the bedside stand prior to September 6, 2004. She testified that on September 6, after she had seen stains in D.W.'s underwear,

I was laying on this end of the bed . . . I just noticed the toilet paper and some rolled up stuff. And, knowing what [D.W.] had told me, I picked up the paper and felt it, and it felt kind of hard. It did smell like lotion and it had blood on it.

Miranda said that she found the crumpled toilet paper on the front of the bedside stand, and she placed it in the blue basket where it was found by police. The officer conducting the search testified that there were two pieces of toilet paper, crumpled together, and that he seized them.

Hager interviewed Archie on September 8, 2004, in a police station interview room. Archie waived his rights under *Miranda v. Arizona*³ and agreed to speak to police. A videotaped recording of the interview was played at trial.

In the interview, Archie initially expressed confusion about why he had been arrested. Hager asked if Archie knew where Miranda had taken D.W., and Archie indicated that Miranda had taken D.W. to the doctor because of the blood in her underwear. Archie claimed he was "the one who told [Miranda] to make her a doctor's appointment." Archie said that he did not know anything about how the blood got into D.W.'s underwear, other than what Miranda told him.

Archie initially denied awareness of the accusation that had resulted in D.W.'s August 19, 2004, visit to Dr. Anderson. Later, however, Archie recalled that Miranda had "said something about [D.W.] . . . that [D.W.] came to her and she talked to me and she said something about, uhm, a cover over the head or some shit. Something like that."

Archie claimed that D.W. lied about him, stating that she used to always tell me and my wife about [her uncle], uh, the daycare people, uh the, all these other people, the

³ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

little boys down the street, uh, the boy touched my pee pee, all this and that and half of the time it's come, from, from her ass growing up, she got problems about 2, 3:00 every morning She'd come and peak [sic] around the corner and watch us have sex.

Archie further explained that when he and Miranda first met, they sometimes had sex in the same room with D.W., although once they knew she was seeing them have sex, they tried to prevent her from seeing them.

Archie admitted that he used the lotion found in the bedroom and that his wife used lotion on the children. Archie also admitted that he put lotion on D.W., but that he did not put any on her genitals. Instead, he said, "I let her do that herself when she, when she use lotion I let her do that herself. I wash, I wipe their legs down with lotion and their arms. Any of their private parts on a female, I let her do that." Archie also discussed an incident in which D.W. had injured her "private area" while riding her bicycle, but stated that D.W. had blamed the injury on a boy down the street. Archie repeatedly denied sexually assaulting D.W.

Miranda testified that D.W. had never identified anyone other than Archie as having "sexed" her or made allegations about anyone else similar to those she had made about Archie. Miranda admitted that D.W. had said that Miranda's brother had "touched" her and that another girl at a daycare provider had "touched" her. However, the incident with Miranda's brother involved roughhousing during which D.W. had been injured, and was not sexual; nor had D.W. said the incident at daycare involved sexual touching. Hager testified that during the course of her investigation, she received no information from any other source indicating that D.W. had made accusations of other people sexually touching her, that D.W. had watched Archie and Miranda having sex, that D.W. had injured herself on her bicycle, or that Archie had encouraged Miranda to take D.W. to the doctor.

On September 23, 2004, Hager took oral swabs from Archie for DNA analysis. Those swabs were sent to the University of Nebraska Medical Center's human DNA identification laboratory, as were the sexual assault kit obtained from D.W., D.W.'s

underwear, and the crumpled pieces of toilet paper collected from Archie and Miranda's house. The laboratory tested samples of fabric from D.W.'s underwear, portions of the toilet paper, and the three swabs obtained from D.W. in the sexual assault kit. For each of the samples, an extraction procedure was used to separate sperm fractions from epithelial cells, the cells "that may be present on someone's skin or other mucosal surfaces such as the lips or the vagina."

Preliminary tests were conducted on each of the five items. In the preliminary tests, D.W.'s underwear and the toilet paper tested positive for blood. A preliminary semen test was inconclusive when performed on D.W.'s underwear and each of the swabs obtained from D.W. A second, confirmatory test for semen was performed on the swabs, and each test was negative. The toilet paper tested positive for semen in both tests.

Genetic profiles were detected on all five items. The samples from the vulva and anal swabs taken from D.W. and the samples from D.W.'s underwear were consistent with only D.W.'s DNA profile. The toilet paper contained a mixture of DNA consistent with Archie's and D.W.'s respective DNA profiles. In the epithelial fraction, Archie's DNA profile was detected in the mixture at all the tested genetic locations, and D.W.'s profile was detected at all the tested genetic locations except one. In the sperm fraction, only Archie's DNA profile was detected at all the genetic locations tested.

Probability statistics were generated for each of the genetic profiles obtained from the toilet paper sample. For the epithelial fraction, the probability of an individual unrelated to Archie or D.W. matching the DNA profile obtained was 1 in 4.87 million in the Caucasian population, 1 in 3.12 million in the African-American population, and 1 in 6.29 million in the American Hispanic population. For the sperm fraction, the probability of a DNA profile unrelated to Archie's matching the DNA profile obtained from the toilet paper sample was 1 in 13.6 septillion in the Caucasian population, 1 in 49.1 quintillion in the African-American population, and 1 in 308 sextillion for American Hispanics. The director of the laboratory opined, to a reasonable degree of scientific certainty, that the DNA profile that matched Archie's was from sperm within seminal fluid.

Archie was charged by information with one count of first degree sexual assault on a child⁴ and one count of incest.⁵ Archie entered pleas of not guilty to each count. Archie later filed a motion to withdraw his plea with respect to the count of incest, so that he could file a motion to quash that count on the basis that the incest statute⁶ was unconstitutionally vague. The district court granted Archie's motion to withdraw his plea and overruled his motion to quash. Archie again pled not guilty to incest.

The case went to a jury trial. In addition to the evidence summarized above, D.W. testified at trial. When D.W. entered the courtroom, the court, without objection, introduced D.W. to the people in the courtroom and had her identify Archie.

The State began its examination of D.W. by asking several questions about the difference between the truth and a lie and about the identification of parts of the body. D.W. identified body parts correctly and indicated awareness of the difference between the truth and a lie. D.W. was then asked whether anyone had ever touched her to make her feel "mad or sad or angry," and D.W. said that Archie had touched her to make her mad.

D.W. explained that she had taken her pants off, because Archie "want[ed] to touch me." She identified the lotion found in the bedroom, and testified that Archie "[p]ut it on his — put it on his pee pee." D.W. said that after Archie applied the lotion to himself, he was "touching" her, with the lotion, on her "pee pee." Asked if it hurt, D.W. said, "[w]hen I go potty, it really hurt." D.W. also identified the roll of toilet paper in the photograph of the bedroom. D.W. said that Archie "wiped [the toilet paper] on my butt" when he was done touching her.

D.W. talked about how blood had come out of her "pee pee," and Miranda had discovered the blood on D.W.'s underwear when D.W. was taking a bath. D.W. said that "[m]y daddy said I can't tell my mom, 'cause he said I can't tell her if — I'd get a whooping." D.W. again identified Archie as the person of whom

⁴ See § 28-319.

⁵ See § 28-703(1).

⁶ *Id.*

she was speaking, and she said that Archie had “whooped” her before and that it hurt and scared her.

D.W. was given a male and a female doll to reenact the incident. D.W. identified herself as the female doll and took the pants off the doll. D.W. asked, “Where are the covers?” and was given a piece of paper to be a cover. D.W. was asked, “Why did you put the cover on top of you?” and replied, “Because [Archie] didn’t want me to see.” D.W. took the pants off the male doll and positioned them together, then separated the dolls, with the male doll standing over the female doll.

On cross-examination, defense counsel questioned D.W. about talking to Miranda, in the following colloquy:

Q . . . And you talked to your mom before you came to court today?

A Yes. This is [what] my mom said, if — if I tell the truth, when I was really brave, I would go somewhere fun.

Q Oh, okay. So your mom told you to come to court today and tell us what you told us?

A Uh-huh (affirmative sound).

. . . .

Q And if you told us what you said today, she would take you someplace really fun?

A Uh-huh (affirmative sound).

Q Is that yes?

A That’s a yes.

D.W. was asked about her conversations with the Center counselor, Hager, and the prosecutor, and D.W. answered affirmatively to some of the questions asking whether Hager and the prosecutor had told D.W. what to say in court. D.W. also stated that the prosecutor had, prior to her testimony, shown her the pictures she was shown in court. On redirect, D.W. clarified that Miranda, the Center counselor, and the prosecutor had all told D.W. to testify truthfully.

After D.W.’s testimony, the State rested, and Archie made a motion to dismiss both charges for failure to make a prima facie case. Archie specifically argued that there was insufficient evidence of sexual penetration and repeated his constitutional

claim. The motion was denied. Archie rested without adducing evidence and made a motion for directed verdict on the same grounds as his motion to dismiss, which was also denied.

The jury found Archie guilty on both counts. However, when the verdicts were presented to the court, the court noticed that the verdict form for the count of incest was defective, because the introductory paragraph incorrectly identified the charge as first degree sexual assault of a child, although the actual verdict lines correctly identified the charge as incest. The court explained the problem to the jury and asked the jury to confirm its verdicts, which it did. The jury was polled, and each juror indicated agreement with the verdicts. The court accepted the verdicts without objection.

Archie filed a motion for new trial, supported by two affidavits: one executed by Archie's mother and the other by a former spouse of Archie. The evidence adduced in support of the motion for new trial will be discussed in more detail below, but summarized, the affidavits averred that each affiant had been told, by Miranda, that the State had pressured Miranda to ensure that D.W. testified against Archie. Miranda testified at an evidentiary hearing and generally denied the allegations. The court overruled the motion for new trial, finding that the evidence did not support the allegations of witness or prosecutorial misconduct, or that a witness or prosecutor suborned perjury or interfered with Archie's right to a fair trial.

The matter proceeded to sentencing. The presentence investigation report indicated that Archie has a lengthy criminal history, including a 2000 conviction for attempted robbery. Archie was sentenced to a period of imprisonment of 25 to 30 years for first degree sexual assault on a child, and a concurrent term of imprisonment of 10 to 20 years for incest. Archie appeals.

ASSIGNMENTS OF ERROR

Archie assigns, consolidated and restated, that the district court erred in (1) overruling his motion to quash and motion to dismiss because the incest statute is unconstitutionally vague; (2) permitting Hager to testify that she believed D.W. to be telling the truth during Hager's interview of D.W.; (3) introducing D.W. to the jury and directing D.W. to identify Archie in

the presence of the jury; (4) providing a verdict form that was confusing, misleading, and insufficient to support Archie's conviction because it was unclear and ambiguous; (5) overruling his motions to dismiss and for directed verdict on the basis of insufficient evidence; (6) overruling his motion for new trial; and (7) imposing excessive sentences.

[1] Archie also argues that the district court erred in permitting George to testify that when asked what caused the blood in her underwear, D.W. blamed Archie. However, Archie did not assign this as error. An appellate court does not consider errors which are argued but not assigned.⁷ Therefore, we do not consider this argument.

STANDARD OF REVIEW

[2,3] 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.⁸ The determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion.⁹

[4,5] 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.¹⁰ 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.¹¹

[6] 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

⁷ *State v. King*, 272 Neb. 638, 724 N.W.2d 80 (2006).

⁸ *State v. Marrs*, 272 Neb. 573, 723 N.W.2d 499 (2006).

⁹ *State v. Bracey*, 261 Neb. 14, 621 N.W.2d 106 (2001).

¹⁰ *State v. Stark*, 272 Neb. 89, 718 N.W.2d 509 (2006).

¹¹ *State v. Floyd*, 272 Neb. 898, 725 N.W.2d 817 (2007).

and construed most favorably to the State, is sufficient to support the conviction.¹²

[7] 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.¹³

[8] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.¹⁴

ANALYSIS

CONSTITUTIONALITY OF § 28-703

Archie contends that the court erred in overruling his various challenges to the constitutionality of the incest statute, § 28-703, which provides in relevant part that “any person who engages in sexual penetration with his or her minor stepchild commits incest,” a Class III felony. Archie relies on the dissenting opinion in *State v. Johnson*¹⁵ and argues that § 28-703 is unconstitutionally vague because it does not define the age of a “minor” stepchild.

In *Johnson*, the defendant was acquitted of first degree sexual assault of a child, but convicted of incest, based on alleged sexual acts between the defendant and his stepdaughter. The defendant admitted that he and his stepdaughter had sexual contact when she was 17 years old and sexual intercourse when she was 18 years old. The defendant's stepdaughter, however, testified that they had had sexual contact when she was 12 years old and that sexual intercourse started a year later.¹⁶

The defendant proposed that the jury be instructed that the stepchild must, as an element of the crime of incest, be less than 16 years old. The trial court, however, instructed the jury that as an element of the crime of incest, the stepchild must be less than 19 years old. The defendant was convicted of incest, and

¹² *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007).

¹³ *Floyd*, *supra* note 11.

¹⁴ *State v. Davlin*, 272 Neb. 139, 719 N.W.2d 243 (2006).

¹⁵ *State v. Johnson*, 269 Neb. 507, 695 N.W.2d 165 (2005).

¹⁶ See *id.*

he appealed, arguing in part that § 28-703 is unconstitutionally vague. The Nebraska Court of Appeals concluded as a matter of statutory interpretation¹⁷ that the instruction given by the trial court was correct. We granted the defendant's petition for further review.¹⁸

This court was divided on the issue of whether § 28-703 is unconstitutionally vague. We agreed that because the defendant had failed to file a motion to quash in the trial court raising his constitutional claim, that issue could only be reached as plain error.¹⁹ Four members of this court were of the opinion that the issue should be considered as plain error and that § 28-703 was unconstitutionally vague.²⁰ Three members of this court, however, declined to reach the issue and “[w]ithout deciding whether the statute is or is not unconstitutionally vague,” concluded that “because the invalidity of the statute is not plainly evident, we cannot . . . consider the constitutionality of the statute where the defendant has failed to properly preserve the issue for appeal.”²¹ Because “[n]o legislative act shall be held unconstitutional except by the concurrence of five judges,”²² the opinion of those three justices was the opinion of the court. The opinion further concluded, based upon statutory interpretation, that a “minor” for purposes of § 28-703 is a person under 19 years of age.²³

In this case, Archie made his constitutional argument in the trial court and preserved it for appeal. He contends, based on the four-judge dissent in *Johnson*, that § 28-703 is unconstitutionally vague. However, Archie does not have standing to make this claim.

[9-12] The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness

¹⁷ See Neb. Rev. Stat. § 43-2101 (Reissue 2004).

¹⁸ See *Johnson*, *supra* note 15.

¹⁹ See *id.*

²⁰ See *id.* (Gerrard, J., dissenting).

²¹ *Id.* at 516, 695 N.W.2d at 173.

²² Neb. Const. art. V, § 2.

²³ See *Johnson*, *supra* note 15.

that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.²⁴ To have standing to assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly prohibited by the questioned statute and cannot maintain that the statute is vague when applied to the conduct of others.²⁵ Conduct which is clearly proscribed by the statute will not support a vagueness challenge (1) because the statute is not vague as to the party challenging the statute and (2) because the court will not examine the vagueness of the law as it might apply to the conduct of persons not before the court.²⁶ The test for standing to assert a vagueness challenge is the same whether the challenge asserted is facial or as applied.²⁷

Here, there is little question that Archie's alleged conduct was clearly prohibited by the statute. Whatever the definition of a "minor stepchild" may be, it certainly includes a 6-year-old girl. Unlike *Johnson*,²⁸ the facts of this case do not present any ambiguity with respect to whether § 28-703 prohibits the conduct alleged. There is no merit to Archie's first assignment of error.

HAGER'S TESTIMONY ABOUT INTERVIEW OF D.W.

Archie contends that the district court erred in permitting Hager to testify, over a relevance objection, that she had no concerns during her interview of D.W. at the Center that D.W. was not telling Hager the truth.

At trial, Hager testified at length about the procedures used to investigate family crimes and interview children. Hager said that as a member of the family crimes unit of the Lincoln Police Department, she had received specialized child forensic interview training. Hager explained there is a standard form for interviewing a child interviewee which begins with telling the child interviewee about the interview room and that the interviewer

²⁴ *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002).

²⁵ *Id.*

²⁶ *State v. Hookstra*, 263 Neb. 116, 638 N.W.2d 829 (2002).

²⁷ *Faber*, *supra* note 24.

²⁸ *Johnson*, *supra* note 15.

is a police officer, and permitting the child interviewee to ask questions about those things. Then, the interviewer moves on to discussing a nonabuse event with the child interviewee, to “get the child used to the way we are going to talk.” Hager said that after that,

I’ll move to what we call the ground rules, which include I’ll say things such as if you don’t understand, it’s okay to say you don’t understand. If I use a big word that you don’t understand, just let me know. If you don’t remember, it’s okay to say that you don’t remember.

And also part of the ground rules is what we call the truth or lie ceremony. So it’s a way to see if a child knows the difference and can understand the difference between the truth and a lie.

And then we go into the part of the interview where we elicit information regarding the abuse event.

And, after that, we close up usually with another non-abuse event . . . [s]o we end it in what we say is a positive note, to talk about something different.

Hager then testified specifically regarding her interview of D.W. at the Center. Hager agreed that during the course of the interview, she did not have any concerns that D.W. did not understand the difference between the truth and a lie. Although D.W. was “very energetic” and “couldn’t sit still for very long,” Hager testified that D.W. was able to provide information pertinent to the investigation.

However, Hager said that she departed from the standard sequence for interviewing a child during her interview of D.W. For example, Hager said she did not go through a “body part inventory” with D.W., because D.W. was already using terms to describe body parts and it was unnecessary to identify what D.W.’s terms meant. Hager also said that although she discussed the difference between a truth and a lie with D.W., she did not go through the truth-or-lie ceremony.

Hager was cross-examined regarding the truth-or-lie ceremony. Because it is significant to our analysis of this issue, an extensive section of defense counsel’s colloquy with Hager is set forth below.

Q Why do you refer to the form during your interview with the child?

A Those are tools. . . .

Q Okay. And the truth [or] lie portion of the form is also to go over or to determine what?

A If it's age appropriate, meaning there's a certain age that I don't use that form with, that is to establish or to see if they can tell the difference between the truth and a lie.

Q Okay. And you said earlier that you didn't go over this form with [D.W.] before your interview did you?

A Yes.

Q So you did not use the truth/lie part with her when you questioned her, is that right?

A Correct. That form, I did not.

. . . .

Q . . . You testified earlier that you've done a series of child forensic interviews in your profession, is that right?

A Yes.

Q And you were specially trained to question children?

A Yes.

Q All right. And you mentioned something yesterday, you need to make sure, when you're questioning a child, not to mislead, is that right?

A Yes.

Q Because that can be a problem in these kind[s] of cases, can it not?

A When interviewing children, yes, that can be a problem.

. . . .

Q — an idea may be planted in a child's head, inadvertently, by a questioner?

A Can it be?

Q Yes.

A Yes.

Q Okay. Or a child may give a positive response that they suspect maybe the questioner is asking for, is that right?

A Yes, that's possible.

Q And that's why you have the protocols to determine the truth and lie, make sure a child understands the difference between the truth and lie before you do an interview, is that right, at least part of the reason?

A As part of the interview, we sometimes use that tool, yes.

On redirect examination, the State revisited the subject of the truth-or-lie ceremony. Hager testified that the documents about which she had been questioned were "five separate tools" that might or might not be used in a particular instance. Hager explained that "[i]t all depends upon the age of the child and their [sic] disposition, as far as the interview." Hager said she had spoken to D.W. about the importance of telling her the truth. Hager testified over a relevance objection that she had no concerns D.W. was not telling her the truth and agreed that it was only "at times, when you have children where you may have those concerns [about telling the truth], that's when you definitely need to go through the format of the truth and lie ceremony."

Archie argues, based on *State v. Beermann*,²⁹ that Hager gave improper testimony as to the credibility of another witness. In *Beermann*, the 10-year-old alleged victim of a sexual assault testified, at trial, regarding five sexual assaults committed by the defendant. Issues were raised regarding inconsistency between the alleged victim's trial testimony and the testimony she gave at a preliminary hearing. Following her trial testimony, the county sheriff's deputy who had investigated the allegations was asked if he had heard the alleged victim's in-court testimony, and he said he had. The deputy testified that the alleged victim's in-court testimony was consistent with what he had been told during the investigation. The deputy was then asked if, based upon his training and experience and his observations of the victim, he had an opinion whether or not the alleged victim had been sexually abused. The deputy testified it was his opinion that the alleged victim had been sexually abused.³⁰

²⁹ *State v. Beermann*, 231 Neb. 380, 436 N.W.2d 499 (1989).

³⁰ See *id.*

On appeal, this court concluded that the testimony had been erroneously admitted, in part based on the principle that “it is totally improper for one witness to testify as to the credibility of another witness.”³¹ We found that the testimony was precluded by Neb. Evid. R. 701 and 702,³² because there was no evidence that the deputy was an expert on the subject of his testimony, and the subject was not proper for lay opinion testimony because “it tended to usurp the jury’s role.”³³ We held that the credibility of a witness is left to the jury’s judgment and that “[n]o witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth.”³⁴

Archie also relies on the Court of Appeals’ opinion in *State v. Doan*.³⁵ In *Doan*, an appeal from a conviction for sexual assault of a child, the State presented expert testimony from a counselor who had treated the alleged victim. The counselor testified to the characteristics typically seen in sexually abused children and that part of her function was to evaluate “whether or not I believe they’ve been abused or not.”³⁶ The counselor testified about the history she obtained from the alleged victim and described the alleged victim’s physical appearance and reactions while the alleged victim described the abuse to the counselor. The counselor concluded that she had received “validation” of the alleged abuse.³⁷

The Court of Appeals, noting our holding in *Beermann*, concluded that the opinion testimony should have been excluded for lack of proper foundation. The court found “no showing” that the counselor “had the underlying expertise to validate

³¹ *Id.* at 396, 436 N.W.2d at 509.

³² Neb. Rev. Stat. §§ 27-701 and 27-702 (Reissue 1995).

³³ *Beermann*, *supra* note 29, 231 Neb. at 396, 436 N.W.2d at 509.

³⁴ *Id.*, quoting *State v. Romero*, 147 Wis. 2d 264, 432 N.W.2d 899 (1988). Accord *State v. Smith*, 241 Neb. 311, 488 N.W.2d 33 (1992).

³⁵ *State v. Doan*, 1 Neb. App. 484, 498 N.W.2d 804 (1993).

³⁶ *Id.* at 488, 498 N.W.2d at 807.

³⁷ See *id.*

[the] account of sexual abuse, even if such testimony could be received, which it cannot.”³⁸ The court held that “in a prosecution for sexual assault of a child, an expert witness may not give testimony which directly or indirectly expresses an opinion that the child is believable, that the child is credible, or that the witness’ account has been validated.”³⁹

More recently, in *In re Interest of Kyle O.*,⁴⁰ the Court of Appeals addressed a situation in which a 14-year-old defendant was convicted of sexual contact with a 5-year-old alleged victim. The defendant argued that the trial court erred in excluding a letter from the defendant’s counselor. The Court of Appeals noted that the letter contained the opinion of the counselor that the defendant was telling the truth in denying the allegations. The Court of Appeals, citing *Beermann*, concluded that the trial court did not abuse its discretion by excluding the letter, because the opinion of the counselor regarding the defendant’s credibility was irrelevant.⁴¹

The circumstances of the instant case, however, are distinguishable from those presented in *Beermann*, *In re Interest of Kyle O.*, and *Doan*. In this case, Hager did not purport to offer an expert opinion as to D.W.’s credibility. Hager’s statement consisted of one question and one answer, in which Hager agreed that she did not have “any concerns that [D.W.] wasn’t telling [her] the truth.” The question and answer were obviously in the context of explaining on redirect examination why Hager did not utilize the truth-or-lie ceremony with this particular child witness. Nonetheless, it is improper for a prosecutor to inquire of a witness whether another person may or may not have been telling the truth in a certain instance. The proper line of inquiry, as was expressed on direct examination, is whether Hager had concerns regarding D.W.’s ability to “understand the difference between the truth and a lie.” Hager testified on direct examination that D.W. understood that difference.

³⁸ *Id.* at 496, 498 N.W.2d at 812.

³⁹ *Id.*

⁴⁰ *In re Interest of Kyle O.*, 14 Neb. App. 61, 703 N.W.2d 909 (2005).

⁴¹ See *id.* See, also, *State v. Egger*, 8 Neb. App. 740, 601 N.W.2d 785 (1999).

[13] Based on our review of the entire record and the context in which the line of inquiry came about, however, we conclude that Hager's statement did not materially influence the jury in a verdict adverse to the defendant. Harmless error exists in a jury trial of a criminal case when the court makes an erroneous evidentiary ruling which, on review of the entire record, did not materially influence the jury in a verdict adverse to the defendant.⁴² Any error in permitting Hager's statement on redirect examination was harmless beyond a reasonable doubt.⁴³

In this case, Hager had been cross-examined in depth regarding her decision not to administer the truth-or-lie ceremony to D.W. The evident implication of Archie's cross-examination was that because Hager departed from established protocol, she might have misled D.W., suggested the "right" answers to questions, or even planted ideas in D.W.'s head. This was a legitimate line of inquiry on cross-examination, but by challenging the basis for Hager's departure from the interrogation form, the cross-examination implicated Hager's assessment of whether D.W. understood the concept of telling the truth during the interview. Here, while the form of the question posed to Hager on redirect examination was improper, we must examine the entire context of questioning when assessing prejudice.

[14] Unlike the circumstances presented in *Beermann*, *In re Interest of Kyle O.*, and *Doan*, in this case, Hager did not testify to the substance of D.W.'s own statements or offer expert opinion testimony on the credibility of those statements. Instead, Hager answered a single question during redirect examination that was related to an issue raised by Archie during cross-examination. Read in context, the effect of Hager's single statement was not to vouch for the credibility of a witness, but simply to explain why she departed from the standard interview form in her interview of D.W. In a harmless error review, we look at the evidence upon which the jury 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,

⁴² See *State v. McKinney*, ante p. 346, 730 N.W.2d 74 (2007).

⁴³ See *id.*

whether the guilty verdict rendered in the trial was surely unattributable to the error.⁴⁴ Considering the context in which Hager's statement was made and based on our review of the entire record, we conclude that the guilty verdict rendered in this trial was surely unattributable to any error in permitting this statement on redirect and that such error was harmless beyond a reasonable doubt.

INTRODUCTION OF D.W. TO JURY

Archie claims that the district court committed plain error when, before D.W. testified, the court introduced D.W. to the people in the courtroom and directed her to identify Archie.

Prior to D.W.'s testimony, before the jury entered the courtroom, the court and counsel discussed how the court would proceed with D.W.'s testimony. The court explained:

[D.W.] is seven years old. What I would propose to do is, when she comes in, introduce myself to her and explain to her who everybody else in the well is.

I would just say you know who . . . Archie is, if that's not objectionable to [defense counsel]. If that is — I would just say the other people sitting at these tables in suits are attorneys, and they may ask you some questions, let her know who the jurors are and just tell her that they're just going to be listening to what's going on, to what she has to say, who my court reporter is, who I am. And that's it.

And I may just say that the people sitting in the back are people who come in and watch what's going on in courtrooms.

And then what I may very well do is . . . I may ask [the prosecutor] to put something on the monitor there, just a piece of paper that I have, just a blank piece of paper there, one of those pieces of paper that I have in front, just so she knows that he may put things there and she'll be able to see them on her monitor here, and just — then I will ask her — and I'm willing — And then I would ask her what we talked about the other day, telling the difference between telling the truth and telling a lie and good or bad and promise to tell the truth.

⁴⁴ *Id.*

But I think it's kind of important that she feel that she knows who the players are in the courtroom, coming into a courtroom now. I know she's been in the courtroom before, empty. I think it's different when you come and you see a lot of people, that at least she knows who's here.

The court asked both the State and Archie if they had any objection to this procedure, and both parties affirmatively stated that they had no objection.

The jury was brought into the courtroom, and before D.W. entered, the court explained to the jury the process that would be followed. The court explained, "I just wanted you to know that that's what I'm going to do, because she's a seven-year-old girl." However, the court also instructed the jury at that time that "[D.W.'s] testimony has to be treated just the same as anybody else's testimony. No deference is given to her because she's a seven-year-old girl. I'm just trying to make her feel a little bit more comfortable in this strange environment."

After D.W. entered the courtroom and took the stand, the court generally followed the procedure it had explained to the parties and the jury. The court specifically directed D.W.'s attention to the five people seated at the defendant's table, and asked D.W., "One of them you know, and that's . . . Archie, right?" D.W. nodded, and when prompted by the court to speak aloud, answered, "Yes."

[15,16] Although Archie complains about this procedure on appeal, he did not object at trial, even after being expressly invited to do so. 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.⁴⁵ Consideration of plain error occurs, of course, at the discretion of an appellate court,⁴⁶ and the scope of our review is obviously limited by an appellant's failure to raise an argument in the trial court.

Archie contends the court committed plain error, as it was "prejudicial for the court to overly accommodate and to

⁴⁵ *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006).

⁴⁶ *State v. Al-Zubaidy*, 257 Neb. 935, 602 N.W.2d 8 (1999).

personalize himself to a witness in a criminal case.”⁴⁷ Archie argues that the court’s conduct “implicitly communicated that this child needed to be treated tenderly as a victim” and this “validated” the State’s theory that D.W. had been sexually assaulted.⁴⁸ Archie also argues that the court erred by instructing D.W. to identify Archie in the courtroom before her testimony.

[17] We disagree with Archie’s characterization of the court’s accommodation of D.W.’s testimony. The court’s procedure did not show undue favoritism toward D.W.; rather, the court simply recognized that D.W. was a 7-year-old child who might be unfamiliar with, and intimidated by, a courtroom setting. The trial court has broad discretion over the general conduct of trial.⁴⁹ The court must also exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence, so as to make the interrogation and presentation effective for the ascertainment of the truth.⁵⁰ A trial court has wide discretion in fashioning procedures and modifying standard trial practices to accommodate the special needs of child witnesses. Recognizing the difficulties a particular child may face in trying to testify in a traditional courtroom setting, a judge may require that the environment in which a witness is to give testimony may be made less formal and intimidating.⁵¹

[18] The district court in this case exercised its discretion to help D.W. testify truthfully without being overwhelmed by her surroundings. As described above, the court carefully explained to the jury what it was doing and why it was being done and instructed the jury that D.W.’s testimony should be treated the same as the testimony of any other witness. Absent evidence to the contrary, it is presumed that a jury followed the instructions

⁴⁷ Brief for appellant at 24.

⁴⁸ *Id.*

⁴⁹ See *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005), *cert. denied* 546 U.S. 947, 126 S. Ct. 449, 163 L. Ed. 2d 341.

⁵⁰ Neb. Evid. R. 611(1)(a), Neb. Rev. Stat. § 27-611(1)(a) (Reissue 1995).

⁵¹ See, *Commonwealth v. Amirault*, 404 Mass. 221, 535 N.E.2d 193 (1989); John E.B. Myers & Nancy W. Perry, *Child Witness Law and Practice* § 7.4 (1987 & Cum. Supp. 1992).

given in arriving at its verdict.⁵² There is no indication that the jury failed to respect its instruction here and no plain error apparent in the court's procedure.

INCEST VERDICT FORM

Archie assigns error to the verdict form for the count of incest. Following the jury instructions, the case was submitted to the jury, and it found Archie guilty on both counts. However, when the verdicts were presented to the court, an issue arose with respect to the verdict form for the count of incest. At the jury instruction conference, the court had provided the parties with drafts of the verdict forms for each count of the information and the parties agreed that the verdict forms were acceptable. However, the verdict form for the count of incest was later found to be defective. Below the caption, the form incorrectly read: "**We, the Jury**, duly impaneled and sworn in the above-entitled cause, do, with respect to the charge of First Degree Sexual Assault of a Child . . . find as follows . . ." Below that, the form correctly provided the jury with the options of finding Archie "**Guilty** of Incest," "**Guilty** of Attempted Incest," or "**Not Guilty**."

The court noticed the mistake when the bailiff was reading the verdict for the count of incest. The court told the jury:

We can only read these things for so many times. With first degree sexual assault, find guilty of incest. This is a typographical error, obviously. It says incest. I'm going to have [the bailiff] read it as it says. It says guilty of incest.

Then I'm going to ask them, notwithstanding the . . . differences in what it says, whether in fact the verdict is for guilty of the charge of incest.

The court asked if that procedure was agreeable to the parties, and the parties indicated that it was. The court informed the jury of the mistake, calling it a "scrivener's error," and admitted it was the court's "mistake for not catching that." The court asked the jury, with respect to the count of first degree sexual assault on a child, whether the verdict of guilty was its unanimous verdict, and it indicated it was. The court then asked the jury

⁵² *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006).

with respect to the verdict form for the count of incest, “which has the box checked, ‘Guilty of incest,’ notwithstanding the fact that the body says, the very introduction says first degree sexual assault of a child, it says incest, guilty of incest, is this your unanimous verdict?” All the jurors indicated that it was. The jury was polled, and each juror indicated agreement with the verdicts.

[19] Archie now claims that he was prejudiced by the erroneous verdict form. However, objections to the verdict form should be made at the jury instruction conference or at the time the verdict is returned.⁵³ Archie concedes that our review of this issue is for plain error. There is no question that the verdict form contained an error. The issue, then, is whether that error was so prejudicial that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.⁵⁴

We have reviewed the record and examined the verdict forms, and based on that review and observation of the forms, we are convinced that the erroneous verdict form did not mislead the jury and that the verdicts rendered accurately reflected the jury’s actual determination of Archie’s guilt of both offenses. No plain error is present, and we reject Archie’s fourth assignment of error.

SUFFICIENCY OF EVIDENCE

Archie argues that the evidence is insufficient to sustain his convictions. First, Archie argues generally that the evidence lacks the probative force to support a finding of guilt. Archie suggests that D.W.’s injuries might have been inflicted by an ordinary childhood accident, that D.W.’s testimony was tainted by suggestions from Miranda and the State, and that the DNA sample on the toilet paper was contaminated because the two pieces of toilet paper were collected and stored together.

⁵³ *Bradley T. & Donna T. v. Central Catholic High Sch.*, 264 Neb. 951, 653 N.W.2d 813 (2002).

⁵⁴ See *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), *cert. denied* 543 U.S. 1128, 125 S. Ct. 1088, 160 L. Ed. 2d 1081 (2005).

[20] However, the credibility and weight of witness testimony are for the jury to determine, and witness credibility is not to be reassessed on appellate review.⁵⁵ The evidence conflicted on how D.W.'s injuries were likely to have been inflicted, and D.W. directly stated that she was injured by Archie. Archie argued to the jury that D.W.'s testimony was unreliable, but the jury obviously found her testimony credible. The evidence does not support Archie's argument that the toilet paper sample was contaminated—rather, the record indicates that the two pieces of toilet paper were crumpled together when they were found and that they were taken as evidence and retained in the same condition in which they were found. In short, taken in the light most favorable to the State, the evidence summarized above is sufficient to support Archie's convictions.

Archie specifically argues that even if the evidence is sufficient to establish sexual contact, there is not enough evidence to support a finding that he subjected D.W. to sexual penetration. At the time the offenses were allegedly committed, § 28-319(1) provided, in relevant part, that “[a]ny person who subjects another person to sexual penetration . . . (c) when the actor is nineteen years of age or older and the victim is less than sixteen years of age is guilty of sexual assault in the first degree.” Similarly, pursuant to § 28-703(1), “any person who engages in sexual penetration with his or her minor stepchild commits incest.” We note that § 28-319 was significantly amended effective July 14, 2006,⁵⁶ but that amendment is not applicable to this proceeding.

[21] Obviously, pursuant to §§ 28-319(1) and 28-703, sexual penetration is an element of both offenses, and the jury was so instructed. The jury was also correctly instructed that

[s]exual penetration means sexual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the actor's or victim's body or any object manipulated by the actor into the genital or anal openings of the victim's body which

⁵⁵ *Robinson*, *supra* note 45. See, also, *State v. Faust*, 269 Neb. 749, 696 N.W.2d 420 (2005); *State v. Earl*, 252 Neb. 127, 560 N.W.2d 491 (1997).

⁵⁶ See 2006 Neb. Laws, L.B. 1199.

can be reasonably construed as being for nonmedical or nonhealth purposes. Sexual penetration shall not require emission of semen.⁵⁷

The slightest intrusion into the genital opening is sufficient to constitute penetration, and such element may be proved by either direct or circumstantial evidence.⁵⁸ It is not necessary that the vagina be entered or that the hymen be ruptured; the entry of the vulva or labia is sufficient.⁵⁹

Archie argues that D.W. did not testify directly to sexual penetration. However, taken in the light most favorable to the State, the evidence is sufficient to establish that sexual penetration occurred. The physical examinations of D.W., D.W.'s testimony, and the blood found on D.W.'s underwear and the toilet paper taken from Miranda and Archie's house are indicative of an injury resulting from sexual penetration. This evidence is sufficient to support the jury's conclusion that Archie subjected D.W. to sexual penetration.⁶⁰

We find sufficient evidence in the record to support the jury's findings. Archie's assignment of error is without merit.

MOTION FOR NEW TRIAL

Archie contends that the district court erred in overruling his motion for new trial based on alleged witness and prosecutorial misconduct. Before the jury instruction conference, Archie made a motion for mistrial, based on information obtained from Archie's mother, who claimed that she had been contacted by Miranda. According to Archie's mother, Miranda told her that the State had threatened Miranda that unless D.W. had testified the way she did in court, the State would take Miranda's children away from her. The court overruled the motion for mistrial, noting that the issues presented could, if necessary, be raised through a motion for new trial. After conviction, Archie filed a motion for new trial based on the same allegations,

⁵⁷ Neb. Rev. Stat. § 28-318(6) (Cum. Supp. 2004).

⁵⁸ See *State v. Hirsch*, 245 Neb. 31, 511 N.W.2d 69 (1994).

⁵⁹ *Id.*

⁶⁰ Compare *id.*

supported by two affidavits: one executed by Archie's mother, Paulette Archie, and the other by Lisa Merriweather, a former spouse of Archie.

Paulette averred that she had regular contact with Miranda during the pendency of the case and had spoken with Miranda about D.W.'s accusations against Archie. Paulette claimed that following D.W.'s in-court testimony, Paulette and Miranda spoke about the trial, Miranda's testimony, and D.W.'s testimony. Paulette averred that

[d]uring our conversations, [Miranda] told me that she had been threatened by . . . the state to bring [D.W.] to court and to compel [D.W.] to testify against [Archie] in the manner that [D.W.] did. Further, [Miranda] told me that if she failed to bring [D.W.] to court and to compel [D.W.] to testify in the manner that she did . . . the state threatened to remove [Miranda's] children from her care.

Paulette further stated that Miranda had told Paulette that she had not told the truth during her testimony, instead saying what the prosecutor wanted her to say, but that if questioned by authorities, she would deny what she had said to Paulette.

Similarly, Merriweather averred that she visited Miranda's home approximately 3 weeks after the jury had found Archie guilty and that she and Miranda had discussed the case, Miranda's testimony, and D.W.'s testimony. Merriweather stated that "[d]uring our conversation, [Miranda] told me that she had been threatened by a Brian from Child Protective Services that if she failed to cooperate with the State and did not bring [D.W.] to court, the State could remove her children from her care and/or charge her with child neglect."

On Archie's motion, the court ordered an evidentiary hearing on the allegations set forth in the affidavits. Miranda testified that she spoke with Paulette briefly at the courthouse, on the day that D.W. testified, and spoke with Paulette at home "[a] couple days later," when Paulette came to Miranda's home to pick up Archie's son for a visit. Miranda denied speaking to Paulette about the case on those occasions. Miranda specifically denied making any of the statements attributed to her in Paulette's affidavit.

Miranda admitted she had spoken to Merriweather at around the time Merriweather had claimed. Miranda denied that she and Merriweather conversed about Archie's trial, stating instead that "[s]he talked to me about it" and Miranda "just answered her questions." Miranda said the "question and answer conversation" lasted for 45 minutes to an hour. Miranda denied making the statement attributed to her in Merriweather's affidavit.

Miranda testified that she had told Merriweather, "'I'm lying, I'm lying,'" sarcastically, in response to Merriweather's accusing Miranda of being a liar. Miranda said that she did that "because I just wanted to have her hear what she wanted to hear, I guess." Miranda said that Merriweather had been accusative and had raised her voice. Miranda testified that initially, she insisted to Merriweather that she was telling the truth, but she finally just gave up and told Merriweather that Merriweather was right. According to Miranda, Merriweather called Miranda a liar "[a] lot," and Miranda sarcastically replied, "[I]ike, I'm a liar, like, yeah, I'm lying, like that, yeah."

The court overruled the motion for new trial. After reciting the evidence in detail, the court found that the evidence did not support the allegations of witness or prosecutorial misconduct.

[22,23] A new trial, after a verdict of conviction, may be granted, on the application of the defendant, for "misconduct of the jury, of the prosecuting attorney, or of the witnesses for the state" materially affecting the defendant's substantial rights.⁶¹ A trial judge is accorded significant discretion in granting or denying a motion for new trial, because the trial judge sees the witnesses, hears the testimony, and has a special perspective on the relationship between the evidence and the verdict.⁶² When the granting of a new trial requires a consideration of conflicting evidence, the findings of the trial court thereon will not ordinarily be disturbed on appeal.⁶³

In this case, the district court was presented with starkly conflicting evidence from individuals with different interests in

⁶¹ Neb. Rev. Stat. § 29-2101(2) (Cum. Supp. 2006).

⁶² *Springer v. Bohling*, 263 Neb. 802, 643 N.W.2d 386 (2002).

⁶³ *Hartley v. Guthmann*, 248 Neb. 131, 532 N.W.2d 331 (1995).

the outcome of the proceedings. The court's order demonstrates that it carefully considered that evidence before overruling the defendant's motion for new trial. Miranda testified before the district court that the allegations in the affidavits were false, and the court specifically found that Miranda's testimony was credible and that Miranda did not influence D.W.'s trial testimony. Because these findings are supported by the evidence, the district court did not abuse its discretion in overruling Archie's motion for new trial.

EXCESSIVE SENTENCES

Archie argues that his sentences, of 25 to 30 years' imprisonment for first degree sexual assault of a child, and a concurrent term of 10 to 20 years' imprisonment for incest, were excessive. Archie argues that the district court failed to properly consider that Archie had no prior sexual offenses and that a sexual adjustment inventory test administered to Archie showed no established pattern of sexual interest in children.

However, as previously noted, a sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.⁶⁴ First degree sexual assault on a child is a Class II felony,⁶⁵ punishable by a minimum of 1 year's imprisonment and a maximum of 50 years' imprisonment.⁶⁶ Incest is a Class III felony,⁶⁷ punishable by a minimum of 1 year's imprisonment and a maximum of 20 years' imprisonment, a \$25,000 fine, or both.⁶⁸ The sentences imposed in this case were clearly within the statutory limits.

[24,25] 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

⁶⁴ *Davlin*, *supra* note 14.

⁶⁵ § 28-319(2).

⁶⁶ Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2006).

⁶⁷ § 28-703(2).

⁶⁸ § 28-105(1).

amount of violence involved in the commission of the crime.⁶⁹ When a sentence imposed within statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying these factors as well as any applicable legal principles in determining the sentence to be imposed.⁷⁰

A review of Archie's criminal record reveals a long history of lawbreaking and violence, particularly domestic violence, and the testimony at trial also evidences Archie's propensity for violence.⁷¹ Moreover, the transcript of Hager's interview of D.W., present in the presentence investigation report, contains ample proof of the pain and fear Archie inflicted on D.W. by beating and sexually abusing her. Sexual assault on a child is a serious and deplorable crime, and the injury that results from this type of assault is well established.⁷² The record also indicates that Archie subjected D.W. to sexual abuse on more than one occasion. Based on our review of the record, we conclude that the district court did not abuse its discretion in sentencing Archie, and we reject his final assignment of error.

CONCLUSION

For the foregoing reasons, we find no merit to Archie's assignments of error. The judgment of the district court is, therefore, affirmed.

AFFIRMED.

HEAVICAN, C.J., not participating.

⁶⁹ *Marrs*, *supra* note 8.

⁷⁰ *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006).

⁷¹ Compare *State v. Freeman*, 267 Neb. 737, 677 N.W.2d 164 (2004).

⁷² See, *State v. Meers*, 257 Neb. 398, 598 N.W.2d 435 (1999); *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989); *State v. Davis*, 1 Neb. App. 502, 500 N.W.2d 852 (1993).

HOWARD L. MAXON, APPELLANT, v. CITY OF
GRAND ISLAND, NEBRASKA, APPELLEE.

731 N.W.2d 882

Filed May 25, 2007. No. S-05-1204.

1. **Constitutional Law: Ordinances: Appeal and Error.** The constitutionality of an ordinance presents a question of law, in which an appellate court is obligated to reach a conclusion independent of the decision reached by the trial court.
2. **Administrative Law: Appeal and Error.** In reviewing the decision of an administrative tribunal on a petition in error, both the district court and the appellate court review the decision of the tribunal to determine whether it acted within its jurisdiction and whether the decision of the tribunal is supported by sufficient relevant evidence.
3. **Constitutional Law: Ordinances: Presumptions: Proof: Appeal and Error.** When passing on the constitutionality of an ordinance, an appellate court begins with a presumption of validity so that the burden of demonstrating a constitutional defect rests with the challenger.
4. **Constitutional Law: Ordinances.** The void-for-vagueness doctrine requires that an ordinance define the prohibited conduct with sufficient definiteness such that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.
5. **Employment Security: Words and Phrases.** In the employment context, misconduct is generally defined to include behavior which evidences (1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations.
6. **Statutes.** A statute will not be deemed vague if it uses ordinary terms which find adequate interpretation in common usage and understanding.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Reversed and remanded with directions.

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

William A. Harding and Adam J. Prochaska, of Harding, Shultz & Downs, and Douglas R. Walker, Grand Island City Attorney, for appellee.

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

GERRARD, J.

NATURE OF CASE

Howard L. Maxon, a former officer of the City of Grand Island, Nebraska, appeals from the order of the district court affirming the termination of his employment by the city. Pursuant to Grand Island city ordinance § 2-22, an officer of the city, such as Maxon, may be removed from office by the mayor for “misconduct.” Because we conclude that the city’s allegations against Maxon do not constitute misconduct, we reverse the judgment of the district court and remand the cause to the court with directions to provide relief in a manner that is not inconsistent with this opinion.

STATEMENT OF FACTS

Maxon served as the emergency management director of the City of Grand Island and Hall County for approximately 25 years. As the emergency management director, Maxon was considered an appointive officer of the City of Grand Island.¹

On February 15, 2005, Gary Greer, the Grand Island city administrator, asked Maxon to come to Greer’s office, where Greer took Maxon’s keys, asked him to sign a letter of resignation, and then asked him to leave. Maxon refused to sign the letter and ultimately left the building. Greer issued a letter to Maxon, dated February 15, 2005, informing him that he was being suspended with pay, effective immediately. The letter indicated that a copy of the letter would be sent to the mayor and that Greer was requesting that Maxon be discharged at the earliest possible time. The letter set forth specific instances in which Greer considered Maxon’s conduct to have been unacceptable for a director of the City of Grand Island.

The following day, February 16, 2005, Maxon wrote a letter to the mayor requesting a hearing to appeal the notice of discharge and asking that he be permitted to continue working pending the outcome of the hearing. Maxon’s request to continue working was denied.

On February 25, 2005, in compliance with § 2-22, the mayor signed and filed formal charges of misconduct against Maxon.

¹ Grand Island City Ordinance, ch. 2, art. II, § 2-21.

The alleged charges of misconduct were divided into four categories: (1) unsatisfactory performance; (2) incompetence; (3) demeaning, disruptive, and uncooperative conduct in the workplace; and (4) insubordination. Instances of each were specified in the charges.

The hearing before the city council was held on March 29, 2005. At the time of the hearing, the city chose to prosecute only three of the four charges of misconduct, removing the third category, "Demeaning, Disruptive and Uncooperative Conduct in the Work Place." During the course of the hearing, both the city and Maxon were allowed to submit evidence and examine witnesses.

UNSATISFACTORY PERFORMANCE

In support of its contention that Maxon's job performance was unsatisfactory, the city offered into evidence two of Maxon's performance evaluations that Greer had conducted. The first evaluation occurred on April 27, 2004, and Greer concluded that Maxon had met or exceeded expectations in some areas but needed improvement in other areas, including dependability, productivity, initiative, attitude, self-improvement, leadership, and training.

Greer performed a second performance evaluation of Maxon on February 9, 2005. The results of this evaluation indicated that Maxon's job performance had not improved. The evaluation provided that Maxon still needed improvement in all of the same areas as in his April 2004 evaluation and also needed improvement in the areas of quality, versatility, communication skills, and delegation.

Maxon presented evidence that all his performance evaluations prior to the time Greer became the city administrator were satisfactory. On cross-examination, Greer admitted that his performance evaluations of Maxon were vastly different when compared to the evaluations of prior supervisors. Maxon testified that he was "shocked" when Greer informed him that his performance was unsatisfactory.

INCOMPETENCE

With regard to the city's allegation that Maxon was incompetent, the city presented evidence that while Maxon was the

emergency management director, 911 emergency dispatch service surcharges increased from 50 cents per telephone landline to \$1 per telephone landline, which should have resulted in an increase in revenue for Maxon's department. David Springer, the finance director for the City of Grand Island, testified that he asked Maxon multiple times if everything was "on track" for the surcharge to be increased starting on January 1, 2002, and that Maxon assured him that it was. However, Springer testified that Maxon failed to implement the surcharge increase for 2002 and that this resulted in a 1-year delay and cost the city an estimated \$100,000 to \$180,000 in lost revenue.

Maxon testified that he did everything he could to facilitate the 911 surcharge implementation process and that any delay was not his fault, but was the result of the county board's failure to act in a timely manner. Maxon presented evidence that at a July 11, 2000, county board meeting, he and a committee of the Hall County Board of Supervisors recommended increasing the 911 surcharge. The board, however, voted to table the recommendation. The record shows that the next time the county board discussed the increase concerning the 911 surcharge was on November 13, 2001.

The Hall County clerk testified that at this meeting, it was Maxon who brought to the board's attention the notice requirements to be complied with before implementing the surcharge increase. The county board met on December 18, 2001, and again discussed the 911 surcharge increase. The county clerk testified, however, that the board "took no action at that time with respect to the 911 surcharge." The resolution to increase the 911 surcharge was eventually adopted by the county board on July 16, 2002.

With respect to this 1-year delay, Maxon testified that "we thought everything was fine and then at the last minute we found out that the telephone companies . . . had to be notified." When asked about a September 2000 letter generically addressed from Qwest Communications, Inc., to "QWEST Enhanced 911 Customer," which provided information that such notice was required, Maxon testified that he did not recall receiving the letter, and his customary initials acknowledging receipt were not contained on the letter.

Greer also testified that he asked Maxon to configure the telephone system so that National Public Radio would play when a caller was placed on hold. Approximately 1 month after asking Maxon to perform this responsibility, the system had still not been configured. Shortly thereafter, Greer reassigned this responsibility to another department. Maxon testified that after receiving this assignment, he discovered a broken cable which he unsuccessfully attempted to repair. Maxon explained that he contacted a vendor, who then repaired the broken cable shortly before Greer reassigned the project.

INSUBORDINATION

The city's remaining charge against Maxon involved allegations of insubordination. The city presented evidence that Greer interviewed every employee in Maxon's department and then created an interoffice memorandum, addressed to Maxon, that summarized the content of the interviews and made suggestions for correcting certain problems. Greer concluded the memorandum by stating, "I would encourage you to share this memo (post it on the wall) and discuss its contents with department team members." Greer testified that he expressly told Maxon to post this memorandum on the wall, but Maxon failed to do so.

Maxon testified that although he did not post the memorandum on the wall, he did share the memorandum with the department team leaders. In response to why he did not post the memorandum on the wall, Maxon explained that he and another official in his department felt that it "would not further the betterment of the department at that time." Maxon further testified that although the memorandum was not posted on the wall, it was eventually distributed to all of the employees.

The city council voted to affirm the charges of misconduct and the termination of Maxon's employment. Maxon filed a petition in error with the district court seeking review of the city council's determination. The district court affirmed the city council's decision. Maxon appealed.

ASSIGNMENTS OF ERROR

Maxon assigns, restated and renumbered, that the district court erred in (1) finding that § 2-22 is not unconstitutionally

vague, (2) determining that there was sufficient evidence in the record to sustain the formal charges of misconduct against him and that he received proper notice of those charges, (3) failing to find that the city had violated his procedural due process rights, (4) finding that he received proper notice of the charges against him when the city adduced evidence outside of the formal charges, (5) finding that his failure to request a continuance at the hearing waived any procedural defects he may have had regarding the city's failure to formally appoint a special assistant city attorney to prosecute the charges against him, (6) concluding that the interlocal agreement between the city and Hall County allowed the city to unilaterally terminate him, and (7) failing to conclude that the city council was required to make findings of fact and conclusions of law relating to its determination to affirm the charges of misconduct against him.

STANDARD OF REVIEW

[1] The constitutionality of an ordinance presents a question of law, in which an appellate court is obligated to reach a conclusion independent of the decision reached by the trial court.²

[2] In reviewing the decision of an administrative tribunal on a petition in error, both the district court and the appellate court review the decision of the tribunal to determine whether it acted within its jurisdiction and whether the decision of the tribunal is supported by sufficient relevant evidence.³

ANALYSIS

UNCONSTITUTIONALITY OF § 2-22

[3,4] We first consider Maxon's assertion that § 2-22 is unconstitutionally vague. When passing on the constitutionality of an ordinance, this court begins with a presumption of validity. Therefore, the burden of demonstrating the constitutional defect rests with the challenger.⁴ The void-for-vagueness doctrine

² *Waste Connections of Neb. v. City of Lincoln*, 269 Neb. 855, 697 N.W.2d 256 (2005).

³ *Barnett v. City of Scottsbluff*, 268 Neb. 555, 684 N.W.2d 553 (2004).

⁴ *Howard v. City of Lincoln*, 243 Neb. 5, 497 N.W.2d 53 (1993).

requires that an ordinance define the prohibited conduct with sufficient definiteness such that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.⁵

Section 2-22 provides in relevant part that the mayor may remove an officer of the city “for misconduct” and establishes the procedure by which an officer may be terminated, including written charges and a hearing before the city council. Maxon argues that because the ordinance neither defines misconduct nor explains the type of behavior that would qualify as misconduct, it is unconstitutionally vague and violates the due process provisions of the U.S. Constitution and the Nebraska Constitution. Accordingly, we must determine whether the term “misconduct” as used in § 2-22 is unconstitutionally vague.

[5] In the context of an employment case involving an employee’s request for unemployment benefits, although the term “misconduct” was not defined in the applicable statute, we concluded that the definition of “misconduct” was well established. We explained:

“While the term ‘misconduct’ is not specifically defined in the statute, it has generally been defined to include behavior which evidences (1) wanton and willful disregard of the employer’s interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer’s interests or of the employee’s duties and obligations.”⁶

While the facts of the present case involve an ordinance dealing with the removal of an employee, as opposed to an employee’s ability to receive unemployment benefits, we do not

⁵ *Village of Winslow v. Sheets*, 261 Neb. 203, 622 N.W.2d 595 (2001).

⁶ *Poore v. City of Minden*, 237 Neb. 78, 80, 464 N.W.2d 791, 793 (1991) (quoting *Stuart v. Omaha Porkers*, 213 Neb. 838, 331 N.W.2d 544 (1983)). See, also, *Douglas Cty. Sch. Dist. 001 v. Dutcher*, 254 Neb. 317, 576 N.W.2d 469 (1998).

find this to be a relevant distinction. There is no logical reason why the generally accepted definition of misconduct in an employment setting should not likewise apply to § 2-22 in the present case.

[6] For an ordinance to meet constitutional standards, it is not necessary that it define or describe every conceivable situation under which misconduct may be found. As we have noted in previous cases, when evaluating an ordinance for vagueness, we do not seek mathematical certainty, but, rather, flexibility and reasonable breadth.⁷ Moreover, a statute will not be deemed vague if it uses ordinary terms which find adequate interpretation in common usage and understanding.⁸

We conclude that the term “misconduct,” as used in the context of an employment relationship such as that found in § 2-22, has the same generally accepted meaning as in our prior cases dealing with unemployment benefits. Unlike some other settings where the term “misconduct” has been found to be unconstitutionally vague,⁹ we find that the term, as used in an employment context, carries a common enough meaning to satisfy the requirements of due process and, therefore, is not unconstitutionally vague.

ALLEGATIONS OF MISCONDUCT

Maxon next argues that the allegations of misconduct with which he has been charged, specifically, unsatisfactory performance, incompetence, and insubordination, do not constitute misconduct as required by § 2-22. We agree.

Pursuant to the generally accepted definition of “misconduct” previously discussed, in order for the city to remove Maxon, his alleged behavior must include conduct that would evidence wanton and willful disregard of the employer’s interests, deliberate

⁷ *Howard v. City of Lincoln*, *supra* note 4.

⁸ *Hall v. Progress Pig, Inc.*, 259 Neb. 407, 610 N.W.2d 420 (2000).

⁹ See, e.g., *Giaccio v. Pennsylvania*, 382 U.S. 399, 86 S. Ct. 518, 15 L. Ed. 2d 447 (1966) (statute allowing jury to assess costs against acquitted criminal defendant where it found defendant guilty of “misconduct”); *Soglin v. Kauffman*, 418 F.2d 163 (7th Cir. 1969) (university disciplinary proceeding).

violation of rules, disregard of standards of behavior which the employer can rightfully expect from the employee, or negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations.¹⁰

The city's allegations of unsatisfactory performance, incompetence, and insubordination are not categories of job performance that are commonly understood to be "misconduct" in an official capacity. While we question whether conduct characterized as unsatisfactory performance or incompetence could ever qualify as misconduct, as that term is commonly understood, on the specific facts presented in this case, they certainly do not. We also recognize that under certain circumstances, insubordination may rise to the level of misconduct. Again, however, the fact that Maxon chose not to post Greer's memorandum on the wall does not satisfy that threshold.

In concluding that Maxon's conduct rises to the level of "misconduct" as required by § 2-22, the dissent relies on its understanding of one aspect of "misconduct," which is "negligence which manifests culpability," or, stated another way, "culpable negligence." The dissent asserts, relying on dictionary definitions of "negligence" and "culpability," that "negligence which manifests culpability," or "culpable negligence," is satisfied upon a mere showing of blame for ordinary negligence. But the same dictionary defines "culpable negligence" as conduct that "while not intentional, involves a disregard of the consequences likely to result from one's actions,"¹¹ and further explains that culpable negligence "'means something more than negligence'" and "'has been held to amount to more than 'blameworthy' conduct'"¹²

This is consistent with the well-established principle that culpable negligence, as contemplated by § 2-22, requires a showing of conduct that rises above that which would generally qualify

¹⁰ *Poore v. City of Minden*, *supra* note 6.

¹¹ Black's Law Dictionary 1062 (8th ed. 2004).

¹² *Id.* at 1062. Accord 65 C.J.S. *Negligence* § 19 (2000).

as ordinary or simple negligence.¹³ Our view of “culpable negligence” fundamentally differs from the dissent’s view. While difficult to precisely define, culpable negligence is more than simple negligence and less than an intentional act—but on a sliding scale, culpable negligence is much closer to an intentional disregard of the employer’s interests than it is to mere negligence (i.e., neglect of duty). As explained by another court, “culpable negligence” consists of

acts which are . . . unreasonable and taken in disregard of a known or obvious risk Thoughtless, heedless, or inadvertent acts do not constitute culpable negligence, nor do mere errors in judgment or simple inattention. Mistakes in judgment resulting from inexperience, excitement, confusion, or inattention likewise do not constitute culpable negligence.¹⁴

Thus, in order for the city to establish that Maxon’s conduct constitutes “negligence which manifests culpability,” the city must prove more than ordinary negligence in the performance of duty. Even viewing the evidence in a light most favorable to the city, which we must, the circumstances with regard to the 911 surcharge issue present, at most, a disputed case of ordinary negligence in the performance of duty which, as already discussed, is an insufficient ground for terminating Maxon *for misconduct* under § 2-22.

We note that Maxon is not an elective officer within the scope of Neb. Rev. Stat. § 16-217 (Reissue 1997), and there is nothing that would prevent a municipality from enacting an ordinance that would empower the city to terminate an employee, such as Maxon, for behavior such as incompetence, neglect of duty, insubordination, or even official misconduct, so long as the categories or definitions are sufficient to give persons of common

¹³ See, *Favreau v. Dept. of Employment and Training*, 151 Vt. 170, 557 A.2d 909 (1989); *Bettencourt v. Pride Well Service, Inc.*, 735 P.2d 722 (Wyo. 1987); *Byers v. Ritz*, 890 So. 2d 343 (Fla. App. 2004); *Liberty Mortg. v. National City Bank*, 755 N.E.2d 639 (Ind. App. 2001); *Matter of Coniber v. Hulst*, 15 A.D.2d 252, 222 N.Y.S.2d 773 (1962).

¹⁴ *Martin v. Alley Const., Inc.*, 904 P.2d 828, 832 (Wyo. 1995).

intelligence adequate notice of the transgressing conduct.¹⁵ However, § 2-22, as it currently reads, provides no such additional categories. Accordingly, the only behavior for which the city may remove Maxon from office is misconduct, and the city's evidence and allegations of unsatisfactory performance, incompetence, and insubordination do not rise to the level of misconduct as that term is generally understood.

We conclude that the allegations raised against Maxon do not rise to the level of misconduct as required by § 2-22. Because this conclusion is dispositive, we need not address Maxon's other assignments of error.

CONCLUSION

For these reasons, we reverse the judgment of the district court with directions to reverse the decision of the city council and provide relief in a manner that is not inconsistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

¹⁵ See *United States v. Lanier*, 520 U.S. 259, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997).

CONNOLLY, J., dissenting.

I join the part of the majority opinion that holds that the term "misconduct" is not unconstitutionally vague. But I dissent because I believe Maxon's carelessness in handling the surcharge amounted to misconduct. The majority opinion concludes that the term "misconduct" in the context of an employment relationship includes "'negligence which manifests culpability.'" This definition is well established within our unemployment benefits jurisprudence.

Negligence is commonly understood as the "failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation,"¹ and culpability means "[b]lameworthiness."² Thus, I interpret "negligence which

¹ Black's Law Dictionary 1061 (8th ed. 2004).

² *Id.* at 406.

manifests culpability” as an ordinary negligence standard with a showing of blameworthiness. The majority opinion, however, asserts that “negligence which manifests culpability” is equivalent to “culpable negligence,” a term of art with a distinct legal definition. But in assuming that these terms are the same, I believe the majority opinion fails to give proper meaning to the selected words.

In construing a statute, words are to be given their ordinary and common meaning, unless they have acquired a technical or special legal meaning, or a different meaning is apparent from the context of the words.³ I believe the same principle applies when considering language, as developed by case law. It seems to me one would not understand the term “negligence which manifests culpability” (or blameworthiness) to require “‘more than negligence’” or conduct which is “‘‘more than ‘blameworthy,’’’” as the majority opinion holds. And the context of this phrase does not suggest that such a meaning is more appropriate than its common meaning. Because we have not used the term “culpable negligence” in defining misconduct, I believe that its technical and legal definition is inapplicable here.

In reviewing the decision of an administrative tribunal on a petition in error, both the district court and the appellate court review the decision of the tribunal to determine whether it acted within its jurisdiction and whether the decision of the tribunal is supported by sufficient relevant evidence.⁴ The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did from the testimony and exhibits contained in the record before it.⁵ Stated another way, the evidence is “sufficient as a matter of law” if a judge could not, were the trial to a jury, direct a verdict.⁶ It is something less

³ See 73 Am. Jur. 2d *Statutes* §§ 124 and 152 (2001). See, also, e.g., *State v. County of Lancaster*, 272 Neb. 376, 721 N.W.2d 644 (2006).

⁴ *Barnett v. City of Scottsbluff*, 268 Neb. 555, 684 N.W.2d 553 (2004).

⁵ *Id.*

⁶ See *Eshom v. Board of Ed. of Sch. Dist. No. 54*, 219 Neb. 467, 471, 364 N.W.2d 7, 11 (1985).

than the weight of the evidence and can be such as to permit the drawing of two inconsistent conclusions.⁷

The record shows that Maxon, the emergency management director for the City of Grand Island and Hall County, and a committee of the Hall County Board of Supervisors (County Board) recommended increasing the 911 surcharge from \$.50 to \$1 per access line per month at a County Board meeting on July 11, 2000. The County Board voted to table the recommendation because it needed more information. The County Board did not address the 911 surcharge again until November 13, 2001.

Maxon testified that he worked on the recommendation during 2001. Springer, the treasurer and finance director of the City of Grand Island, testified that he asked Maxon several times that year if everything was “on track” for the surcharge to be increased starting on January 1, 2002. Maxon assured him that it was and also assured him that he would notify Qwest Communications, Inc., the main service supplier, of the change. But Maxon testified he discovered, “at the last minute,” in 2001 that state law required notice to the telephone companies before a surcharge could be changed. The record, however, contains a letter from Qwest Communications, Inc., dated September 2000 that provided information that such notice was required.

Because the telephone companies did not receive proper notice, the 911 surcharge could not be put into effect for 2002 and was delayed until 2003. City officials estimated that Maxon’s department lost \$100,000 to \$180,000 in revenue because of the delay. Maxon claims that he was not responsible for the failure to implement the 911 surcharge increase by 2002 because he “did everything [he] could to facilitate that process.” Instead, he places the blame on the County Board for tabling the recommendation. But the testimony from city officials shows that Maxon was in charge of implementing the 911 surcharge. When asked why Maxon would be responsible for the delay and revenue loss, Springer testified, “[H]e was the director of the department . . . and he has the responsibility for that department for the revenues. He budgeted the revenue and he should

⁷ See *id.*

have been following up on it.” And, as stated above, Maxon had assured Springer that he was on track.

Under our standard of review, I believe that sufficient evidence supports the city council’s decision to terminate Maxon’s employment because of his mishandling of the 911 surcharge implementation. Maxon was in charge of the 911 surcharge, and he repeatedly assured city officials that he would have it done in time to be implemented in 2002. Nearly 1½ years passed between the first time the surcharge was presented to the County Board and the next time it appeared on the County Board’s agenda. Yet, in all that time, Maxon neglected the notice requirements for the public hearing. And while he argues he was not at fault for the County Board’s delay, the evidence suggests otherwise.

Despite Maxon’s excuses, there was sufficient evidence to support that Maxon was negligent in implementing the 911 surcharge and that his negligence caused the city to lose significant revenue. I believe these facts fit the definition of misconduct as “negligence which manifests culpability.” Thus, I would affirm.

WRIGHT, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V.
DARIN C. YORK, APPELLANT.

731 N.W.2d 597

Filed May 25, 2007. No. S-06-957.

1. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a post-conviction 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: 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.
3. **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.

4. **Postconviction: Constitutional Law.** Where an issue of constitutional dimensions has been raised in a direct appeal of a criminal conviction, and that issue was not considered or ruled upon by the Supreme Court in the direct appeal, the issue may properly be raised in a subsequent motion for postconviction relief.
5. **Res Judicata.** The doctrine of res judicata, or claim preclusion, only bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if the former judgment was on the merits.
6. **Effectiveness of Counsel: Appeal and Error.** An ineffective assistance of counsel claim is not procedurally barred if it was raised on direct appeal but not expressly decided on the merits.
7. **Postconviction: Effectiveness of Counsel: Appeal and Error.** When a plaintiff seeking postconviction relief has different counsel on appeal than at trial, the plaintiff's motion for postconviction relief is procedurally barred if the plaintiff (1) knew of the issues assigned in the postconviction motion at the time of the plaintiff's direct appeal, (2) failed to assign those issues on direct appeal, and (3) did not assign as error the failure of appellate counsel on direct appeal to raise the issues assigned in the postconviction motion.

Petition for further review from the Nebraska Court of Appeals, CARLSON, MOORE, and CASSEL, Judges, on appeal thereto from the District Court for Morrill County: PAUL D. EMPSON, Judge. Reversed and remanded with directions.

Bell Island, of Island, Huff & Nichols, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Kimberly Klein for appellee.

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

GERRARD, J.

NATURE OF CASE

In 2005, Darin C. York was convicted of incest in the district court. On direct appeal, York argued that his trial counsel was ineffective, but conceded that the record was inadequate to review the issue, and the issue was only being raised in order to preserve it for a later postconviction action. The Nebraska Court of Appeals granted the State's motion for summary affirmance, citing Neb. Ct. R. of Prac. 7B(2) (rev. 2001).¹

¹ See *State v. York*, 14 Neb. App. xlvi (No. A-05-1188, Feb. 27, 2006).

York filed a postconviction motion raising his ineffective assistance of counsel claims. The district court dismissed York's motion without an evidentiary hearing, concluding that the claims were procedurally barred. York appealed. The Court of Appeals granted the State's motion for summary affirmance.² The primary issue in this petition for further review is whether the Court of Appeals' summary affirmance on direct appeal was a disposition on the merits of York's ineffective assistance of counsel claims.

STATEMENT OF FACTS

York was convicted, pursuant to a guilty plea, of one count of incest³ and was sentenced to a term of 4 to 6 years' imprisonment. During his guilty plea and sentencing, York was represented by a private attorney retained by York's family.

York, represented by different counsel, appealed his conviction and sentence to the Court of Appeals. On direct appeal, York claimed, among other things, ineffective assistance of trial counsel. In his brief on direct appeal, York cited two specific instances that he alleged constituted ineffective assistance of his trial counsel. First, York assigned as error that his "plea of guilty was not voluntary because it was based on an assurance from his attorney that he would receive a sentence of probation." Second, York alleged that his trial counsel had a conflict of interest because his attorney was simultaneously representing York's sister, the alleged victim, in a civil personal injury case.

York conceded that his ineffective assistance of counsel claim had not been raised in the trial court and that the record was inadequate to review the issue. York explained that he was nevertheless including this assignment of error in order to preserve the issue for a later postconviction action.

The State filed a motion for summary affirmance, arguing in relevant part that York's ineffective assistance of counsel arguments were without merit. However, the State's motion for summary affirmance "acknowledge[d]," in part, that the court "may find that the record is insufficient to evaluate . . . the assignment

² See *State v. York*, 15 Neb. App. ____ (No. A-06-957, Jan. 18, 2007).

³ See Neb. Rev. Stat. § 28-703 (Reissue 1995).

of error.” Without setting forth a specific basis for its ruling, the Court of Appeals granted the State’s motion for summary affirmance, citing only rule 7B(2) in its minute entry.

On April 10, 2006, York, through the same counsel that represented him on direct appeal, filed the postconviction motion that is the subject of this present appeal. In his postconviction motion, York alleged, in relevant part, that he was entitled to postconviction relief because his trial counsel had a conflict of interest, was ineffective in advising him that pleading guilty would result in a sentence of probation, and was ineffective in failing to object when the State violated the plea agreement when it did not remain silent at sentencing.

The State filed a motion to dismiss in the district court, arguing that the issues raised in York’s postconviction motion had already been raised and ruled upon in York’s direct appeal to the Court of Appeals. The district court granted the State’s motion to dismiss without an evidentiary hearing, concluding that the issues raised were procedurally barred. The court determined that the issues relating to the conflict of interest and sentencing advice had been raised on direct appeal and had been “ruled on by the Court of Appeals when [it] granted the [State’s] Motion for Summary Affirmance.” With respect to the alleged breach of the plea agreement, the court concluded that it was procedurally barred because it had not been raised on direct appeal, but could have been.

York appealed to the Court of Appeals. The State filed a motion for summary affirmance, arguing that the district court correctly determined that the issues raised were procedurally barred. The State asserted that “the granting of the state’s motion for summary affirmance [in the direct appeal] constitutes a resolution on the merits” of the ineffective assistance of counsel issues “such as they were,” and cited *State v. Lotter*⁴ and *State v. Caddy*⁵ for the proposition that arguments that were or could have been raised on direct appeal are procedurally barred on postconviction review.

⁴ *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003).

⁵ *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001).

The Court of Appeals granted the State's motion for summary affirmance with the following minute entry: "Motion of appellee for summary affirmance sustained; judgment affirmed. See, rule 7B(2); *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003); *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001)."⁶ We granted York's petition for further review.

ASSIGNMENT OF ERROR

York assigns that the Court of Appeals erred in sustaining the State's motion for summary affirmance.

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.⁷

ANALYSIS

York argues that he is entitled to an evidentiary hearing on his allegations of ineffective assistance of counsel. York argues that both the district court and the Court of Appeals incorrectly interpreted the Court of Appeals' summary affirmance on direct appeal as being a disposition of his ineffective assistance of counsel claims on the merits.

[2,3] In raising his ineffective assistance of counsel arguments on direct appeal, but noting that the record was insufficient to address the claims, York was following the established procedure in Nebraska for preserving ineffective assistance of counsel claims for later review. We have said that 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 post-conviction review.⁸ Claims of ineffective assistance of counsel

⁶ *State v. York*, *supra* note 2.

⁷ *State v. Marshall*, 272 Neb 924, 725 N.W.2d 834 (2007).

⁸ *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006).

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.⁹

The State contends that the Court of Appeals' summary affirmation on direct appeal constituted a resolution of York's ineffective assistance of counsel claims on the merits and that thus, these same claims are now procedurally barred on postconviction review. The record does not support this argument.

[4] In *State v. Svoboda*,¹⁰ we held that an issue is not procedurally barred if not "litigated" in a prior proceeding. In that postconviction case, we had affirmed the judgment on direct appeal, because the defendant had not made a then-necessary motion for new trial.¹¹ In a subsequent postconviction proceeding, the State argued that the constitutional issues raised were procedurally barred. We disagreed, explaining that because we had not considered or passed upon the issues raised on direct appeal, they had not been resolved on the merits. We held that where an issue of constitutional dimensions has been raised in a direct appeal of a criminal conviction, and that issue was not considered or ruled upon by this court in the direct appeal, the issue may properly be raised in a subsequent motion for postconviction relief.¹²

[5,6] Although the strict doctrine of res judicata does not apply to a postconviction action,¹³ we have applied res judicata principles in determining whether issues are procedurally barred.¹⁴ The doctrine of res judicata, or claim preclusion, only

⁹ *Id.*

¹⁰ *State v. Svoboda*, 199 Neb. 452, 454, 259 N.W.2d 609, 611 (1977).

¹¹ See *State v. Svoboda*, 194 Neb. 663, 234 N.W.2d 901 (1975).

¹² *Svoboda*, *supra* note 10. See, also, *State v. Whitmore*, 238 Neb. 125, 469 N.W.2d 527 (1991).

¹³ See *State v. Parker*, 180 Neb. 707, 144 N.W.2d 525 (1966).

¹⁴ See *State v. Pilgrim*, 188 Neb. 213, 196 N.W.2d 162 (1972).

bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if the former judgment was on the merits.¹⁵ We conclude that the same principle applies in postconviction actions, and we specifically hold that an ineffective assistance of counsel claim is not procedurally barred if it was raised on direct appeal but not expressly or necessarily decided on the merits.

Applying the foregoing principles to the present case, we determine that the ineffective assistance of counsel claims raised in York's direct appeal brief, specifically, his allegation that trial counsel had a conflict of interest and incorrectly advised him that pleading guilty would result in a sentence of probation, are not procedurally barred. Given our review of the record, which revealed a clear lack of evidence relating to York's claims, and the fact that York conceded in his brief to the Court of Appeals that the record was inadequate, we cannot say that the merits of York's claims were either "directly addressed" or "necessarily included" in the Court of Appeals' nonspecific minute entry sustaining the motion for summary affirmance. Accordingly, the Court of Appeals' summary affirmance on direct appeal cannot be read to have disposed of the merits of the ineffective assistance of counsel claims raised in York's brief, and the district court and Court of Appeals erred in concluding otherwise.

[7] However, York's allegation that his trial counsel was ineffective for failing to object when the State breached an alleged promise to remain silent during sentencing is procedurally barred. Unlike York's other two allegations, this particular claim was not addressed in his brief on direct appeal. Rather, York raised this argument for the first time in his postconviction motion. When a plaintiff seeking postconviction relief has different counsel on appeal than at trial, the plaintiff's motion for postconviction relief is procedurally barred if the plaintiff (1) knew of the issues assigned in the postconviction motion at the time of the plaintiff's direct appeal, (2) failed to assign those issues on direct appeal, and (3) did not assign as error the

¹⁵ See *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005).

failure of appellate counsel on direct appeal to raise the issues assigned in the postconviction motion.¹⁶

In the present case, York's appellate counsel knew or should have known about the alleged promise by the State to remain silent during sentencing and trial counsel's failure to make the proper objection. Because trial counsel's ineffectiveness on this issue was not raised on direct appeal, but could have been, it is now procedurally barred.

CONCLUSION

The Court of Appeals' summary affirmance on direct appeal cannot be read to have disposed on the merits the ineffective assistance of counsel claims raised in York's brief. Accordingly, the district court and Court of Appeals erred in concluding that the claims raised by York on direct appeal were procedurally barred. However, York's allegation that his trial counsel was ineffective for failing to object when the State allegedly breached a promise to remain silent during sentencing is procedurally barred.

The judgment of the Court of Appeals is reversed, and the cause remanded to that court with directions to remand the cause to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

¹⁶ *State v. Caddy*, *supra* note 5.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE
OF THE NEBRASKA SUPREME COURT, RELATOR,
v. JEFFREY E. DORTCH, RESPONDENT.

731 N.W.2d 594

Filed May 25, 2007. No. S-07-093.

Original action. Judgment of disbarment.

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

PER CURIAM.

INTRODUCTION

This is an action brought by the Counsel for Discipline of the Nebraska Supreme Court, relator, seeking the imposition of discipline against respondent, Jeffrey E. Dortch, a member of the Nebraska State Bar Association. On January 25, 2007, the chairperson of the Committee on Inquiry of the Fourth 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 because his attorney trust account was overdrawn. On February 14, the court entered an order requiring respondent to show cause why his license to practice law should not be suspended based upon the allegations set forth in the application. Respondent did not respond to the show cause order. On March 14, the court entered an order temporarily suspending respondent's license to practice law in this state until further order of the court.

On February 27, 2007, respondent was formally charged with violating certain disciplinary rules and his oath of office as an attorney. Respondent did not file an answer or otherwise respond to the formal charges. Relator moved for judgment on the pleadings pursuant to Neb. Ct. R. of Discipline 10(I) (rev. 2005), and requested that this court enter an appropriate sanction. We determine that the requirements of disciplinary rule 10(I) have been satisfied. Therefore, we grant relator's motion for judgment on the pleadings and order that respondent be disbarred.

STATEMENT OF FACTS

The substance of the allegations contained in the formal charges may be summarized as follows: Respondent was admitted to the practice of law in the State of Nebraska on September 20, 2001. On February 27, 2007, formal charges were filed by relator against respondent. Count I alleges that on May 19, relator received a letter from Isaac D. Brown alleging that respondent had been appointed to represent Brown in an appeal of a criminal conviction to the Nebraska Court of Appeals and that respondent had failed to file the appellate brief. Relator attempted to contact respondent by letter to gain

respondent's response to Brown's allegations, but respondent failed to respond. Thereafter, in accordance with Neb. Ct. R. of Discipline 9(G) (rev. 2001), relator prepared a complaint, which included allegations regarding respondent's alleged failure to file an appellate brief on behalf of Brown. On December 29, a copy of the complaint was sent to respondent, and respondent was informed he had 10 days to submit a response. Respondent did not submit a response. The formal charges allege that respondent's actions constitute a violation of respondent's oath as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 1997), and the following provisions of Neb. Ct. R. of Prof. Cond. (rev. 2005): rules 1.1 (competence), 1.3 (diligence), 1.4 (communications), and 8.4 (misconduct).

Count II alleges that on June 28, 2006, respondent received notification from an Omaha bank that respondent's attorney trust fund account was overdrawn and that four checks written by respondent on that account had been dishonored due to insufficient funds. On June 29, relator sent respondent notice of the overdrawn status of his trust account and instructed respondent to file a written response explaining why his trust account did not have sufficient funds to honor checks presented against it. Respondent did not respond to relator's letter. Thereafter, in accordance with disciplinary rule 9(G), relator prepared a complaint, which included allegations regarding respondent's attorney trust account. On December 29, a copy of the complaint was sent to respondent, and respondent was informed he had 10 days to submit a response. Respondent did not submit a response. The formal charges allege that respondent's actions constitute a violation of respondent's oath as an attorney and Neb. Ct. R. of Prof. Cond. 1.15 (rev. 2005) (safekeeping property) and rule 8.4.

Under disciplinary rule 10(H), respondent has 30 days from the date of service of the formal charges to file an answer. The court file reflects that respondent was served on March 28, 2007. The court file further reflects that respondent did not file an answer to the formal charges stated above. On April 13, relator moved for judgment on the pleadings pursuant to disciplinary rule 10(I).

ANALYSIS

Initially, we note that conduct alleged in the formal charges occurred after September 1, 2005. Therefore, this case is governed by the Nebraska Rules of Professional Conduct. Nonetheless, we are guided by the principles previously announced in our prior decisions under the Code of Professional Responsibility.

Disciplinary rule 10(I) provides that if no answer is filed “within the time limited therefor,” the matter may be disposed of by the court on its own motion or on a motion for judgment on the pleadings. We determine that the requirements of disciplinary rule 10(I) have been satisfied, and therefore, we grant the relator’s motion for judgment on the pleadings. The failure of a respondent to answer the formal charges subjects the respondent to a judgment on the formal charges filed. See *State ex rel. Counsel for Dis. v. Lechner*, 266 Neb. 948, 670 N.W.2d 457 (2003). We conclude that by virtue of respondent’s conduct, respondent has violated the following provisions of the Nebraska Rules of Professional Conduct: rules 1.1, 1.3, 1.4, 1.15, and 8.4. We further conclude that respondent has violated the attorney’s oath of office. See § 7-104.

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. Petersen*, 272 Neb. 975, 981-82, 725 N.W.2d 845, 850 (2007). 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 or subsequent to suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.

With respect to the imposition of attorney discipline in an individual case, we have stated that “each case justifying the discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.” *Petersen*, 272 Neb. at 982, 725 N.W.2d at 851. 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.*

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. Riskowski*, 272 Neb. 781, 724 N.W.2d 813 (2006).

We have noted that the determination of an appropriate penalty to be imposed on an attorney requires consideration of any aggravating or mitigating factors. *Petersen, supra*.

Pursuant to the formal charges, to which respondent has failed to respond, respondent has engaged in conduct that has violated several disciplinary rules and his oath of office as an attorney. There is no record in the instant case of any mitigating factors. Under the provisions of the Code of Professional Responsibility, we have previously disbarred attorneys who, similar to respondent, had violated the disciplinary rules regarding trust accounts and failed to cooperate with the Counsel for Discipline during the disciplinary proceedings. See, *State ex rel. Counsel for Dis. v. Watts*, 270 Neb. 749, 708 N.W.2d 231 (2005); *State ex rel. Special Counsel for Dis. v. Brinker*, 264 Neb. 478, 648 N.W.2d 302 (2002); *State ex rel. NSBA v. Howze*, 260 Neb. 547, 618 N.W.2d 663 (2000). We consider such discipline to be appropriate under similar violations of the Nebraska Rules of Professional Conduct.

We have considered the undisputed allegations of the formal charges 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.

CONCLUSION

The motion for the judgment on the pleadings is granted. It is the judgment of this court that respondent should be disbarred from the practice of law in the State of Nebraska, and we therefore order respondent disbarred, effective immediately. Respondent is directed to comply with Neb. Ct. R. of Discipline 16 (rev. 2004), and upon failure to do so, respondent shall be

8. **Workers' Compensation: Rules of Evidence.** Given the beneficial purposes of workers' compensation law in Nebraska, the compensation court is empowered to admit evidence not normally admissible under the rules of evidence applicable in the trial courts of this state.
9. **Workers' Compensation: Evidence: Expert Witnesses: Testimony.** In a workers' compensation case, a witness must qualify as an expert and the testimony must assist the trier of fact to understand the evidence or determine a fact in issue. The witness must have a factual basis for the opinion, and the testimony must be relevant.
10. **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 Nebraska Workers' Compensation Court.
Affirmed as modified.

Thomas F. Hoarty, Jr., of Byam & Hoarty, for appellant.

Michael J. Lehan for appellee.

Jerald L. Rauterkus and Patrick R. Guinan, of Erickson & Sederstrom, P.C., L.L.O., for Cornhusker Casualty Company, workers' compensation carrier for appellant.

Ronald E. Frank, of Sodoro, Daly & Sodoro, for St. Paul Fire & Marine Insurance Company, workers' compensation carrier for appellant.

HEAVICAN, C.J., WRIGHT, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

Joe Olivotto (Olivotto) worked for DeMarco Brothers Company (DeMarco) as a terrazzo installer from 1954 to 1980. During this time, Olivotto was allegedly exposed to asbestos. He died in 2004 from malignant pleural mesothelioma. In this workers' compensation action, Romana I. Olivotto (Mrs. Olivotto) sought from DeMarco death benefits and compensation for medical bills. The trial court awarded her a weekly indemnity benefit, medical expenses, and burial expenses. A review panel of the Workers' Compensation Court affirmed the award of medical and burial expenses but concluded the trial court erred in finding that Mrs. Olivotto was entitled to a

weekly indemnity benefit. DeMarco appeals, and Mrs. Olivotto has cross-appealed.

SCOPE 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).

[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. *Vega v. Iowa Beef Processors*, 270 Neb. 255, 699 N.W.2d 407 (2005).

FACTS

Olivotto was employed by DeMarco from 1954 to 1980 as a terrazzo installer, working in new construction and remodeling jobs in the Midwest. Terrazzo is a cement-based product that is mixed with marble chips and then ground to a marble-like finish.

Olivotto retired sometime in 1980 due to a heart condition not related to any occupational injury or disease. In November 2002, Olivotto began experiencing difficulties with the accumulation of fluid in his lungs. He was first seen at Nebraska Methodist Hospital in January 2003. He was diagnosed in July with malignant pleural mesothelioma, and he underwent a surgical procedure to drain his pleural effusion. In August, he underwent a second surgery at the Mayo Clinic to address complications.

On December 15, 2003, Olivotto filed a petition in the Workers' Compensation Court seeking compensation and benefits for medical expenses. He alleged that during his employment with DeMarco, he was injuriously exposed to asbestos while working as a terrazzo installer.

The president of DeMarco testified that the tiling materials, terrazzo marble, and grout used in the trade did not contain asbestos. His company did extensive tilework in schools, offices, airports, hospitals, and shopping malls. The construction was primarily new construction rather than remodeling, where one normally encountered asbestos. He testified that terrazzo installers generally did not work alongside other tradesmen such as asbestos insulators.

DeMarco denied that Olivotto sustained any occupational disease or resulting disability arising out of or in the course of his employment and alleged that if there was any injurious exposure, it did not occur during Olivotto's employment with DeMarco. Olivotto died on April 24, 2004, and the parties stipulated that the petition could be amended to reflect Olivotto's death and substitute Mrs. Olivotto as the named plaintiff.

The trial court found by a preponderance of the evidence that Mrs. Olivotto sustained her burden of proof that her husband was exposed to asbestos in the work environment from 1954 to 1980. The court relied on the testimony of Olivotto and a coworker, John DePellegrin, that throughout the course of their employment as terrazzo installers, they were exposed at various times to asbestos materials used by other contractors and tradesmen. DeMarco objected to this testimony on the bases of hearsay and foundation, but the court found that while there was some technical merit to such objections, the Workers' Compensation Court was not bound by the usual common-law or statutory rules of evidence pursuant to Neb. Rev. Stat. § 48-168 (Reissue 2004). The court concluded that Olivotto and DePellegrin, having worked in the construction trade for a combined total of more than 75 years, had the requisite experience and knowledge to identify the existence of asbestos in their work environment.

The trial court noted Olivotto had testified that in the course of his career as a terrazzo installer, other tradesmen would be working at some of the same job locations installing asbestos. He did not recall any specific job where asbestos was used but stated that when he worked on a job at a post office sometime in the 1970's, workers in the same area sprayed asbestos. He testified that he was told to leave the area because asbestos was being sprayed and because the asbestos made the worksite

dangerous. He also remembered the spraying of asbestos in the 1960's. He testified that he removed floor tiles in a doctor's office sometime in the 1960's or 1970's and that there was asbestos in the tiles. However, Olivotto, who had limited ability to read English, admitted on cross-examination that he could not read the word "asbestos" and that he did not recall any one specific exposure.

Olivotto's coworker, DePellegrin, testified that he had worked for DeMarco from 1952 to his retirement in 1999 and that he had worked with Olivotto most of the time Olivotto worked for DeMarco. DePellegrin testified that they worked on a variety of construction and remodeling projects, including a post office, numerous schools, and hospitals. There was often a powdery substance in the air. DePellegrin said there were bags on the worksite which had the word "asbestos" on them. He could not remember exactly the dates or locations where asbestos was sprayed, because he did not pay much attention to it. He was sure there had been asbestos at a post office job.

DePellegrin stated on cross-examination that at the time he was working with Olivotto, asbestos was in almost every building. He stated that when asbestos was sprayed, it created dust, which the workers inhaled. The asbestos insulators were sometimes close to where he and Olivotto were working. On many occasions, DePellegrin saw bags of asbestos materials being mixed for use as insulation.

In spite of DePellegrin's difficulty remembering dates and jobs performed, the trial court determined that he was a credible witness and that although DePellegrin did not remember specific occasions when asbestos insulators were working nearby, he knew they had been present. The court found by a preponderance of the evidence that Mrs. Olivotto had sustained her burden of proof that her husband was exposed to asbestos in the work environment from 1954 to 1980.

The trial court found sufficient evidence that Olivotto's malignant pleural mesothelioma was caused by asbestos exposure on the job. It also found that there was sufficient authority to allow Mrs. Olivotto to bring a claim for outstanding medical expenses. DeMarco was ordered to pay medical expenses incurred for the treatment of Olivotto's mesothelioma in the sum of \$113,594.25

and to reimburse Mrs. Olivotto for her insurance deductible of \$4,800, as well as expenses for transportation and lodging at the Mayo Clinic of \$726.28.

As to an indemnity benefit and burial expenses, the trial court determined that Olivotto was “injured” within the meaning of the Nebraska Workers’ Compensation Act when he became disabled and sought treatment with Dr. Matthew McLeay, a pulmonologist, on January 29, 2003. The court stated that the evidence concerning Olivotto’s exposure to asbestos from the beginning of 1954 until his retirement in 1980 made it difficult to pinpoint the last injurious exposure. The court found that Olivotto experienced a generalized exposure to asbestos in the work environment and that the last injurious exposure occurred on the final day Olivotto worked for DeMarco, which was September 30, 1980. The court found that Olivotto was entitled to a weekly indemnity benefit from the date of his injury, which was January 29, 2003. Mrs. Olivotto was therefore entitled as the surviving spouse to a weekly indemnity benefit from the date of Olivotto’s death on April 24, 2004, in the amount of \$297.76 per week during the pendency of her widowhood. The court awarded reasonable burial expenses not to exceed \$6,000.

A Workers’ Compensation Court review panel heard the case on July 26, 2005. Before the review panel, DeMarco assigned 12 errors concerning the trial court’s award. Eight of the errors related to findings of fact made by the trial court or the admission of evidence at trial. The review panel affirmed the trial court’s factual determination that Mrs. Olivotto sustained her burden of showing by a preponderance of the evidence that Olivotto’s death from mesothelioma was the result of his exposure to asbestos while employed by DeMarco. The review panel found there was sufficient evidence which, if believed by the trier of fact, would support the trial court’s finding of medical causation and its finding of the date of Olivotto’s last injurious exposure. The review panel affirmed the trial court’s findings as to compensation for Olivotto’s medical bills and the right of Mrs. Olivotto to proceed without filing a separate action for revivor.

However, the review panel concluded that the trial court had erred in its determination that Mrs. Olivotto was entitled to a

weekly indemnity benefit. It opined that under the Nebraska Workers' Compensation Act, an injury has occurred as the result of an occupational disease when violence has been done to the physical structure of the body and a disability has resulted. Olivotto retired from DeMarco for reasons unrelated to mesothelioma, which did not manifest itself until shortly before his death. At that time, Olivotto had been retired for 23 years. Because he did not work after his retirement from DeMarco, it followed that Mrs. Olivotto was not entitled to a weekly indemnity benefit because no earnings were being accrued by Olivotto at the time the occupational disease resulted in injury.

The review panel therefore affirmed the award of the trial court in all respects except for its finding that Mrs. Olivotto was entitled to a weekly indemnity benefit. DeMarco appeals, and Mrs. Olivotto has cross-appealed.

ASSIGNMENTS OF ERROR

DeMarco's assignments of error claim that the trial court erred (1) in determining that Mrs. Olivotto met her burden to prove by a preponderance of the evidence that Olivotto suffered an accident or occupational disease arising out of or occurring in the course of his employment with DeMarco; (2) in admitting the testimony of DePellegrin and Olivotto concerning Olivotto's alleged exposure to asbestos-containing materials; (3) in receiving the opinion testimony of Drs. P. James Connor and Claude Deschamps concerning the causal relationship, if any, between Olivotto's development of mesothelioma and his work for DeMarco; (4) in finding that Olivotto's development of mesothelioma was causally related to his work for DeMarco; (5) in finding that Olivotto's last injurious exposure to asbestos occurred on September 30, 1980; (6) in refusing to admit the summary of the court's compliance officer dated January 2, 2004, concerning insurance coverage for DeMarco and the letter of insurance counsel regarding the policy information; and (7) in its calculation of medical expenses incurred by Olivotto and in awarding reimbursement for those medical expenses to Mrs. Olivotto in her capacity as a widow.

On cross-appeal, Mrs. Olivotto asserts that the review panel erred in failing to affirm the award of a weekly indemnity benefit

and that the trial court erred in affirming that the last date of injurious exposure was September 30, 1980.

ANALYSIS

[3,4] Our review is governed by the following legal principles: 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. *Vega v. Iowa Beef Processors*, 270 Neb. 255, 699 N.W.2d 407 (2005). In order to recover under the Nebraska Workers' Compensation Act, a claimant has the burden of proving by a preponderance of the evidence that an accident or occupational disease arising out of or occurring in the course of the employment proximately caused an injury which resulted in disability compensable under the act. *Owen v. American Hydraulics*, 254 Neb. 685, 578 N.W.2d 57 (1998). When testing the sufficiency of the evidence to support findings of fact made by the Workers' Compensation Court trial judge, the evidence must be considered in the light most favorable to the successful party and the successful party will have the benefit of every inference reasonably deducible from the evidence. *Swanson v. Park Place Automotive*, 267 Neb. 133, 672 N.W.2d 405 (2003).

ADMISSION OF EVIDENCE

DeMarco claims that the trial court erred in concluding Olivotto suffered an occupational disease arising out of his employment and that it was error to admit Olivotto's and DePellegrin's testimony to prove Olivotto's exposure to asbestos. DeMarco asserts that the testimony lacked foundation and was hearsay and that Olivotto and DePellegrin did not have the requisite personal knowledge to render an opinion concerning the existence of asbestos at any worksite.

DePellegrin testified that he saw bags marked "asbestos" at one or more of the worksites. DeMarco argues this testimony was hearsay because it was an out-of-court statement offered to prove that Olivotto was exposed to asbestos during his employment with DeMarco.

[5-7] The Workers' Compensation Court is not bound by the usual common-law or statutory rules of evidence or by any

technical or formal rules of procedure. § 48-168. See, *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996); Workers' Comp. Ct. R. of Proc. 10A (2006). Admission of evidence is within the discretion of the Workers' Compensation Court, whose determination in this regard will not be reversed upon appeal absent an abuse of discretion. *Fay v. Dowding, Dowding*, 261 Neb. 216, 623 N.W.2d 287 (2001). On appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Ortiz v. Cement Products*, 270 Neb. 787, 708 N.W.2d 610 (2005).

[8] In *Fite v. Ammco Tools, Inc.*, 199 Neb. 353, 258 N.W.2d 922 (1977), we discussed the scope of the Nebraska Workers' Compensation Act. We stated that the act was one of general interest, not only to the worker and his employer, but to the state as well, and that the act should be construed so that technical refinements of interpretation would not be permitted to defeat it. Given the beneficent purposes of workers' compensation law in Nebraska, the compensation court is empowered to admit evidence not normally admissible under the rules of evidence applicable in the trial courts of this state. See *id.* The court can admit such evidence in order to investigate cases in the manner it judges is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of the Nebraska Workers' Compensation Act. See *id.* The act permits the compensation court to admit evidence that, over a proper objection, could not be introduced in a trial court in this state. See *id.*

In the case at bar, the question is whether the trial court abused its discretion in the admission of Olivotto's and DePellegrin's testimony. We conclude that it did not. There was sufficient foundation for testimony about exposure to asbestos because the trial court found that Olivotto and DePellegrin were skilled tradesmen and had the requisite experience and knowledge from more than 75 years of working in the construction trade to know the existence of asbestos in their immediate work environment. Such a determination was not an abuse of discretion by the trial court.

DePellegrin testified to various jobsites such as a post office, numerous schools, and hospitals where there was powder "flying"

around. He said there were bags on the worksite bearing the word “asbestos.” Olivotto testified that when he worked on a job at a post office sometime in the 1970’s, asbestos was sprayed and he was told to leave because the asbestos made the worksite dangerous.

DeMarco next argues there was no foundation for the evidence of causation. It claims that the medical history given to Olivotto’s doctors was not consistent with his knowledge of exposure to asbestos. The trial court found by a preponderance of the evidence that Olivotto had sustained his burden of proof that he was exposed to asbestos in the work environment from 1954 to 1980. As the trial court noted, one of Olivotto’s difficulties was that nearly a quarter of a century had passed from the date of his retirement until the first symptoms of mesothelioma appeared and he was diagnosed in 2003. We will not disturb the findings of fact by the compensation court unless they are clearly wrong. *Ortiz v. Cement Products*, 270 Neb. 787, 708 N.W.2d 610 (2005). The evidence was sufficient to support these findings of fact, and they were not clearly wrong.

MEDICAL CAUSATION

DeMarco argues that the trial court erred in finding that Olivotto’s development of mesothelioma was causally related to his work for DeMarco. In its findings of medical causation, the trial court relied primarily upon the opinion of Dr. Connor. DeMarco claims that Dr. Connor’s opinion was contrary to the evidence and was based upon testimony which should have been excluded for lack of proper foundation. DeMarco argues that Dr. Connor’s testimony was not competent expert testimony of a causal connection between Olivotto’s mesothelioma and his employment. DeMarco claims that Dr. Connor had no factual basis for his opinion because the documents upon which Dr. Connor relied were devoid of any information concerning the nature of Olivotto’s employment with DeMarco and/or the potential exposure to asbestos in the course of Olivotto’s employment.

The trial court found that Dr. Connor’s report dated July 26, 2004, the medical records and reports of Dr. Deschamps, the depositions of Drs. Connor and Deschamps, and the affidavit of

Dr. Connor provided a “sufficient statement of medical causation” to establish that Olivotto’s mesothelioma was due to asbestos exposure at work.

Prior to preparing his report, Dr. Connor reviewed a letter from Olivotto’s attorney stating that Olivotto had previously testified in a deposition about his employment with DeMarco from 1954 to 1980. Dr. Connor was told that Olivotto and a coworker had previously testified concerning exposure to asbestos at various jobsites; that Olivotto had begun experiencing physical symptoms in 2002 and subsequently began a course of treatment which resulted in a diagnosis of malignant pleural mesothelioma following a biopsy at Nebraska Methodist Hospital; and that Olivotto sought treatment at the Mayo Clinic, where the diagnosis of mesothelioma was confirmed. Dr. Connor was also furnished with medical records from the office of Dr. McLeay, records from the Mayo Clinic, letters from Dr. Deschamps, and itemized bills incurred by Olivotto.

In a document labeled “Plaintiff’s Rule 10 Medical Report,” Dr. Connor stated that he had examined Olivotto’s medical records and opined that the records reflected agreement with the medical community that mesothelioma was almost always asbestos related. He said that in cases in which the disease had not appeared to be asbestos related, the exposure may not have been remembered or observed. He was aware that the records included a history showing Olivotto had worked as a terrazzo installer on both new construction and remodeling projects in locations where plumbing, heating, insulation, and installation of wallboard containing asbestos was also underway. Dr. Connor reported that Olivotto had provided a history stating he knew he had been exposed to asbestos fiber in his occupation and that a coworker had given a similar history.

Dr. Connor stated that he had examined all of Olivotto’s x rays, including CAT scans, that were available at Nebraska Methodist Hospital. He opined that the most dramatic film was that of a CAT scan showing Olivotto’s right lung almost completely encased in a 1- to 2-centimeter-thick layer of mesothelioma. He noted that in reviewing records dating as far back as 2000, there had been evidence of thickened pleura, which could have been the result of asbestos exposure, and there were

instances where pleural calcification also might have been present, which was typical of asbestos exposure.

Dr. Connor also noted an area of rounded atelectasis in the lung base that he associated with asbestos exposure. Olivotto's pulmonary function test was consistent with asbestos-induced restrictive lung disease. There was also evidence of minimal obstruction, which Dr. Connor described as one of the earliest abnormalities found in people exposed to asbestos before clinical findings reveal any disease. Dr. Connor testified that he had reviewed the billing records for Olivotto's medical care and that all were related to care for mesothelioma and its associated complications.

It was Dr. Connor's opinion, based upon a reasonable degree of medical certainty, that the mesothelioma was caused by exposure to asbestos during Olivotto's work as a terrazzo installer.

[9] In a workers' compensation case, a witness must qualify as an expert and the testimony must assist the trier of fact to understand the evidence or determine a fact in issue. The witness must have a factual basis for the opinion, and the testimony must be relevant. *Veatch v. American Tool*, 267 Neb. 711, 676 N.W.2d 730 (2004). From our review of the record, we conclude that Dr. Connor had a factual basis for his opinion.

Dr. Deschamps also gave a medical opinion that Olivotto's diagnosis of mesothelioma was related to occupational exposure to asbestos. Deschamps stated that occupational exposure to asbestos was a well-known factor in mesothelioma. The records attached to Dr. Deschamps' report showed that Olivotto had been a construction worker and had significant exposure to environmental hazards such as insulation, ceramics, and flooring over a 26-year period.

A determination concerning the sufficiency of the foundation for an expert's opinion is left to the discretion of the trial court. We conclude there was sufficient evidence to support the medical opinions of Drs. Connor and Deschamps, and the trial court did not abuse its discretion in admitting such evidence.

DATE OF LAST INJURIOUS EXPOSURE

DeMarco argues that the trial court erred in finding that Olivotto's date of last injurious exposure to asbestos was September 30, 1980. DeMarco was unable to locate any of its

insurance records for the period of 1954 through 1980. The records of the compensation court disclose only certain periods of coverage.

The trial court found that Olivotto experienced a generalized exposure to asbestos in the work environment from the beginning of his employment until his retirement in 1980. It concluded that the last injurious exposure occurred on the final day Olivotto worked for DeMarco, which the court found was September 30, 1980.

This court addressed the issue of the date of last injurious exposure in *Morris v. Nebraska Health System*, 266 Neb. 285, 664 N.W.2d 436 (2003). Barbara Morris ceased her employment with Nebraska Health System on October 9, 1998, when she suffered a reaction to latex that required her to seek emergency medical treatment. She had noticed symptoms later associated with an allergy to latex in the 1980's, but the allergy was not diagnosed until 1997, when her employer was the University of Nebraska Medical Center. In determining her date of last injurious exposure, we stated it was necessary to first determine the date of disability and then search backward to find the last causal relationship between the exposure and the disability.

We determined that the date of disability was October 9, 1998, the date of the injury resulting in Morris' disability. We concluded that the record supported the trial court's findings that the exposure on October 9 bore the requisite causal relationship to her disability and that the trial court's finding that Nebraska Health System was responsible for her benefits was not clearly wrong. Because Morris' employment with Nebraska Health System on the date of her disability exposed her to latex, that employer was properly held liable for her compensation benefits under the "last injurious exposure rule."

In *Osteen v. A. C. and S., Inc.*, 209 Neb. 282, 290-91, 307 N.W.2d 514, 520 (1981), we stated:

The last injurious exposure, to be "injurious," must indeed bear a causal relationship to the disease. However, according to the authorities, this means simply that the exposure must be *of the type which could* cause the disease, given prolonged exposure. As described in *Mathis v. State Accident Insurance Fund*, 10 Or. App. 139, 499 P.2d

1331 (1972), an exposure which will support imposition of liability under this rule need not be proved to have been a “material contributing cause” of the disease. Indeed, to so require would bring the employee back to Square One by requiring “proof of the unprovable and litigation of the unlitigable.” *Holden v. Willamette Industries, Inc.*, *supra* at 301. As Larson notes at 17-87: “[O]nce the requirement of some contributing exposure has been met, courts . . . will not go on to weigh the relative amount or duration of the exposure under various employers As a result, in some cases carriers and employers that have been on the risk for relatively brief periods, perhaps only a few weeks, have nevertheless been charged with full liability for a condition that had developed over a number of years.”

In *Hull v. Aetna Ins. Co.*, 247 Neb. 713, 529 N.W.2d 783 (1995), the employee suffered from contact dermatitis due to substances in the workplace in 1960 and 1987 through 1990. The occupational disease did not manifest itself to a level of disability until March 1989. We stated:

Where an occupational disease results from the continual absorption of small quantities of some deleterious substance from the environment of the employment over a considerable period of time, an afflicted employee can be held to be injured only when the accumulated effects of the substance manifest themselves, which is when the employee becomes disabled and entitled to compensation. . . . Thus, the date that determines liability is the date that the employee becomes disabled from rendering further service. . . .

. . . .

The mere date of disability, however, does not end the inquiry. The second issue is the nexus between the exposure to the injury and the disability.

In the case of occupational disease, liability is most frequently assigned to the carrier who was covering the risk when the disease resulted in disability, if the employment at the time of disability was of a kind contributing to the disease. The employer or insurer at the time of the most

recent exposure which bears a causal relation to the disability is generally liable for the entire compensation. *Id.* at 719-20, 529 N.W.2d at 789 (citations omitted).

Olivotto was injured within the meaning of the Nebraska Workers' Compensation Act when he became disabled and sought treatment on January 29, 2003. Because he was not employed on that date, the trial court relied on the last injurious exposure rule to determine the date of the last causal relationship between his disability and his work-related exposure. There was no evidence that Olivotto was exposed to asbestos in any situation not related to his work for DeMarco. The trial court therefore determined that the last injurious exposure was the final date of Olivotto's employment with DeMarco, September 30, 1980. This finding of fact has the effect of a jury verdict and will not be disturbed unless it is clearly wrong. See *Ortiz v. Cement Products*, 270 Neb. 787, 708 N.W.2d 610 (2005). Although DeMarco asks us to find that the last injurious exposure was December 31, 1979 (the last date of record that DeMarco had workers' compensation insurance on Olivotto before he retired), we decline to do so.

AWARD OF EXPENSES

DeMarco claims the trial court erred in its calculation of the medical expenses incurred by Olivotto and in awarding Mrs. Olivotto medical expenses incurred by her deceased spouse. DeMarco argues that absent an action for revivor, the workers' compensation statutes do not provide Mrs. Olivotto with a basis upon which to recover Olivotto's medical expenses and/or disability benefits.

Neb. Rev. Stat. § 48-122(3) (Reissue 2004) provides that upon the death of an employee from injuries covered by the workers' compensation statutes, reasonable expenses of burial, not exceeding \$6,000, shall be paid to his dependent or personal representative. The trial court awarded Mrs. Olivotto funeral expenses of \$6,000. DeMarco asserts that § 48-122 does not provide for payment of any other medical, travel, or lodging expenses to a surviving spouse.

This court has previously affirmed the award of medical and hospital expenses to a surviving spouse. See, *Anderson v. Bituminous Casualty Co.*, 155 Neb. 590, 52 N.W.2d 814 (1952);

Cole v. M. L. Rawlings Ice Co., 139 Neb. 439, 297 N.W. 652 (1941). Neb. Rev. Stat. § 48-120(1) (Cum. Supp. 2006) states that the employer is liable for all reasonable medical, surgical, and hospital services. Section 48-122(3), in providing for burial expenses, states that the amount for those expenses shall not exceed \$6,000, “without deduction of any amount previously paid or to be paid for compensation or *for medical expenses.*” (Emphasis supplied.) Section 48-122 therefore identifies the ongoing obligation of the employer to pay medical expenses to a dependent following the death of the employee.

The record shows that DeMarco entered into a stipulation providing that the petition could be amended to reflect Olivotto’s death and substitute Mrs. Olivotto as the named plaintiff. DeMarco cannot complain on appeal about the failure to file a revivor action when it stipulated in the trial court that Mrs. Olivotto could be substituted as the named plaintiff. There was no error on the part of the trial court in awarding medical expenses to Mrs. Olivotto as Olivotto’s widow.

DeMarco also argues that the trial court erred as a matter of fact in including in the award \$4,800 as reimbursement to Mrs. Olivotto for a medical deductible paid. The trial court awarded Mrs. Olivotto a total of \$119,120.53. This figure included medical expenses of \$113,594.25, a “[r]eimbursement to widow for medical deductible paid” of \$4,800, and transportation and lodging expenses of \$726.28. Mrs. Olivotto testified that the \$4,800 deductible was part of the \$113,594.25 total for medical expenses. Thus, allowing her to recover that amount twice constituted double recovery. DeMarco’s argument on this point appears to be correct, and we conclude that the award for medical expenses should be reduced by \$4,800.

ADMISSION OF INSURANCE RECORD

[10] DeMarco does not argue the assigned error related to the admission of a summary from the Workers’ Compensation Court compliance officer concerning insurance coverage. 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. *City of Gordon v. Montana Feeders, Corp.*, ante p. 402, 730 N.W.2d 387 (2007). We therefore will not consider this assigned error.

SUMMARY OF APPEAL

Pursuant to § 48-185, 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). The evidence is sufficient to support the award in all respects, as modified by the review panel, except for the \$4,800 described above.

CROSS-APPEAL

In her cross-appeal, Mrs. Olivotto assigns as error the decision of the review panel reversing the award of indemnity benefits and affirming the date of last injurious exposure as September 30, 1980.

The review panel concluded that the trial court erred as a matter of law in finding Mrs. Olivotto entitled to a weekly indemnity benefit based on Olivotto's average weekly wage on the date of his retirement on September 30, 1980. The panel cited *Ludwick v. Triwest Healthcare Alliance*, 267 Neb. 887, 678 N.W.2d 517 (2004), for the proposition that an injury has occurred as the result of an occupational disease when violence has been done to the physical structure of the body and a disability has resulted. The panel noted that Olivotto retired for reasons unrelated to mesothelioma and that he had been retired for 23 years at the time the mesothelioma manifested itself. Olivotto did not work after his retirement and was not earning any wages at the time of his injury. Therefore, the panel determined that Mrs. Olivotto was not entitled to a weekly indemnity benefit because no earnings were being accrued by Olivotto at the time of his injury.

In *Ludwick*, 267 Neb. at 899, 678 N.W.2d at 526, we held:

[A] worker becomes disabled, and thus injured, from an occupational disease at the point in time when a permanent medical impairment or medically assessed work restrictions result in labor market access loss. . . . An employee's

disability caused by an occupational disease is determined by the employee's diminution of employability or impairment of earning power or earning capacity.

(Citations omitted.)

Olivotto had been retired for more than 20 years at the time his work-related disability developed. He did not work at any other job during that time. Thus, he suffered no loss of access to the labor market and had no diminution of employability or impairment of earning capacity. The review panel was correct in reversing the trial court's award of indemnity benefits.

Mrs. Olivotto also objects to the trial court's finding that Olivotto's date of last injurious exposure was September 30, 1980. That issue has been resolved earlier in this opinion. There is no merit to her cross-appeal.

CONCLUSION

The judgment of the review panel is affirmed except that we reduce the award for medical expenses by \$4,800. The cross-appeal is dismissed.

AFFIRMED AS MODIFIED.

CONNOLLY, J., participating on briefs.

DENNIS D. ROHDE AND ALINE I.M. ROHDE, HUSBAND AND WIFE,
APPELLANTS AND CROSS-APPELLEES, V. CITY OF OGALLALA,
NEBRASKA, APPELLEE AND CROSS-APPELLANT.

731 N.W.2d 898

Filed June 1, 2007. No. S-06-149.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought pursuant to the Political Subdivisions Tort Claims Act, the findings of a trial court will not be disturbed on appeal unless they are clearly wrong.
2. **Statutes.** Statutory interpretation presents a question of law.
3. **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.
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.

Appeal from the District Court for Keith County: DONALD E. ROWLANDS II, Judge. Affirmed.

George M. Zeilinger for appellants.

Jerrod M. Gregg, of McQuillan & McQuillan, P.C., for appellee.

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

WRIGHT, J.

NATURE OF CASE

Dennis D. Rohde and Aline I.M. Rohde sued Kenneth Knoepfel and the City of Ogallala, Nebraska (City), for damages based on erroneous advice Knoepfel, the City's zoning director, provided concerning the subdivision of a tract of land. The Keith County District Court dismissed the action with prejudice, finding that the City had immunity from liability for damages under Neb. Rev. Stat. § 13-910(4) (Cum. Supp. 2002). The Rohdes appeal, and the City cross-appeals.

SCOPE OF REVIEW

[1] In actions brought pursuant to the Political Subdivisions Tort Claims Act (PSTCA), the findings of a trial court will not be disturbed on appeal unless they are clearly wrong. *McGrath v. City of Omaha*, 271 Neb. 536, 713 N.W.2d 451 (2006).

FACTS

In 2001, the Rohdes purchased a 5-acre tract of land within the city limits of Ogallala. The property included a house that the Rohdes were going to refurbish for relatives. They also planned to build a new house on the property, and they contacted Knoepfel for advice on subdividing the property. Knoepfel told the Rohdes they needed to have a survey completed and to subdivide the property into two equal tracts of 2½ acres.

A registered land surveyor performed a survey, which was submitted to the Ogallala Planning Commission and approved on September 10, 2001. The subdivision was approved by the city council on September 25. Two days later, the Rohdes were informed by the City that it had made a mistake and that the

Rohdes could not be granted a permit to build a new house on the property because city ordinances required that lots be a minimum of 3 acres. The Rohdes and their attorney went to the city council meeting on October 23. Knoepfel apologized for giving improper advice, but the city council later rescinded its approval of the subdivision.

The Rohdes sued, alleging that Knoepfel was negligent and provided them with incorrect information. They alleged damages of \$35,000. The City and Knoepfel asserted that the claim was barred by § 13-910(1) through (4). The district court sustained a motion to dismiss on the basis of § 13-910(4) and also found that there was no duty owed to the Rohdes.

The Rohdes appealed, and the Nebraska Court of Appeals reversed the judgment and remanded the cause for further proceedings. See *Rohde v. Knoepfel*, 13 Neb. App. 383, 693 N.W.2d 564 (2005). The appellate court determined that the case could not be resolved on a motion to dismiss because there were issues concerning whether Knoepfel was acting at a policy level or functional level and whether approval of subdivisions was a ministerial act by a political subdivision.

Upon remand, the Rohdes argued that the Court of Appeals opinion was binding upon the district court and established as the law of the case that Knoepfel's actions were negligent and were not taken in the exercise of a discretionary function and that the City was liable for damages. Following a bench trial, the court found generally in favor of the City and against the Rohdes.

The district court determined that the Court of Appeals' decision "merely established that this Court was in error in sustaining the . . . Motion to Dismiss, thereby depriving the [Rohdes] of their right to a contested trial." The court found that Knoepfel was acting within the scope of his employment as the zoning director for the City, that Knoepfel was negligent in advising the Rohdes that they could subdivide the 5-acre tract into two equal tracts, and that the Rohdes were damaged.

However, the district court concluded that the City was immune from suit. Under § 13-910(4), the PSTCA does not apply to any claim based upon the revocation of a permit. The City had rescinded its prior approval of the subdivision when

it discovered the errors made by Knoepfel, the City's planning commission, and the city council. The court sustained a motion to dismiss filed by Knoepfel, dismissed the complaint with prejudice, and taxed all costs to the Rohdes.

ASSIGNMENTS OF ERROR

The Rohdes assign as error the district court's finding that their claim against the City was barred by § 13-910(4) and the dismissal of the action with prejudice.

ANALYSIS

At all times relevant to this case, § 13-910 provided in part: "The Political Subdivisions Tort Claims Act . . . shall not apply to: . . . (4) Any claim based upon the issuance, denial, suspension, or revocation of or failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, or order."

The issue is whether the district court correctly determined that the City was exempt from liability under § 13-910(4). The Rohdes sought permission to subdivide their property into two sections. They were erroneously told by Knoepfel that subdivision was permissible and that each half should be 2½ acres. The City's ordinances required such plots to be a minimum of 3 acres in size. The City rescinded its original approval of the subdivision.

[2-4] Statutory interpretation presents a question of law. *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007). 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. *Knapp v. Village of Beaver City*, ante p. 156, 728 N.W.2d 96 (2007). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *State ex rel. Columbus Metal v. Aaron Ferer & Sons*, 272 Neb. 758, 725 N.W.2d 158 (2006).

Section 13-910(4) is clear and unambiguous. Political subdivisions are not liable under the PSTCA for actions based upon the revocation of a permit or license. The City revoked its decision to issue a permit allowing the Rohdes to subdivide

their property because such division did not comply with City ordinances.

The Rohdes argue they were damaged as a result of the opinion of Knoepfel, who erroneously advised them concerning subdivision of their property. They claim Knoepfel was negligent at the operational level, and they rely upon *Talbot v. Douglas County*, 249 Neb. 620, 544 N.W.2d 839 (1996). In *Talbot*, this court held that actions carried out by an attorney related to collecting delinquent child support were operational activities which fell outside the scope of the discretionary function exemption of the PSTCA. *Talbot* concerned § 13-910(2) and did not mention § 13-910(4).

In actions brought pursuant to the PSTCA, the findings of a trial court will not be disturbed on appeal unless they are clearly wrong. *McGrath v. City of Omaha*, 271 Neb. 536, 713 N.W.2d 451 (2006). Section 13-910(4) clearly provides that a political subdivision has immunity from suit for any claim based upon the revocation of a permit. The district court was correct in dismissing the action on this basis.

CROSS-APPEAL

In its cross-appeal, the City asserts that the district court erred in finding that the City owed a duty to the Rohdes, in finding that the actions of Knoepfel and the City were the proximate cause of the damages suffered by the Rohdes, and in finding that § 13-910(1) and (2) did not bar the Rohdes' claim. Having determined that the district court was correct in finding that the City was immune from liability under § 13-910(4), we do not address these claims.

CONCLUSION

The district court was correct in finding that the City was immune from suit for damages pursuant to § 13-910(4). Dismissal of the Rohdes' complaint was correct, and the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA ON BEHALF OF MINOR CHILD KAYLA T. ET AL.,
 APPELLEES AND CROSS-APPELLANTS, V. LYLE D. RISINGER,
 APPELLANT AND CROSS-APPELLEE.

731 N.W.2d 892

Filed June 1, 2007. No. S-06-1089.

1. **Actions: Paternity: Child Support: Equity.** While a paternity action is one at law, the award of child support in such an action is equitable in nature.
2. **Paternity: Child Support: Appeal and Error.** A trial court's award of child support in a paternity case will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.
3. **Paternity: Appeal and Error.** In a de novo review in a filiation proceeding, when the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Parent and Child: Child Support: Public Policy.** A private agreement between parents that would deprive a child of support from one parent contravenes the public policy of this state.
5. **Judgments.** A decree or judgment for the payment of money is one which is immediately due and collectible where its nonpayment is a breach of duty by the judgment debtor.
6. **Child Support.** Child support payments ordinarily vest as they accrue.

Appeal from the District Court for Rock County: MARK D. KOZISEK, Judge. Affirmed as modified.

Rodney J. Palmer, of Palmer & Flynn, P.C., for appellant.

Avery L. Gurnsey, Rock County Attorney, for appellees.

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

MILLER-LERMAN, J.

NATURE OF CASE

Lyle D. Risinger appeals a decree of paternity and child support order entered by the district court for Rock County. The court established Risinger as the father of Kayla T. and ordered him to pay child support and retroactive child support. The court rejected Risinger's assertion that he was not liable for child support because he had an agreement with Kayla's mother that she would not seek child support in return for his giving up all contact with Kayla. We affirm the district court's decree of paternity and support, but, as requested in the State's

cross-appeal, we modify the decree to reflect that retroactive child support was due upon entry of the judgment rather than payable in future installments.

STATEMENT OF FACTS

Kayla was born to Linda T. on June 9, 1988. Risinger had been in a sexual relationship with Linda in 1987, but the relationship ended prior to Kayla's birth. On March 31, 2005, the State of Nebraska filed a petition on behalf of Kayla and Linda against Risinger seeking to establish paternity, child support, and medical reimbursement. The State sought, *inter alia*, retroactive child support from the date of Kayla's birth.

Risinger filed an initial answer and two amended answers. In the filings, Risinger admitted paternity but affirmatively stated that he had been repudiated by Linda and told that he could not be involved in Kayla's life. Risinger asserted that Linda agreed to refrain from seeking child support in exchange for his agreeing not to see Kayla. Risinger denied that he should be required to pay child support until he had the opportunity to establish a relationship with Kayla. Risinger requested that he be given such opportunity and agreed that he should be required to pay reasonable child support after such relationship had been established. Risinger further asserted, however, that because of the agreement, Linda should be equitably estopped from collecting retroactive child support.

At a hearing on the State's petition, Risinger testified that in late 1987, after he learned that Linda was pregnant, he and Linda had a conversation in which they determined that their relationship was over. Risinger testified that he reluctantly agreed to Linda's request that because they were no longer involved, she did not want him to have anything to do with the baby. Risinger testified that Linda agreed that if he stayed out of the baby's life, she would not seek child support.

In her testimony at the hearing, Linda denied any such agreement. She testified that after a telephone call from Risinger in February 1988, she did not hear from him again until August 1997, when he called, asking to see Kayla. She told him supervised visits could be arranged if he paid all retroactive child support, but Risinger refused and stated he would wait until Kayla turned 18.

The district court entered a decree of paternity and child support order on September 6, 2006. The decree established Risinger as Kayla's father. With regard to support, the court noted the conflicting testimonies regarding the existence of an agreement by which Linda would not seek child support if Risinger stayed away from Kayla. The court found that the evidence supported Linda's version of events and that there was no agreement. The court determined that because Risinger did not carry his burden of establishing the existence of an agreement, equitable estoppel was not applicable.

The court ordered Risinger to pay child support of \$591 per month beginning October 1, 2006. The court also determined that Risinger owed retroactive child support in the amount of \$60,119, calculated from Kayla's birth until the date of the decree. The court ordered Risinger to pay the retroactive child support at a rate of \$25 per month from October 1, 2006, through June 1, 2007, and then at a rate of \$350 per month commencing July 1, 2007, and continuing each month thereafter until paid in full. The court ordered that there would be no interest on installments timely made but that interest would accrue on unpaid installments 30 days past due.

Risinger appeals the decree of paternity and support, and the State cross-appeals, challenging the payment schedule.

ASSIGNMENTS OF ERROR

Risinger asserts that the court erred in (1) finding that there was no agreement between him and Linda by which he would not see or visit Kayla in exchange for Linda's not seeking child support and (2) failing to find that Linda was equitably estopped from seeking child support.

In its cross-appeal, the State asserts that the district court erred in ordering Risinger to pay the retroactive child support in monthly installments rather than entering judgment for the full amount due with interest to accrue on the full amount from the date of judgment.

STANDARDS OF REVIEW

[1,2] While a paternity action is one at law, the award of child support in such an action is equitable in nature. *State on behalf of Joseph F. v. Rial*, 251 Neb. 1, 554 N.W.2d 769 (1996). A trial

court's award of child support in a paternity case will not be disturbed on appeal in the absence of an abuse of discretion by the trial court. *Id.*

ANALYSIS

Appeal: Equitable Estoppel Does Not Apply to Prevent the State From Seeking Child Support on Behalf of Kayla.

Risinger asserts that the district court erred in failing to find that Linda should be equitably estopped from seeking child support. Risinger's argument in favor of equitable estoppel relies at least in part on the existence of an agreement between Risinger and Linda by which Linda would not seek child support. Risinger therefore also asserts that the court erred in finding that there was no such agreement. We determine that the court did not err in finding that there was no agreement; that even if such agreement did exist, the agreement was against public policy; and that because the right to support belonged to Kayla, any agreement made or actions taken by Linda would not be the basis for equitable estoppel in this paternity and child support action brought by the State on Kayla's behalf. We therefore reject Risinger's assignments of error.

[3] We note that the evidence regarding the existence of an agreement between Risinger and Linda included Risinger's testimony that an agreement was made and Linda's conflicting testimony that no agreement was made. We have stated that in a de novo review in a filiation proceeding, when the evidence is in conflict, the appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *State on behalf of Pathammavong v. Pathammavong*, 268 Neb. 1, 679 N.W.2d 749 (2004). Similarly, in the present case, we consider and give weight to the fact that the district court heard and observed the testimonies of both Risinger and Linda and, based on its assessment of such testimonies and other evidence, accepted Linda's testimony over Risinger's testimony regarding the existence of an agreement. The court did not err in finding that there was no agreement between the parties that Risinger would not see or visit Kayla in exchange for Linda's not seeking child support.

More fundamentally, we determine that even if such an agreement were made, the agreement was against public policy and therefore could not be the basis for equitable estoppel in this case. Although Risinger's argument in favor of equitable estoppel relies heavily on the existence of an agreement, he also argues that even if an agreement was not actually made, Linda should be equitably estopped from seeking child support because her actions were consistent with such an agreement and she prevented Risinger from seeing or visiting Kayla. We note that courts in various other states have held that an agreement between parents that would deprive a child of his or her right to support is void as against public policy. See, *Hoover-Reynolds v. Superior Court*, 50 Cal. App. 4th 1273, 58 Cal. Rptr. 2d 173 (1996); *Straub v. B.M.T. by Todd*, 645 N.E.2d 597 (Ind. 1994); *State Dept. of Human Services v. T.D.G.*, 861 P.2d 990 (Okla. 1993); *Berryhill v. Rhodes*, 21 S.W.3d 188 (Tenn. 2000); *Hurlbut v. Scarbrough*, 957 P.2d 839 (Wyo. 1998). See, also, *Susan H. v. Keith L.*, 259 Neb. 322, 609 N.W.2d 659 (2000) (applying Oklahoma law).

[4] We determine that a private agreement between parents that would deprive a child of support from one parent contravenes the public policy of this state. In this regard, we note that Neb. Rev. Stat. § 43-1405 (Reissue 2004) provides a procedure whereby the liability of a father for child support may be discharged by a voluntary settlement agreement between the father and the mother in which "the father promises to make adequate provision for the support of the child." The statute provides that such agreement is binding on the parties and bars all other remedies only when such agreement "is approved by the court having jurisdiction to compel the support of the child." The statute further requires that "[t]he court shall approve such settlement only if it shall find and determine that adequate provision is made for the support of the child" Because Nebraska statutes provide a procedure by which parents may agree to discharge a father's liability for a child where adequate provision is made, we determine that the public policy of this state would forbid the enforcement of a private agreement that purported to discharge a parent's liability for child support if the agreement did not follow the statutory requirements for court approval and

failed to adequately provide for the support of the child. We therefore conclude that even if the purported agreement existed and even if Linda's actions were consistent with the existence of such agreement, as a matter of public policy, such agreement could not form the basis of an equitable estoppel.

We further note in this regard that the present proceeding to establish the paternity of Kayla was brought by the State pursuant to Neb. Rev. Stat. § 43-1411 (Reissue 2004). Under § 43-1411, the mother or the alleged father may bring an action either during pregnancy or within 4 years after the child's birth, while "the guardian or next friend of such child or the state" may bring an action either during pregnancy or within 18 years after the child's birth. We have characterized actions brought by the State or by the guardian or next friend of the child as "'cause[s] of action brought on the child's behalf . . . to establish paternity and secure the child's rights.'" *State on behalf of S.M. v. Oglesby*, 244 Neb. 880, 883, 510 N.W.2d 53, 56 (1994) (quoting *Doak v. Milbauer*, 216 Neb. 331, 343 N.W.2d 751 (1984)). Because the present action was not brought by Linda within 4 years after Kayla's birth but instead was brought by the State within 18 years of Kayla's birth, this was clearly an action brought on Kayla's behalf in order to secure her rights, including child support. Even though the State fashioned the action as one brought on behalf of both Linda and Kayla, at least with regard to issues of support, this action is one brought on behalf of Kayla to secure her right to support. Therefore, whether or not Linda should be equitably estopped from seeking any sort of relief for herself, the State was not estopped from seeking support on Kayla's behalf in this action.

Although based on somewhat different reasoning than that of the district court, we determine that the district court did not err in awarding child support and we reject Risinger's assignments of error.

Cross-Appeal: Retroactive Child Support Due Upon Entry of Judgment.

The State asserts on cross-appeal that the district court erred in ordering Risinger to pay the retroactive child support in monthly installments rather than entering judgment for the full amount due with interest to accrue from the date of judgment.

We agree that the court should have entered judgment for the full amount due with interest to accrue from the date of judgment rather than ordering Risinger to pay in monthly installments, and we therefore modify the decree of paternity and support to so provide.

[5] In *Bowers v. Lens*, 264 Neb. 465, 648 N.W.2d 294 (2002), we faced a similar issue with regard to an order of retroactive alimony. In *Bowers*, the district court, in a March 13, 2001, order, determined that a certain amount of alimony was due from the husband to the wife retroactive from April 1997 through March 2001. The court ordered the husband to pay the judgment in monthly installments of \$500 starting April 1, 2001, and continuing until the judgment was paid in full. On appeal, we concluded that the court erred in limiting the wife's ability to collect the alimony to a periodic basis. We noted that "a decree or judgment for the payment of money is one which is immediately due and collectible where its nonpayment is a breach of duty by the judgment debtor." *Id.* at 470, 648 N.W.2d at 299. We further noted that alimony payments ordinarily vest as they accrue, and we concluded that "a judgment for retroactive alimony, i.e., alimony that should have vested and accrued in prior months, is one which is immediately due and collectible by the judgment debtor." *Id.* at 471, 648 N.W.2d at 300. We therefore modified the decree in *Bowers* to allow the wife to collect the entire alimony judgment in such manner as allowed by law.

[6] Similarly, in the present case, we conclude that the district court erred in ordering the retroactive child support of \$60,119 to be paid in future monthly installments. Like alimony payments, child support payments ordinarily vest as they accrue. See, *Gress v. Gress*, 257 Neb. 112, 596 N.W.2d 8 (1999); *Maddux v. Maddux*, 239 Neb. 239, 475 N.W.2d 524 (1991). We conclude that the judgment in this case for child support that should have vested and accrued in prior months is a judgment which was immediately due and collectible upon entry of the decree of paternity and support. We determine that the district court abused its discretion in ordering the retroactive child support to be paid in future monthly installments. Thus, we conclude that the order should be modified and judgment entered for the full

amount due, with interest to accrue on the full amount from the date of judgment.

CONCLUSION

We conclude that the district court did not err in finding Risinger liable for child support and that the purported agreement by which Risinger would avoid child support in exchange for not contacting Kayla would contravene public policy and be unenforceable. We are aware of the economic burden placed on Risinger as a result of the outcome in this case, but we are nevertheless constrained by the child's best interests. Thus, we reject Risinger's assignments of error. Further, as urged by the State on cross-appeal, we conclude that the court erred in ordering Risinger to pay retroactive child support in future monthly installments. We therefore affirm the decree of paternity and child support order, but we modify the decree to reflect that the retroactive child support of \$60,119 became due and payable upon entry of the decree on September 6, 2006.

AFFIRMED AS MODIFIED.

AARON M. FERER, APPELLANT, v. AARON FERER & SONS CO.,
A NEBRASKA CORPORATION, ET AL., APPELLEES.

732 N.W.2d 667

Filed June 8, 2007. No. S-05-730.

1. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Gifts: Intent.** To make a valid and effective gift inter vivos, there must be an intention to transfer title to the property, and a delivery by the donor and acceptance by the donee.
3. **Gifts: Proof.** The person asserting the gift must prove all the essential elements by clear, direct, positive, express, and unambiguous evidence.
4. **Gifts: Intent.** One of the essential elements of a gift is the intention to make it.
5. ____: _____. A clear and unmistakable intention on the part of the donor to make a gift of his or her property is an essential element of the gift, and this contention must be inconsistent with any other theory.

6. ____: _____. To constitute a valid inter vivos gift, the donor must have a present donative intent.
7. **Gifts: Proof.** The mere preparation of a donative document does not effect a present transfer necessary to perfect a gift.
8. **Gifts: Intent.** Where the intention to make a gift is not clearly manifested, subsequent acts may aid in clarifying that intention.
9. ____: _____. The mere intention to make a gift in the future is insufficient to constitute a completed gift.
10. **Stock: Gifts: Intent.** Notwithstanding the fact that a stock transfer has been recorded on the books of the company, if there is a lack of donative intent, the gift of stock will not be considered valid.
11. **Trial: Witnesses.** A trial court is allowed broad discretion in permitting or refusing a request to ask leading questions.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

James D. Sherrets, Theodore R. Boecker, Jr., and Jason M. Bruno, of Sherrets & Boecker, L.L.C., for appellant.

Steven E. Achelpohl for appellee Aaron Ferer & Sons Co.

Michael A. Nelsen, of Hillman, Forman, Nelsen, Childers & McCormack, for appellees Matthew Ferer and Whitney Ferer.

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

GERRARD, J.

NATURE OF CASE

In 1995, Harvey Ferer decided to make a gift of stock in the family corporation, Aaron Ferer & Sons Co., to each of his three sons. Stock certificates and transfer documents were prepared, signed, and placed in the company safe, and corresponding notations were made in the stock record books. Before the stock certificates were presented to his sons, however, Harvey decided later in 1995 not to give any stock to one of his sons. The question presented in this appeal is whether Harvey made a completed gift of stock to that son sometime in 1995.

STATEMENT OF FACTS

Aaron Ferer & Sons Co. (hereinafter AFSCO) is a family-owned business engaged in metals trading. Harvey, who managed

AFSCO for most of his adult life, had three sons: Aaron Ferer, Matthew Ferer, and Whitney Ferer. The appellees, Matthew and Whitney, have worked for AFSCO virtually their entire adult lives. The appellant, Aaron, worked for AFSCO until he terminated his employment on September 27, 1995.

HARVEY'S FIRST GIFT OF STOCK
TO HIS SONS IN 1994

In late 1994, Harvey met with Aaron, Matthew, and Whitney to discuss, among other things, the future of AFSCO. Harvey announced his plans to start making annual gifts of AFSCO stock to each of his three sons, up to the annual gifting limit. At this meeting, Harvey handed each of his sons a stock certificate representing 11,764 shares and explained that he would give a similar gift each year, so long as the sons remained actively involved in and employed at the company. At the time of this gift, all three sons were actively involved and employed at AFSCO.

PREPARATION AND DISTRIBUTION OF 1995 STOCK
CERTIFICATES AND STOCK POWER

On June 30, 1995, Harvey and Matthew met with two attorneys from the Erickson & Sederstrom law firm (E&S). At this time, Harvey informed one of the attorneys, Charles Sederstrom, that he was "contemplating" making a gift of stock to each of his sons for 1995, similar to the gift he made in 1994. After this meeting, pursuant to Harvey's instructions, Matthew contacted E&S and requested that stock certificates be filled out and forwarded to AFSCO.

As a result of the June 30, 1995, meeting and Matthew's request, Connie Bitzes, a legal secretary for E&S, was asked to prepare four unsigned stock certificates and an unsigned stock power. At that time, E&S maintained at its office four maroon books that contained the blank AFSCO stock certificates and stock stubs and also contained the stock stubs or receipts for AFSCO stock certificates that had previously been issued. E&S did not have any presigned stock certificates or stock powers, nor did it have a facsimile signature stamp for any of the officers or directors of AFSCO.

Accordingly, when AFSCO wanted to issue new stock certificates, an AFSCO representative would contact E&S, which would then prepare both an unsigned stock power and the unsigned stock certificates with the corresponding stock stubs. The stock certificates would be removed from the maroon books and, along with the stock power, sent to AFSCO. In addition to sending AFSCO the stock power and stock certificates, E&S would request that both the stock power and the original stock certificate, from which the gift stock originated, be returned to E&S.

The stock stubs from the newly issued stock remained in the maroon books and provided the following information: the number of shares issued on that particular stock certificate, to whom the certificate was issued, and the stock number of the original stock certificate from which the shares originated. At the time E&S prepared and issued the new stock certificate, it would mark "cancelled" on the stock stub corresponding to the original stock certificate which was the original source of the stock gift, even though the original stock certificate had not yet been returned to E&S. Once the original stock certificate and the signed stock power were returned, E&S would attach the stock power and stock certificate to the corresponding stock stub in one of the maroon books.

Consistent with the above-described procedure, and in accordance with Matthew's request, E&S sent a letter addressed to Matthew, dated July 6, 1995, attached to which was an unsigned stock power and four unsigned stock certificates. Bitzes testified that although the date on the stock certificates and the stock power was February 2, 1995, neither the stock power nor the certificates were in existence on that date, but were actually prepared by her on July 6, 1995. Bitzes further testified that although she had not yet received Harvey's original stock certificates, she marked "cancelled" on the stock stubs in the maroon books.

The July 6, 1995, letter explained that the issuance of the four stock certificates had been noted in "the stock record book" (the four maroon books). The letter also directed Harvey to return his original stock certificate so that it could be canceled. It was necessary that Harvey's original stock certificate be

returned and canceled because Harvey's original certificate was the source from which he was going to be giving his sons their gifts of stock. The letter further instructed Harvey to sign and return the enclosed stock power. The stock power stated:

FOR VALUE RECEIVED, the undersigned hereby assigns and transfers by gift unto Matthew D. Ferer 11,764 shares, Aaron M. Ferer 11,764 shares and Whitney H. Ferer 11,764 shares of the common capital stock of Aaron Ferer & Sons Co., a Nebraska corporation, standing in the name of Harvey D. Ferer on the books of said corporation represented by certificate No. 0460. The undersigned does hereby irrevocably constitute and appoint the Secretary of the corporation as attorney to transfer the stock on the books of the corporation with full power of substitution in the premises.

Dated this 2nd day of February, 1995.

Harvey D. Ferer

Matthew received the unsigned stock certificates, showed them to Harvey, and then, pursuant to Harvey's instructions, acquired the necessary signatures on the stock certificates and locked them in the company safe.

AARON QUILTS AFSCO

In approximately 1993, Aaron began expressing his dissatisfaction with his employment at AFSCO. During this period of time, Aaron frequently voiced his complaints and his desire to leave the company in the presence of Harvey, Matthew, and Whitney. On September 27, 1995, Aaron terminated his employment with AFSCO.

RETURN OF ITEMS AND CANCELLATION OF STOCK CERTIFICATE

In late September or early October 1995, Matthew and Harvey again met with Sederstrom. Both Sederstrom and Matthew testified that during this meeting, Harvey specifically told Sederstrom that he was not going to be making any gifts of stock to Aaron for 1995 because Aaron no longer worked for AFSCO. Sederstrom told Harvey that if he was not going to be giving Aaron the gift of stock, then Harvey needed to return

to E&S his original stock certificate and the new stock certificates and stock power that had been sent to him. Harvey told Sederstrom that he would return these items to E&S.

Matthew testified that in late 1995 or early 1996, Harvey told him and Whitney that Aaron would not be receiving a stock gift for 1995 and that Matthew should return the stock certificate that had been drawn up in Aaron's name to E&S. Accordingly, on January 17, 1996, Matthew sent to E&S the certificate and a letter requesting that the certificate be canceled and reissued in Harvey's name. The letter explained that the certificate should be canceled and reissued, as the stock had not been gifted to Aaron because Aaron had left the company. Upon receiving the stock certificate and the letter, E&S stamped "cancelled" on the certificate, placed it in one of the four maroon books, and reissued the shares back to Harvey.

The record is clear that the stock certificate was returned to E&S on January 17, 1996. However, the record is less clear as to when Harvey's stock power and original stock certificate were returned to E&S. Bitzes testified that she did not know when these items were eventually returned, but testified that when they were returned, they were placed in the maroon books. In this regard, Sederstrom testified that although he did not know the exact date that the stock power and original stock certificate were returned, the items could have come back at anytime between October 1995, when he told Harvey to return the items, and January 17, 1996, the date of Matthew's letter requesting the cancellation of the certificate in Aaron's name.

HARVEY'S DESIRE THAT STOCK REMAIN WITH FAMILY MEMBERS ENGAGED IN BUSINESS

A substantial amount of evidence was presented at trial relating to Harvey's alleged desire that AFSCO stock be held only by family members who are actively employed in the business. Matthew testified that from 1986 to 1995, Harvey had expressed at various times to Aaron, Matthew, and Whitney that the only way they would receive stock from Harvey would be if they were actively employed and involved in the company. Aaron testified that he was aware of Harvey's "general philosophy" that if one of them was not actively working at the

company, they would not get a gift of stock, but claims that this was not “a hard and fast rule.”

Harvey’s will, which was executed in 1994, provided that Aaron would not inherit any AFSCO shares if he was not a “full-time employee” of AFSCO at the time of Harvey’s death. Whitney also testified that on at least two occasions in August or September 1995, Aaron made comments to him to the effect that Matthew and Whitney should be happy that he was leaving the company because that would mean they would get all of Harvey’s stock. Matthew testified that in November 1995, he was having dinner at Harvey’s house with Harvey and Aaron. Matthew testified that Harvey specifically told Aaron that he would not be receiving a gift of stock for 1995 because he had left the company. Aaron denies that this dinner meeting ever occurred.

GIFTS OF STOCK GIVEN TO MATTHEW AND WHITNEY IN 1995 THROUGH 1998

In late 1995, or early 1996, Harvey met with Matthew and Whitney and gave each of them a stock certificate. Harvey explained that this was the second of his stock gifts to them and that Aaron would not be receiving a stock gift.

In his 1995 gift tax return filed with the Internal Revenue Service (IRS), Harvey reported giving only two gifts of stock for 1995, one gift to Matthew and the other to Whitney. The tax return reports no gift of stock to Aaron. Following these gifts, Harvey gave equal stock gifts to Matthew and Whitney in 1996 through 1998, at which point, all of his stock in AFSCO had been given away. Harvey died on August 29, 2001.

COMPLAINT AND DISTRICT COURT DECISION

Aaron’s operative complaint, filed on October 27, 2003, against AFSCO, Matthew, and Whitney (collectively the appellees), alleges that a gift was made by Harvey to Aaron in 1995 for 11,764 shares of AFSCO stock. From this allegation, Aaron asserted five claims: (1) a declaratory judgment determining that the stock certificate prepared in his name and the entries made on the books of E&S constituted a completed gift; (2) the creation of a constructive trust in favor of Aaron;

(3) a finding of a breach of fiduciary duty against Matthew and Whitney and request for the fair value of his claimed stock interest, distributions with respect to the stock, and other damages; (4) a finding of wrongful registration of the stock in the names of Matthew and Whitney; and (5) unjust enrichment and related remedies.

The appellees denied all of the material allegations in Aaron's complaint and alternatively alleged that no gift had occurred for failure of delivery, acceptance, and no donative intent on the part of Harvey; that the gift was also not completed for failure of a condition; and that Aaron's claims are barred by equitable estoppel, laches, the statute of limitations, and unclean hands.

The district court found that Harvey's actions did not constitute a completed gift to Aaron. Accordingly, the court determined that neither Matthew nor Whitney had breached his fiduciary duty. The court further concluded that Aaron's claims are barred by the statute of limitations, laches, and equitable estoppel. Aaron appealed.

ASSIGNMENTS OF ERROR

On appeal, Aaron assigns, summarized, restated, and renumbered, that the district court erred in (1) failing to find that Harvey made a valid completed gift to Aaron; (2) refusing to grant a declaratory judgment in favor of Aaron finding that he is the legal and/or equitable owner of the stocks at issue in this case; (3) failing to impose a constructive trust on the appellees for fraudulently concealing the cancellation of the stocks which he claims belonged to him; (4) failing to conclude that the appellees breached their fiduciary duties to Aaron; (5) failing to find that the appellees were unjustly enriched; (6) receiving, over Aaron's objection, leading testimony on cross-examination of favorable witnesses to the appellees and refusing to strike such testimony; (7) finding Aaron's claims to be barred by the statute of limitations, laches, and equitable estoppel; and (8) referring to Harvey as "the rightful defendant" in its order.

STANDARD OF REVIEW

[1] In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that where

credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.¹

ANALYSIS

[2,3] The primary issue presented in this case is whether Harvey made a valid inter vivos gift of AFSCO stock to Aaron in 1995. To make a valid and effective gift inter vivos, there must be an intention to transfer title to the property, and a delivery by the donor and acceptance by the donee.² The person asserting the gift must prove all the essential elements by clear, direct, positive, express, and unambiguous evidence.³

[4-8] We begin our analysis by addressing the question whether Harvey had the required present donative intent to make a gift of stock to Aaron. One of the essential elements of a gift is the intention to make it.⁴ A clear and unmistakable intention on the part of the donor to make a gift of his or her property is an essential element of the gift, and this contention must be inconsistent with any other theory.⁵ It is well established that to constitute a valid inter vivos gift, the donor must have a present donative intent.⁶ The “mere preparation of a donative document does not effect a present transfer necessary to perfect a gift.”⁷ Where the intention to make a gift is not

¹ *Ottaco Acceptance, Inc. v. Huntzinger*, 268 Neb. 258, 682 N.W.2d 232 (2004).

² *In re Estate of Lamplough*, 270 Neb. 941, 708 N.W.2d 645 (2006).

³ *Masonic Temple Craft v. Stamm*, 152 Neb. 604, 42 N.W.2d 178 (1950).

⁴ *In re Estate of Lamplough*, *supra* note 2.

⁵ *Id.*

⁶ See *Masonic Temple Craft v. Stamm*, *supra* note 3. See, also, *Schultz v. Schultz*, 637 S.W.2d 1 (Mo. 1982); *Matter of Estate of Lewis*, 97 Idaho 299, 543 P.2d 852 (1975); *Sinclair v. Travis*, 231 N.C. 345, 57 S.E.2d 394 (1950); *Rock v. Rock*, 309 Mass. 44, 33 N.E.2d 973 (1941); *Millman v. Streeter*, 66 R.I. 341, 19 A.2d 254 (1941); *Myers v. Weems*, 128 Or. App. 444, 876 P.2d 861 (1994); *Sullivan v. American Telephone & Telegraph Co.*, 230 So. 2d 18 (Fla. App. 1969).

⁷ Restatement (Third) of Property: Wills and Other Donative Transfers § 6.2, comment *u.* at 51 (2003).

clearly manifested, subsequent acts may aid in clarifying that intention.⁸

Aaron argues that the February 2, 1995, stock power, prepared by E&S at Harvey's request, sufficiently establishes Harvey's donative intent to make a gift of stock to Aaron in 1995. Aaron notes that the stock power, which was eventually signed and returned by Harvey to E&S, states that Harvey "assigns and transfers by gift unto . . . Aaron M. Ferer 11,764 shares" and uses the term "irrevocably" in describing the transfer. Aaron asserts that given this language and Harvey's signature on the document, the element of donative intent has been satisfied. We are not persuaded by Aaron's argument. We find, as did the district court, that Harvey lacked the requisite donative intent to make a present gift of stock to Aaron.

The record evidences conduct on Harvey's part that is entirely inconsistent with the present donative intent required to make a valid completed gift inter vivos. Both Sederstrom and Matthew testified that the unsigned stock power and unsigned stock certificates were prepared in July 1995, by E&S, because Harvey was "contemplating" making a gift of stock to each of his sons. After receiving the stock certificates and having them signed, Harvey, rather than presenting the certificates to his sons, or at least informing them that a gift had been made, directed that the certificates be locked in the company safe. This evidence indicates that at the time the stock power and certificates were prepared, Harvey did not intend to make a present gift of stock to his sons and, instead, intended to maintain dominion and control over the certificates.

Also relevant to the question of Harvey's donative intent is the evidence relating to Harvey's desire that stock in AFSCO be given only to family members who are actively employed in the company. Between 1986 to 1995, Harvey had repeatedly expressed that the only way Aaron, Matthew, and Whitney would receive stock would be if they were actively employed and involved in the company. Aaron testified that he was aware

⁸ See *Crowell v. Milligan*, 157 Neb. 127, 59 N.W.2d 346 (1953), *overruled in part on other grounds*, *White v. Ogier*, 175 Neb. 883, 125 N.W.2d 68 (1963).

of this “general philosophy.” In addition, the provisions in Harvey’s 1994 will are persuasive evidence of Harvey’s intent that Aaron should not receive AFSCO stock if he was not employed with the company.

The record further shows that following Aaron’s decision to leave the company, Harvey told several individuals, including Aaron, that he was not going to be giving a gift of stock to Aaron in 1995 because Aaron had left the company. These statements by Harvey are significant because they demonstrate that at the time the statements were made, Harvey was not under the impression that he had already made a completed gift of stock to Aaron. Harvey’s statements do not suggest a desire to revoke or undo a gift that he believed had already been given. Rather, these statements evidence Harvey’s intent to forgo a gift of stock to Aaron in the future that would have otherwise been made. And Harvey could not have believed the gift to be incomplete had he intended to complete it earlier.

Aaron suggests that the fact that the stock power was signed and returned to E&S conclusively establishes Harvey’s donative intent to make a gift. However, the evidence shows that Harvey did not return the signed stock power to E&S until after he had specifically told Sederstrom that he was not going to be making a gift of stock to Aaron in 1995. Moreover, Sederstrom testified he told Harvey that if Harvey was not going to be giving the gift of stock to Aaron, then Harvey needed to return to E&S, among other things, the stock power; and that is exactly what Harvey did.

Furthermore, the record contained two gift tax returns prepared by Harvey for 1995. One return reported a gift of stock to all three of his sons, while the other return reported only a gift of stock to Matthew and Whitney. The evidence presented at trial showed that the tax return reporting a gift to all three sons was only a draft, prepared by Harvey in early 1995, and was never signed by Harvey. The undisputed evidence was that the actual gift tax return, signed by Harvey and filed with the IRS for 1995, was the gift tax return reporting that a gift had been made only to Matthew and Whitney, and not Aaron.

Finally, the record indicates a pattern of gift giving followed by Harvey, both before and after Aaron left the company. In

late 1994, while all three of his sons were working at AFSCO, Harvey gave each of them a stock certificate and explained that a similar gift would be made each year, so long as the sons remained actively employed and involved in the company. The following year, in late 1995 or early 1996, consistent with what he had done the year before, Harvey gave Matthew and Whitney, but not Aaron, gifts of stock for 1995. Harvey gave similar gifts of stock to Whitney and Matthew in 1996 through 1998, at which point, all of Harvey's stock in AFSCO had been given away. Harvey's established pattern of giving his sons annual gifts of stock at the end of the year, or the beginning of the next year, further supports our determination that Harvey did not have a present intent to convey an interest in the stock to Aaron in July 1995, when the stock power and certificates were prepared.

[9] In sum, when considering the foregoing evidence, it is apparent that at no time in 1995, either before or after Aaron left AFSCO, did Harvey have a clear and unmistakable intent to make a present gift of stock to Aaron. There is no evidence in the record that Harvey, at any time other than the 1994 gift, believed that he had completed a gift of AFSCO stock to Aaron. Rather, the evidence at best reveals that Harvey intended to make a gift of stock to Aaron at some point in the future. However, the law is well established that the mere intention to make a gift in the future is insufficient to constitute a completed gift.⁹ Accordingly, Aaron has failed to carry his burden of showing that Harvey made a completed gift of stock to him in 1995.

Aaron argues that Harvey's alleged 1995 gift was complete and irrevocable when the transfers were noted by E&S in the maroon books. Assuming without deciding that the maroon books were the official stock records of AFSCO and that recording the transfer in those books could constitute constructive delivery, we nonetheless conclude that the gift was defeated by Harvey's lack of a present donative intent.

⁹ See, *Tucker v. Addison*, 265 Ga. 642, 458 S.E.2d 653 (1995); *Fuisz v. Fuisz*, 527 Pa. 348, 591 A.2d 1047 (1991); *Figuers v. Sherrell*, 181 Tenn. 87, 178 S.W.2d 629 (1944); *In re Estate of Shivers*, 105 N.J. Super. 242, 251 A.2d 771 (1969); *Harmon v. Schmitz*, 26 S.W.2d 289 (Tex. Civ. App. 1930).

The Oklahoma Supreme Court in *Davis v. National Bank of Tulsa*¹⁰ addressed a situation very similar to the one presented in this case. In *Davis*, a father reissued 80,000 shares of his stock, with 20,000 shares being issued in the names of each of his children. There was no evidence in the record that the stock certificates had been delivered to the children, or to anyone on their behalf. The father retained exclusive possession and control of the stock certificates and the proceeds of sales thereof for many years.

In determining that the father had not made a valid gift *inter vivos* to his children, the court stated that “[i]t is elementary that a gift cannot be made to take effect in possession in futuro” and that “[s]uch a transaction amounts only to a promise to make a gift,” and is not legally enforceable.¹¹ The court continued, “[t]he fact that the stock was registered upon the books of the corporation in the names of the plaintiffs, in the light of all the facts in this case, is not sufficient to establish a completed gift.”¹² The court concluded by explaining that the father had “retained possession, control and dominion over the stock and the proceeds of the sale thereof. There was never a completed gift. The most that may be said of the facts and circumstances is that [the father] evidenced an intent to make a gift in the future.”¹³

[10] Courts in other jurisdictions have similarly concluded that notwithstanding the fact that a stock transfer has been recorded on the books of the company, if there is a lack of donative intent, the gift of stock will not be considered valid.¹⁴ We agree. In this case, Harvey never had the present intent to convey an interest in the stock to Aaron. Therefore, we reject

¹⁰ *Davis v. National Bank of Tulsa*, 353 P.2d 482 (Okla. 1960).

¹¹ *Id.* at 487.

¹² *Id.*

¹³ *Id.* at 488.

¹⁴ See, *Owens v. Owens*, 207 Minn. 489, 292 N.W. 89 (1940); *Lichtenstein v. Eljohann, Inc.*, 161 A.D.2d 397, 555 N.Y.S.2d 331 (1990); *Sullivan v. American Telephone & Telegraph Co.*, *supra* note 6; *Nolan v. American Tel. & Tel. Co.*, 326 Ill. App. 328, 61 N.E.2d 876 (1945).

Aaron's claim that Harvey made a completed gift of stock to him in 1995.

[11] Aaron also assigns error to the admissibility of certain portions of Bitzes' testimony. Aaron argues that the district court erred in allowing, over his objection, opposing counsel to lead favorable witnesses through their examinations. Specifically, Aaron contends that Bitzes was "spoon-fed answers with leading questions" and that her testimony was "dramatically different than her sworn deposition testimony."¹⁵ Given the broad discretion allowed to a trial court in permitting or refusing a request to ask leading questions, and having reviewed the testimony at issue, we find that the trial court did not abuse its discretion.¹⁶

Our conclusion that Harvey did not make a valid inter vivos gift of stock to Aaron in 1995 is otherwise dispositive of this appeal. We need not, and do not, address Aaron's remaining assignments of error.

CONCLUSION

We conclude that Harvey did not make a gift of stock in 1995 to Aaron because Harvey lacked the requisite donative intent to make a present gift of stock to Aaron. Furthermore, the district court did not abuse its discretion in overruling Aaron's objections and allowing the testimony of Bitzes. The judgment of the district court is affirmed.

AFFIRMED.

McCORMACK, J., not participating.

¹⁵ Brief for appellant at 40.

¹⁶ See *Turner v. Welliver*, 226 Neb. 275, 411 N.W.2d 298 (1987).

MONICA REID, APPELLANT, v.
DONALD EVANS, APPELLEE.
733 N.W.2d 186

Filed June 8, 2007. No. S-05-1503.

1. **Statutes: Appeal and Error.** The interpretation of a statute is a question of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.

2. **Appeal and Error.** An appellate court's analysis of a case on appeal is framed by the manner in which the case was litigated and decided below.
3. **Limitations of Actions: Dismissal and Nonsuit.** Pursuant to Neb. Rev. Stat. § 25-217 (Cum. Supp. 2006), an action is dismissed by operation of law as to any defendant who is named and who is not served with process within 6 months after the complaint is filed.

Appeal from the District Court for Douglas County, JOSEPH S. TROIA, Judge, on appeal thereto from the County Court for Douglas County, JANE H. PROCHASKA, Judge. Judgment of District Court affirmed.

Timothy L. Ashford, P.C., L.L.O., for appellant.

Patrick S. Cooper, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

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

PER CURIAM.

NATURE OF CASE

Monica Reid, appellant, filed a negligence action arising from a December 26, 2000, automobile accident in which she was a passenger in a car driven by Donald Evans, appellee. The complaint was filed on September 27, 2004, in the county court for Douglas County and named Donald as the defendant. Reid was unaware that Donald had died prior to the filing of the action. A copy of the complaint naming Donald as the sole defendant was served on Thomas Evans, the special administrator of Donald's estate, on March 19, 2005. Thus, service was not completed on Donald and a complaint naming his estate as defendant was not served within the 6-month statutory time-frame for service of a complaint. See Neb. Rev. Stat. § 25-217 (Cum. Supp. 2006).

On April 15, 2005, counsel for Donald filed a motion under § 25-217 seeking an order formally recognizing the dismissal of Reid's lawsuit by operation of law. In response, Reid filed a pleading entitled "Motion for Revivor to Amend the Complaint," by which she sought to amend her complaint to add Thomas as special administrator of Donald's estate as the defendant.

Reid claimed her proposed amendment was proper because it would relate back to the original filing date under Nebraska's relation-back statute, Neb. Rev. Stat. § 25-201.02 (Cum. Supp. 2006). The county court determined that because Reid's complaint naming Donald as the sole defendant had not been served on the only-named party defendant within the 6-month service of process period, Reid's action stood dismissed by operation of law on March 28, 2005. The county court also denied relief to Reid on her motion to amend. Upon appeal, the district court for Douglas County affirmed the county court's decision. Reid appeals.

We conclude that the district court did not err in affirming the county court's decision that Reid's action stood dismissed by operation of law under § 25-217. We further determine, as did the district court, that because Reid's action stood dismissed, Reid's motion invoking relation back to amend the dismissed complaint was a nullity. Accordingly, we affirm.

STATEMENT OF FACTS

On December 26, 2000, Reid was a passenger in an automobile driven by Donald. Reid was allegedly injured when she and Donald were involved in an accident in Omaha. Donald died sometime in 2003, a fact of which Reid was unaware. On September 27, 2004, Reid filed a negligence action against Donald, captioned "Monica Reid, Plaintiff, vs. Donald Evans, Defendant," in the county court for Douglas County. Reid made several unsuccessful attempts to serve Donald with the summons and a copy of the complaint. On March 19, 2005, Reid served the summons and complaint upon Thomas, Donald's son, who had been named the special administrator of Donald's estate. At the time Reid served Thomas, the complaint named Donald as the only defendant. Neither Thomas nor Donald's estate was named as a party.

On April 15, 2005, counsel for Donald filed a motion to formally recognize the dismissal of Reid's lawsuit against Donald in accordance with § 25-217, which provides that an "action shall stand dismissed without prejudice as to any defendant not served within six months from the date the complaint was filed." The 6-month service time period had expired by March 28, 2005.

In response, on May 2, Reid filed a pleading entitled “Motion for Revivor to Amend the Complaint,” by which Reid sought leave to amend her complaint to name Thomas as the defendant, in his capacity as the special administrator of Donald’s estate. Reid asserted that such an amendment would date back to the original filing date of her complaint under Nebraska’s relation-back statute, § 25-201.02, and in so doing, Reid claimed the action would avoid being time barred under Nebraska’s 4-year statute of limitations for negligence, Neb. Rev. Stat. § 25-207 (Reissue 1995), suspended by 2 months under Neb. Rev. Stat. § 30-2484 (Reissue 1995).

Section 25-201.02 provides in pertinent part as follows:

(2) If the amendment [to a pleading] changes the party or the name of the party against whom a claim is asserted, the amendment relates back to the date of the original pleading if (a) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth . . . in the original pleading, and (b) within the period provided for commencing an action the party against whom the claim is asserted by the amended pleading (i) received notice of the action such that the party will not be prejudiced in maintaining a defense on the merits and (ii) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The parties’ motions came on for hearing on May 5, 2005. In an order filed May 20, the county court granted the motion to formally recognize the dismissal of Reid’s lawsuit under § 25-217, denied Reid’s motion, and ordered that Reid’s lawsuit stood dismissed as of March 28, 2005.

Reid appealed the county court’s order to the district court. In an order filed November 17, 2005, the district court affirmed the county court’s decision that under the provisions of § 25-217, Reid’s lawsuit against Donald stood dismissed by operation of law on March 28. The district court further determined that because Reid’s lawsuit was dismissed on March 28, the county court was thereafter without jurisdiction to consider Reid’s motion to amend and relate back. Reid appeals.

ASSIGNMENTS OF ERROR

On appeal, Reid assigns numerous errors that can be summarized as claiming that the district court erred in (1) affirming the county court's decision that Reid's lawsuit stood dismissed on March 28, 2005, by operation of law under § 25-217 and (2) determining that because Reid's lawsuit was dismissed, the county court lacked jurisdiction to rule on Reid's motion to amend the complaint and relate back under § 25-201.02.

STANDARD OF REVIEW

[1] The interpretation of a statute is a question of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. See *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007).

ANALYSIS

[2] This case was treated as one subject to dismissal under § 25-217 by the lower courts, and our analysis on appeal is framed by the manner in which the case was litigated and decided below. See *Owen v. American Hydraulics*, 258 Neb. 881, 606 N.W.2d 470 (2000). Compare *Babbitt v. Hronik*, 261 Neb. 513, 623 N.W.2d 700 (2001) (analyzing and affirming district court's grant of summary judgment when plaintiff failed to timely commence action against estate).

For her first assignment of error, Reid claims that the district court erred in affirming the county court's decision that her lawsuit against Donald was dismissed by operation of law pursuant to the provisions of § 25-217 because she had not served Donald, the sole defendant named in the complaint, within 6 months of filing the lawsuit. Reid claims that her service of summons and the complaint upon Thomas was sufficient to satisfy the requirements of § 25-217, even though neither Thomas nor the estate was named as a defendant in the lawsuit. We reject Reid's argument.

[3] Central to our analysis of Reid's first assignment of error is the language of § 25-217, which provides that "[a]n action is commenced on the date the complaint is filed with the court. The action shall stand dismissed without prejudice as to any defendant not served within six months from the date the complaint

was filed.” We have construed this language to mean that an action is dismissed by operation of law as to any defendant who is named and who is not served with process within 6 months after the complaint is filed. We have recently stated that “[u]nder § 25-217 . . . the expression ‘any defendant’ . . . mean[s] that dismissal is indicated as to that defendant who [is named and] is ‘not served’ . . .” *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co.*, 268 Neb. 439, 447, 684 N.W.2d 14, 21-22 (2004) (determining that dismissal affects only those named defendants who are not properly served).

Reid’s lawsuit was “commenced” on September 27, 2004, the day she filed her complaint. See § 25-217. Reid failed to obtain service of process upon Donald, the only defendant named in her lawsuit, on or before March 27, 2005, which was 6 months after her lawsuit was filed. As a result, Reid’s lawsuit against Donald stood dismissed by operation of law on March 28. See *Vopalka v. Abraham*, 260 Neb. 737, 746, 619 N.W.2d 594, 601 (2000) (stating that “[d]ismissal by operation of law effectuates the mandatory language of the statute”). See, also, *Kovar v. Habrock*, 261 Neb. 337, 342, 622 N.W.2d 688, 692 (2001) (stating that “[t]he language of § 25-217 . . . is self-executing and mandatory”).

Reid argues that Thomas received notice of the lawsuit within the 6-month service period provided under § 25-217 and that “but for a mistake concerning the identity of the proper party, the action would have been brought against the party Thomas Evans as Special Administrator of the Estate of Donald Evans.” Brief for appellant at 12.

We find Reid’s argument unpersuasive. Thomas was not a named defendant in the lawsuit, and thus, any service of process upon him is of no effect. See, *Lydick v. Smith*, 201 Neb. 45, 266 N.W.2d 208 (1978) (discussing that strict compliance with requirements of service of process is mandatory and jurisdictional); *Wilson v. Smith*, 193 Neb. 433, 436, 227 N.W.2d 597, 598 (1975) (stating that “[s]tatutes [governing] service of summons are mandatory and must be strictly pursued,” quoting *Erdman v. National Indemnity Co.*, 180 Neb. 133, 141 N.W.2d 753 (1966)). Contrary to the requirements in the relevant probate statute regarding commencement of actions against an

estate, Neb. Rev. Stat. § 30-2404 (Reissue 1995), Reid named only Donald in her complaint, and she failed to obtain service of process upon Donald within 6 months of the filing of her lawsuit. “[T]he plain language of § 25-217 requires [that] as to any defendant not served within 6 months of filing, the action stands dismissed.” *Fox v. Nick*, 265 Neb. 986, 990, 660 N.W.2d 881, 885 (2003). We affirm the decision of the district court that affirmed the county court’s decision that Reid’s lawsuit against Donald stood dismissed by operation of law on March 28, 2005.

For her second assignment of error, Reid claims that the district court erred in determining that because Reid’s lawsuit stood dismissed, the county court lacked authority to rule on Reid’s motion to amend the complaint in an attempt to take advantage of Nebraska’s relation-back statute. Reid claims that under § 25-201.02, she should have been allowed to amend her complaint to name Thomas as the defendant and that such an amendment would have been effective as of the date she commenced her lawsuit, thereby making service of process on Thomas timely under § 25-217 and within the statute of limitations. Section 25-201.02 provides in pertinent part as follows:

(2) If the amendment [of a pleading] changes the party or the name of the party against whom a claim is asserted, the amendment relates back to the date of the original pleading if (a) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth . . . in the original pleading, and (b) within the period provided for commencing an action the party against whom the claim is asserted by the amended pleading (i) received notice of the action such that the party will not be prejudiced in maintaining a defense on the merits and (ii) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Counsel for Donald responds that Reid’s relation-back argument is inapplicable because once the case was dismissed by operation of law under § 25-217, the district court was without authority to consider Reid’s motion. Counsel for Donald further argues that even if the relation-back statute did apply, it would

not assist Reid because the version of the relation-back statute adopted by Nebraska, which is derived from a now-superseded version of Fed. R. of Civ. P. 15(c), only allows an amendment to relate back to the original filing date if the party who is being added by the amendment was aware of the claim during “the period provided for commencing an action” against such party, see § 25-201.02(2)(b), and this latter phrase has been interpreted to mean prior to the expiration of the statute of limitations, see *Schiavone v. Fortune*, 477 U.S. 21, 106 S. Ct. 2379, 91 L. Ed. 2d 18 (1986). Compare *Smeal v. Olson*, 263 Neb. 900, 644 N.W.2d 550 (2002) (applying federal jurisprudence under revised rule 15(c) prior to adoption of § 25-201.02). Counsel for Donald argues that because Thomas was not served with notice of Reid’s lawsuit against Donald until March 19, 2005, Thomas did not receive notice prior to the expiration of the statute of limitations, and therefore, Reid cannot benefit from the relation-back statute. We agree with counsel’s initial argument that relation back is inapplicable in this case.

We have stated that

[a]fter dismissal of an action by operation of law pursuant to § 25-217, there is no longer an action pending and the district court has no jurisdiction to make any further orders except to formalize the dismissal. . . . If orders are made following the dismissal, they are a nullity, as are subsequent pleadings.

Kovar v. Habrock, 261 Neb. 337, 342, 622 N.W.2d 688, 692 (2001). Because Reid’s lawsuit had been dismissed, her subsequent motion to amend and take advantage of relation back was a nullity, as would have been any order entered by the county court on that motion. Once Reid’s lawsuit had been dismissed, the county court lacked jurisdiction to make any further orders other than to formalize the dismissal. See *id.* The district court did not err in determining that the county court lacked jurisdiction to consider Reid’s motion to amend, and we affirm the district court’s decision.

CONCLUSION

We conclude that the district court did not err in affirming the county court’s decision that Reid’s lawsuit was dismissed

by operation of law pursuant to § 25-217. We further conclude, as did the district court, that because Reid's lawsuit stood dismissed on March 28, 2005, the county court lacked jurisdiction to consider Reid's motion to amend. Accordingly, we affirm the district court's decision.

AFFIRMED.

MILLER-LERMAN, J., concurring.

I agree with the opinion of the court that the case stood dismissed by operation of law under Neb. Rev. Stat. § 25-217 (Cum. Supp. 2006) and that once the case stood dismissed, Reid's subsequent motion to amend and relate back was a nullity. I write separately to expand on additional reasons why Reid's invocation of relation back would be unavailing and to point out that the version of Fed. R. of Civ. P. 15(c) adopted by the Legislature is less forgiving than the current version of rule 15(c) adopted by the federal courts.

In his brief, counsel for Donald correctly notes that in adopting Neb. Rev. Stat. § 25-201.02 (Cum. Supp. 2006), Nebraska adopted language from a version of rule 15(c) of the Federal Rules of Civil Procedure governing relation back that has since been superseded. In 1991, Fed. R. of Civ. P. 15(c) was modified, and it presently allows for an amendment to a complaint to relate back to the original filing date of the lawsuit if the party added by the amendment received notice of the lawsuit during the period allowed for service of process, even if that time period extends beyond the statute of limitations. 4B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1107 (3d ed. 2002 & Supp. 2007). However, because Nebraska has adopted language derived from the previous rather than the current version of Fed. R. of Civ. P. 15(c), even if Reid's relation-back argument had application, it would be unavailing.

In addition, there is a more fundamental reason in relation-back jurisprudence why Reid's motion to amend by invoking relation back was inapplicable. Relation back is a concept that facilitates amendments to pleadings, and relation back is inapplicable to a lawsuit that has already been dismissed. In order for an amendment to relate back to the original filing date, there must be an action pending at the time the proposed amendment

is filed. If a lawsuit has already been dismissed, there is nothing for a subsequent amendment to relate back to. See, *Marsh v. Soares*, 223 F.3d 1217, 1219 (10th Cir. 2000) (stating that subsequent pleading “‘cannot relate back to a previously filed petition that has been dismissed . . . because there is nothing for the [pleading] to relate back to’”); *Henry v. Lungren*, 164 F.3d 1240, 1241 (9th Cir. 1999) (stating that because “original . . . action was dismissed . . . there was no pending petition to which [the new pleading] could relate back or amend”). See, also, *Hayes v. U.S.*, 73 Fed. Cl. 724, 729 (2006) (stating that “[b]ecause . . . case was dismiss[ed] . . . present claim cannot relate back to that dismissed case”); *Holloway v. U.S.*, 60 Fed. Cl. 254 (2004) (stating that subsequent pleading could not relate back to earlier complaint that had been dismissed); *Frazer v. U.S.*, 49 Fed. Cl. 734, 736 (2001) (stating that once complaint had been dismissed, subsequent pleading “st[ood] alone. And standing alone, it is time-barred”). Reid’s action stood dismissed by operation of law on March 28, 2005, and Reid did not file her motion to amend until May 2. Because Reid’s lawsuit had been dismissed, there was nothing for her proposed amendment to relate back to.

If the Legislature was to revise § 25-201.02 to provide language similar to the current version of rule 15(c) of the Federal Rules of Civil Procedure, a plaintiff seeking to amend and take advantage of relation back who files a motion after the statute of limitations has run but during the period allowed for service, and who otherwise meets statutory requirements, would be able to amend the complaint. Revisions to § 25-201.02 could marginally enhance the utility of statutory relation back in Nebraska.

McCORMACK, J., joins in this concurrence.

DONALD R. BURNS, JR., APPELLEE, v. JOHN D. NIELSEN AND
BARBARA NIELSEN, DOING BUSINESS AS DIAMOND HILL
FARMS, APPELLEES, AND FEDERAL EXPRESS
CORPORATION, APPELLANT.
732 N.W.2d 640

Filed June 8, 2007. No. S-06-030.

1. **Workers' Compensation: Judgments: Appeal and Error.** Distribution of the proceeds of a judgment or settlement under Neb. Rev. Stat. § 48-118.04 (Cum. Supp. 2006) is left to the trial court's discretion and reviewed for an abuse of that discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.
3. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
4. **Workers' Compensation: Subrogation: Tort-feasors.** Neb. Rev. Stat. § 48-118 (Cum. Supp. 2006) grants an employer who has paid workers' compensation benefits to an employee injured as a result of the actions of a third party a subrogation interest against payments made by the third party.
5. **Workers' Compensation: Subrogation: Insurance: Equity.** The term "fair and equitable distribution," as used in Neb. Rev. Stat. § 48-118.04 (Cum. Supp. 2006), does not permit the subrogation interest of an employer or workers' compensation insurer to be subject to equitable defenses.
6. **Statutes: Words and Phrases.** As a general rule, the word "shall" in a statute is considered mandatory and is inconsistent with the idea of discretion.
7. **Workers' Compensation: Courts.** Neb. Rev. Stat. § 48-118.04 (Cum. Supp. 2006) does not authorize the district court to punish an employer beyond the penalties expressly prescribed by the workers' compensation statutes.
8. **Statutes.** A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat that purpose.
9. **Workers' Compensation.** The Nebraska Workers' Compensation Act is intended to provide benefits for employees who are injured on the job and should be construed to accomplish that purpose.
10. **Equity: Estoppel.** The doctrine of equitable estoppel applies where, as a result of conduct of a party upon which another person has in good faith relied to his detriment, the acting party is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed.
11. **Forbearance: Estoppel.** The doctrine of promissory estoppel is based upon a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee which does in fact induce such action or forbearance.
12. **Estoppel.** The doctrine of judicial estoppel holds that one who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding.

13. _____. The doctrine of judicial estoppel protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding.
14. _____. Absent judicial acceptance of an inconsistent position, the application of the doctrine of judicial estoppel is unwarranted because no risk of inconsistent results exists.
15. **Trial: Evidence: Damages.** The collateral source rule provides that benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer.

Appeal from the District Court for Box Butte County: BRIAN SILVERMAN, Judge. Reversed and remanded with directions.

Dallas D. Jones and Jenny L. Panko, of Baylor, Evnen, Curtiss, Gruit & Witt, L.L.P., for appellant.

Patrick M. Connealy, of Crites, Shaffer, Connealy, Watson & Harford, P.C., L.L.O., for appellee Donald R. Burns, Jr.

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

GERRARD, J.

Donald R. Burns, Jr., was injured in a work-related accident on the premises of a third party, and settled both a workers' compensation claim and a third-party negligence claim. Burns' employer, the appellant, sought to enforce a subrogation interest in the proceeds of the negligence settlement. The question presented in this appeal is whether the employer was barred from asserting its subrogation interest by equitable principles, based on its allegedly wrongful conduct in the course of contesting Burns' workers' compensation claim.

BACKGROUND

Burns suffered an accidental injury arising out of and in the course of his employment with the Federal Express Corporation (FedEx). Burns was employed as a courier and was picking up a letter at Diamond Hill Farms on September 30, 1999. Burns stepped onto a walkway made of wooden pallets, and a plank in one of the pallets broke, causing Burns to fall and injure his neck, back, foot, and ankle.

FedEx voluntarily paid \$134,647.36 in medical benefits and a total of \$43,377.72 in disability benefits through 2004. But FedEx did not pay all of the medical expenses Burns claimed, and questioning causation, FedEx denied further benefits. Burns filed a workers' compensation claim on January 21, 2004. Before trial, however, the parties agreed to settle the claim for benefits already paid, plus a lump-sum payment of \$207,500. The settlement was approved by the Workers' Compensation Court.

In the meantime, Burns had filed a complaint in the district court against John D. Nielsen and Barbara Nielsen, doing business as Diamond Hill Farms, alleging that his injuries were caused by their negligence. In an amended complaint filed February 23, 2004, Burns named FedEx as a defendant to determine its subrogation interest.¹ The negligence claim also ended in settlement. The Niensens' insurer agreed to make a lump-sum payment of \$143,052.82 to Burns, and a lump-sum payment of \$156,947.18 to the clerk of the court, pending resolution of the subrogation issues. The Niensens' insurer also agreed to pay Burns \$800 monthly for 20 years and a total of \$115,139 in lump-sum payments to be made at 5-year intervals beginning September 25, 2009. The agreement provided that

[n]othing in this Section shall limit [FedEx's] claim against . . . Burns for reimbursement of its subrogation interest and its claim that the payments to be made pursuant [to] these sections shall be treated as advance payments of workers' compensation benefits by [FedEx] to the extent that the Nebraska Workers' Compensation Court determines that [FedEx] is liable for any additional workers' compensation benefits to or on behalf of [Burns] and the Box Butte County District [Court] shall determine whether or to what extent any credit may be allowed or disallowed.

The agreement was approved by Burns, the Niensens' insurer, and FedEx. The court dismissed Burns' negligence complaint with prejudice on the parties' stipulation for dismissal.

The case then proceeded in district court to a determination of FedEx's subrogation interest and a "fair and equitable

¹ See Neb. Rev. Stat. § 48-118 (Cum. Supp. 2006).

distribution of the proceeds of [the] settlement”² of the negligence claim. Burns argued that FedEx should not receive any part of the settlement, contending that FedEx had engaged in intentional misconduct against Burns, had unclean hands, and was equitably estopped from asserting its subrogation interest. The essence of Burns’ argument was that FedEx had behaved inequitably in resisting the workers’ compensation claim, in part because the experts it retained and relied upon were not reliable. Burns contended that FedEx had “flip-flopped on causation” by voluntarily paying benefits, then denying benefits, then, after the settlement of the workers’ compensation claim, asserting a subrogation interest in the proceeds of the negligence settlement.

The district court agreed with Burns. In a journal entry, the court stated that it was “abundantly clear, this is a gross understatement, that [FedEx] has changed [its] position like a merry-go-round throughout the history of . . . Burns’ case.” The court stated that it “clearly believe[d] that FedEx comes before this Court with unclean hands for numerous reasons and finds that the conduct of FedEx meets the elements of equitable estoppel.” The court adopted and entered a memorandum order prepared by Burns’ counsel.

The memorandum order asserted that “[t]his [was] a proceeding in equity and equitable principles apply.” Of the money deposited with the clerk of the district court, the order directed payment of \$62,734.94 in fees and expenses to Burns’ counsel in the negligence claim, leaving “a balance of \$98,468 to be ‘fairly and equitably’ divided by the court.” (The total sum, \$161,203.87, apparently was composed of the \$156,947.18 originally paid to the clerk of the district court, plus interest accrued during the proceedings.)

In addition to restating the journal entry’s conclusions with respect to unclean hands and estoppel, the order rejected FedEx’s argument that Burns’ Social Security disability benefits and disability insurance benefits should be considered in determining what was a “fair and equitable distribution.” The order stated that it would strain the workers’ compensation statutes to allow

² See Neb. Rev. Stat. § 48-118.04 (Cum. Supp. 2006).

FedEx's subrogation claim to attach, indirectly, to those benefits. The order also stated that consideration of Social Security and insurance disability benefits would violate the collateral source rule. As with the journal entry, the order concluded that FedEx was barred from recovering any of the negligence settlement proceeds.

ASSIGNMENTS OF ERROR

FedEx assigns, consolidated and restated, that the court erred in (1) determining, based on the application of equitable principles, that FedEx was not entitled to recover any of its subrogation interest in the proceeds of the negligence settlement; (2) determining that the collateral source rule barred consideration of other benefits Burns received as a result of his accident; and (3) determining that of the total negligence settlement, only \$161,203.87 was subject to distribution among the parties.

FedEx also assigns that the court erred in not utilizing a "rule of proportionality" to determine a fair and equitable distribution of the negligence settlement proceeds. However, we recently rejected an identical argument in *Turco v. Schuning*,³ which we decided after FedEx's brief was filed. We decline to reconsider *Turco*, and do not further consider this argument.

STANDARD OF REVIEW

[1,2] Distribution of the proceeds of a judgment or settlement under § 48-118.04 is left to the trial court's discretion and reviewed for an abuse of that discretion.⁴ A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.⁵

[3] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.⁶

³ See *Turco v. Schuning*, 271 Neb. 770, 716 N.W.2d 415 (2006).

⁴ *Id.*

⁵ *Orduna v. Total Constr. Servs.*, 271 Neb. 557, 713 N.W.2d 471 (2006).

⁶ *Livengood v. Nebraska State Patrol Ret. Sys.*, ante p. 247, 729 N.W.2d 55 (2007).

ANALYSIS

FAIR AND EQUITABLE DISTRIBUTION OF SETTLEMENT PROCEEDS

[4] Before considering the precise issues presented by this appeal, it will be helpful to review the general framework in which those issues arise. Section 48-118 provides:

When a third person is liable to the employee or to the dependents for the injury or death of the employee, the employer shall be subrogated to the right of the employee or to the dependents against such third person. . . .

. . . .

Nothing in the Nebraska Workers' Compensation Act shall be construed to deny the right of an injured employee or of his or her personal representative to bring suit against such third person in his or her own name or in the name of the personal representative based upon such liability, but in such event an employer having paid or paying compensation to such employee or his or her dependents shall be made a party to the suit for the purpose of reimbursement, under the right of subrogation, of any compensation paid.

In short, § 48-118 grants an employer who has paid workers' compensation benefits to an employee injured as a result of the actions of a third party a subrogation interest against payments made by the third party.⁷

Prior to 1994, an employer would have been entitled to dollar-for-dollar recovery of its subrogation interest.⁸ However, 1994 Neb. Laws, L.B. 594, changed the law in that regard. Those changes are now codified in § 48-118.04, which provides in relevant part that

[i]f the employee or his or her personal representative or the employer or his or her workers' compensation insurer do not agree in writing upon distribution of the proceeds of any judgment or settlement, the court, upon application,

⁷ *Turco*, *supra* note 3; *Combined Insurance v. Shurter*, 258 Neb. 958, 607 N.W.2d 492 (2000).

⁸ See *Jackson v. Branick Indus.*, 254 Neb. 950, 581 N.W.2d 53 (1998).

shall order a fair and equitable distribution of the proceeds of any judgment or settlement.

The legislative history of L.B. 594 reveals that the purpose of what is now § 48-118.04 was to prevent a fair and reasonable settlement between the employee and third-party tort-feasor from being delayed because the parties could not agree on how the proposed settlement should be distributed. As the introducing senator explained, workers' compensation cases

sometimes . . . move slowly through the court for no other reason other than [that] third parties, when you have a lot of parties involved you can't seem to get the cases settled. . . . Oftentimes, in determining either under the doctrine of subrogation or third party medical providers or what have you can't agree on a settlement amount, what percentage should be paid, or whatever in a disputed claim, and because of that the case itself slows down. This would allow the court to step in at that time and say, this is a reasonable settlement figure, it ought to go. This is a reasonable distribution of those proceeds.⁹

As further explained before the Committee on Business and Labor,

often a lawsuit involving subrogation claims move[s] slowly through the court system because parties to a lawsuit cannot resolve conflicts as to how a proposed settlement offer should be distributed among the parties. LB 594 would . . . authorize district court judges before whom an action is pending involving workers' compensation subrogation to order a fair and equitable distribution of a settlement offered to the parties entitled thereto if the court determines that the settlement offer is adequate and in the best interest of the parties.¹⁰

Because § 48-118.04 directs the district court, when the parties cannot agree, to order a "fair and equitable distribution" of settlement proceeds, we have said that the changes made by

⁹ Floor Debate, L.B. 594, Committee on Business and Labor, 93d Leg., 2d Sess. 8098-99 (Jan. 18, 1994).

¹⁰ Committee on Business and Labor Hearing, L.B. 594, 93d Leg., 1st Sess. 59 (Feb. 22, 1993).

L.B. 594 called for application of the law of equity to the statutory right of subrogation.¹¹ However, subrogation in workers' compensation cases is still based on statute, and not in equity.¹²

Thus, in *Turco v. Schuning*,¹³ we applied statutory subrogation, and rejected the argument that the statute had adopted pure equitable subrogation. Specifically, in *Turco*, the district court had applied principles of equitable subrogation and denied a workers' compensation insurer's subrogation claim because the employee had not been "made whole" by his settlement with the third-party tort-feasor's insurer. We applied statutory subrogation and declined to read into the statute a requirement that the employee be "made whole."¹⁴ We explained that while the language now set forth in § 48-118.04 provided for a fair and equitable distribution, it did not adopt the "made whole" doctrine or adopt any other specific rule for determining how to fairly and equitably distribute the settlement.¹⁵ That distribution was left to the court's discretion.¹⁶

[5] It is in this context that the present case arises. FedEx argues that the district court in this case erred by applying equitable principles to bar it from recovering on its subrogation interest. We agree. We conclude, based on our consideration of the statutory scheme, that the phrase "fair and equitable distribution," as used in § 48-118.04, was not intended to permit the subrogation interest of an employer or workers' compensation insurer to be subject to equitable defenses such as those relied upon by the district court.

[6] First, we observe that § 48-118 provides, in definitive language, that when a third person is liable to an employee or employee's dependents for the injury or death of the employee, "the employer *shall* be subrogated to the right of the employee

¹¹ *Jackson*, *supra* note 8.

¹² See, *Turco*, *supra* note 3; *Combined Insurance*, *supra* note 7.

¹³ *Turco*, *supra* note 3.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

or to the dependents against such third person.”¹⁷ As a general rule, the word “shall” in a statute is considered mandatory and is inconsistent with the idea of discretion.¹⁸ There is no indication, either in the statutory language or the legislative history, that § 48-118.04 was intended to infringe on the right of subrogation guaranteed by § 48-118 beyond the extent necessary to effectuate a reasonable settlement.

We also note that the Nebraska Workers’ Compensation Act,¹⁹ of which § 48-118.04 is a part, provides for compensation and penalties for wrongful conduct on the part of an employer—none of which affect an employer’s subrogation interest. In particular, when an employer fails to pay compensation within 30 days of the notice of disability or entry of an award, the employer may be subject to a penalty of 50 percent of the delinquent payment.²⁰ An employer who fails to pay compensation or medical benefits is subject to an award of attorney fees and interest on the final award obtained.²¹ And an employer who willfully fails to secure the payment of compensation, or who conceals property or records with the intent to avoid payment of compensation, may be found guilty of a Class I misdemeanor.²²

[7] In other words, the Nebraska Workers’ Compensation Act expressly provides the sanctions to be imposed when an employer fails to comply with its requirements. The mandate for prompt payment of benefits requires that employees and insurers promptly handle and decide claims. If they do not, and there is no reasonable controversy about compensability, then penalties will be assessed.²³ But those sanctions are imposed by

¹⁷ § 48-118 (emphasis supplied).

¹⁸ *Troshynski v. Nebraska State Bd. of Pub. Accountancy*, 270 Neb. 347, 701 N.W.2d 379 (2005).

¹⁹ Neb. Rev. Stat. ch. 48, art. 1 (Reissue 2004 & Cum. Supp. 2006).

²⁰ § 48-125(1).

²¹ § 48-125(2) and (3).

²² §§ 48-125.01 and 48-145.01(1).

²³ *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003), *disapproved in part on other grounds*, *Kimminau v. Uribe Refuse Serv.*, 270 Neb. 682, 707 N.W.2d 229 (2005).

the Workers' Compensation Court, in a workers' compensation proceeding. We do not read § 48-118.04 as implicitly authorizing the district court to punish an employer beyond the penalties expressly prescribed by the workers' compensation statutes.

[8,9] Nor would it be wise public policy to punish an employer by barring it from asserting a subrogation interest. The purpose of the Nebraska Workers' Compensation Act's penalty provisions is to encourage prompt payment of benefits.²⁴ A subrogation interest is acquired by *paying* benefits to an injured employee—conduct that is hardly wrongful and that the Nebraska Workers' Compensation Act is intended to encourage. Section 48-118 serves this purpose, encouraging prompt payment of benefits, even when a third party is liable for the injury, by providing an employer or insurer with the means to recover at least a portion of its payout. But an employer or insurer unable to secure subrogation will be less likely to pay benefits in the first instance, contrary to the intent of the statute. 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.²⁵ The Nebraska Workers' Compensation Act is intended to provide benefits for employees who are injured on the job and should be construed to accomplish that purpose.²⁶ The district court's interpretation of § 48-118.04 is contrary to the purpose of the workers' compensation statutes.

In particular, the equitable doctrines relied upon by the district court—unclean hands and estoppel—are inapplicable under these circumstances. Under the doctrine of unclean hands, a person who comes into a court of equity to obtain relief cannot do so if he or she has acted inequitably, unfairly, or dishonestly as to the controversy in issue.²⁷ But the doctrine is specifically predicated upon *equitable* rights, and is enforceable against a

²⁴ *Id.*

²⁵ *Pepitone v. Winn*, 272 Neb. 443, 722 N.W.2d 710 (2006).

²⁶ See *Soto v. State*, 269 Neb. 337, 693 N.W.2d 491 (2005).

²⁷ *Olsen v. Olsen*, 265 Neb. 299, 657 N.W.2d 1 (2003); *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002).

party seeking equitable relief.²⁸ An employer or workers' compensation insurer asserting subrogation under § 48-118 is not seeking equitable relief, and the doctrine of unclean hands has no application.

[10,11] The district court specifically identified "equitable estoppel" as another basis for barring FedEx from receiving a share of the settlement proceeds. But the doctrine of equitable estoppel applies where, as a result of conduct of a party upon which another person has in good faith relied to his detriment, the acting party is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed.²⁹ The related doctrine of promissory estoppel is based upon a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee which does in fact induce such action or forbearance.³⁰ There is no suggestion in this case, nor evidence to support a finding, that Burns acted in reliance upon a representation or promise made by FedEx. Neither of these doctrines of estoppel is applicable.

[12,13] Closer to the district court's reasoning is the doctrine of judicial estoppel, which holds that one who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding.³¹ The district court asserted that FedEx had "changed its positions" and taken "inconsistent positions" to meet the exigencies of this case and Burns' workers' compensation proceedings. The doctrine of judicial estoppel protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding.³²

²⁸ See *Fritz v. Jungbluth*, 141 Neb. 770, 4 N.W.2d 911 (1942).

²⁹ *Inner Harbour Hospitals v. State*, 251 Neb. 793, 559 N.W.2d 487 (1997); *Friehe v. Schaad*, 249 Neb. 825, 545 N.W.2d 740 (1996).

³⁰ *Goff-Hamel v. Obstetricians & Gyns., P.C.*, 256 Neb. 19, 588 N.W.2d 798 (1999).

³¹ *Stewart v. Bennett*, ante p. 17, 727 N.W.2d 424 (2007).

³² *Id.*

[14] But absent judicial acceptance of the inconsistent position, the application of the rule is unwarranted because no risk of inconsistent results exists.³³ Here, the Workers' Compensation Court never endorsed the allegedly inconsistent assertion of FedEx that Burns' injury was not compensable. Nor is it necessarily inconsistent for an employer to contest the compensability of an injury before the Workers' Compensation Court but claim a subrogation interest in the proceeds of a third-party settlement.

If there is a reasonable controversy as to the compensability of an injury, an employer is entitled to litigate that issue in the compensation court. An employer's subrogation interest in the proceeds of a third-party settlement is contingent solely upon the employer's paying workers' compensation benefits to an employee injured as a result of the actions of a third party.³⁴ To protect its subrogation interest, the employer is not required to concede the merits of the employee's compensation claim or make an affirmative statement to the district court endorsing the employee's demand for compensation. An employer may voluntarily pay benefits to an injured employee, yet contest some or all of the injured employee's claims before the compensation court. The employer may even prevail in the compensation court and still assert a subrogation interest based on whatever workers' compensation benefits it has already paid. It is simply not inconsistent for an employer to defend against a workers' compensation claim, yet claim subrogation based on workers' compensation benefits it has nonetheless paid. Whether the employer's defense against the workers' compensation claim is reasonable is determined by the Workers' Compensation Court under the Nebraska Workers' Compensation Act, not in the district court by resort to equitable principles.

In short, the district court's duty under § 48-118.04 to "order a fair and equitable distribution of the proceeds of any judgment or settlement" simply requires the court to determine a reasonable division of the proceeds among the parties. The court in

³³ *Id.*

³⁴ See, § 48-118; *Combined Insurance*, *supra* note 7.

this case erred in applying equitable principles to bar FedEx from recovering any of its subrogation interest. FedEx's first assignment of error has merit.

REMAINING ASSIGNMENTS OF ERROR
NOT RIPE FOR CONSIDERATION

[15] FedEx's second assignment of error takes issue with the district court's statement that "consideration of [Burns'] social security and insurance disability benefits would violate the collateral source rule." The collateral source rule provides that benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer.³⁵ However, because the district court determined that FedEx was equitably barred from recovering any of the proceeds of the settlement, the court never directly confronted whether the determination of a "fair and equitable distribution" of the settlement proceeds permits or requires the court to consider an employee's other sources of support, such as Social Security or disability benefits. In the absence of argument on that point and a record directly implicating the issue, we decline to address it in this appeal.

Finally, FedEx assigns that the district court erred in "determining that out of the \$475,000.00 tort settlement, only \$161,203.87 was subject to distribution among the parties." But we do not read the court's order as necessarily making such a determination. Rather, we understand the court's order as disposing of \$161,203.87 because that was the amount of money that the court had to dispose of. Obviously, the court's conclusion that FedEx was not entitled to *any* of the settlement proceeds meant that the court did not have to consider whether FedEx's "fair and equitable" share of the proceeds was greater than the sum paid to the clerk of the court for distribution. Again, in the absence of a record squarely implicating the issue FedEx raises, we decline to consider it.

³⁵ *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006). See, also, §§ 48-130 and 48-147.

Appeals from the District Court for Lancaster County:
STEVEN D. BURNS, Judge. Appeals dismissed.

O. William VonSeggern for appellants.

David T. Schroeder, on brief, for appellant Douglas L. Brunk.

Jon Bruning, Attorney General, and L. Jay Bartel for appellees.

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

WRIGHT, J.

NATURE OF CASE

Stacy Lane VanHorn and Douglas L. Brunk, equine veterinarians, were found by the Nebraska State Racing Commission (Commission) to have violated rules regarding the administration of medications to racehorses. VanHorn and Brunk appealed the Commission's assessment of disciplinary sanctions, and the Lancaster County District Court modified the penalties. The Commission appealed from that determination. This court affirmed the district court's order as to the penalties imposed on VanHorn. We affirmed the district court's order as to Brunk, with a modification of the penalties imposed. See *Brunk v. Nebraska State Racing Comm.*, 270 Neb. 186, 700 N.W.2d 594 (2005).

After the mandates from this court were issued, VanHorn and Brunk each filed an "Application for Damages, Costs and Fees" in the district court. The district court concluded it lacked subject matter jurisdiction and sustained the motions to dismiss filed by the Commission and Dennis Oelschlager, the Commission's executive secretary (hereinafter collectively referred to as "Commission"). VanHorn and Brunk appeal.

SCOPE OF REVIEW

[1] When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of the claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court. *Kaplan v. McClurg*, 271 Neb. 101, 710 N.W.2d 96 (2006).

[2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision. *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006).

FACTS

VanHorn and Brunk served as veterinarians during the 2001 horseracing season at Fonner Park in Grand Island, Nebraska. The Commission determined that VanHorn and Brunk violated Commission rules regarding the administration of medications to racehorses and the handling, packaging, and reporting of medications. It ordered each veterinarian to pay a fine of \$2,000 and ruled them ineligible for licensing until January 1, 2006.

VanHorn and Brunk sought review of the Commission's decisions. The district court affirmed the Commission's findings, except the court determined there was insufficient evidence (1) to support the determination that Brunk failed to cooperate with the Commission during its investigation and (2) to find that VanHorn and Brunk were responsible for the administration of Clonidine, a human blood pressure medication, to racehorses. The court shortened VanHorn's period of disqualification from licensure to July 1, 2003, and Brunk's period of disqualification to July 1, 2004.

The Commission appealed to this court, and VanHorn and Brunk cross-appealed. See *Brunk v. Nebraska State Racing Comm.*, *supra*. We concluded the district court was correct in finding that there was insufficient evidence to support the Commission's determination that VanHorn and Brunk violated the Commission's rules concerning the administration of certain medications. However, we reversed the district court's finding that Brunk cooperated with the Commission's investigation. We held that the penalties assessed by the district court were proportionate to the seriousness of the offenses, except as to the issue of Brunk's cooperation with the Commission. We concluded that Brunk's disqualification period should be extended by 6 months, to January 1, 2005.

This court's opinion was filed on July 22, 2005, and the mandates were issued on August 25. Subsequently, VanHorn and

Brunk each filed an “Application for Damages, Costs and Fees” in the district court. They alleged that after the Commission perfected its appeals, they were advised by the Commission that the modification of their suspensions from licensure was stayed pending appeal pursuant to Neb. Rev. Stat. §§ 25-21,213 and 25-21,216 (Reissue 1995). Because the Commission’s orders of December 31, 2002, remained in effect pending appeal, VanHorn and Brunk were allegedly unable to acquire licensure until the mandate of this court was issued in August 2005. They claimed the Commission’s appeals denied them the opportunity to practice their trade at horseracing events until after this court’s decision. VanHorn claimed lost income of \$294,000 for the 2004 and 2005 racing seasons, and Brunk claimed lost income of \$250,000 for the 2005 racing season.

The Commission moved to dismiss pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b) (rev. 2003), asserting that the district court lacked jurisdiction over the subject matter and/or that the complaints failed to state a claim upon which relief could be granted. The cases were consolidated for argument.

In summary, VanHorn and Brunk claimed they were deprived of income because the Commission appealed the district court’s earlier decisions. They asserted that if a supersedeas bond had been required, they would have been entitled to damages from the Commission for any further damages that might result from an appeal. VanHorn and Brunk requested monetary damages for lost earnings during the pendency of the appeals. They argued that if the State had not appealed, VanHorn could have applied for a license for the racing seasons of 2004 and 2005 and Brunk would have been permitted to apply for a license for the racing season of 2005. They claimed that the statutes, which acted as a supersedeas, deprived them of the opportunity to work and that they should be compensated accordingly.

The district court noted that under § 25-21,213, when the State is a party, no appeal or supersedeas bond is required and the filing of a notice of intention to appeal operates as a supersedeas. The record showed that VanHorn and Brunk had not asked either the district court or this court for damages as a result of the Commission’s appeals. The district court determined it did not have jurisdiction to consider the requests for

damages, and it sustained the Commission's motions to dismiss. The court also concluded it lacked jurisdiction to award attorney fees or costs on appeal except as directed by the mandates of an appellate court, and the mandates here did not include an award of attorney fees.

ASSIGNMENTS OF ERROR

VanHorn and Brunk assert that the district court erred in determining that it lacked jurisdiction to consider their requests for damages and in sustaining the Commission's motions to dismiss.

ANALYSIS

When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of the claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court. *Kaplan v. McClurg*, 271 Neb. 101, 710 N.W.2d 96 (2006). The district court here concluded it lacked authority to take any action other than that stated in the mandates issued by this court. The mandates informed the district court that its earlier decisions concerning VanHorn and Brunk had either been affirmed or affirmed as modified, and the mandates directed the district court to, "without delay, proceed to enter judgment in conformity with the judgment and opinion of [the Nebraska Supreme Court]."

This court has stated:

When an appellate court remands a cause with directions, the judgment of the appellate court is a final judgment in the cause, and the entry thereof in the lower court is a purely ministerial act. No modification of the judgment so directed can be made, nor may any provision be engrafted on or taken from it. That order is conclusive on the parties, and no judgment or order different from, or in addition to, that directed by it can have any effect, even though it may be such as the appellate court ought to have directed.

K N Energy, Inc. v. Cities of Broken Bow et al., 248 Neb. 112, 115, 532 N.W.2d 32, 34 (1995) (*K N Energy, Inc., II*).

In *K N Energy, Inc., II*, the district court had, in part, enjoined certain municipalities from continuing to enforce gas rate ordinances which were subsequently challenged by K N Energy. The Nebraska Court of Appeals reversed the judgment and remanded the cause for a new trial. See *K N Energy, Inc. v. Cities of Broken Bow et al.*, Nos. A-91-848 through A-91-851, 1992 WL 322016 (Neb. App. Nov. 10, 1992) (not designated for permanent publication). Upon further review, this court reversed the judgment of the Court of Appeals and remanded with direction to reinstate the enforcement of rates prescribed by the municipalities' ordinances. *K N Energy, Inc. v. Cities of Broken Bow et al.*, 244 Neb. 113, 505 N.W.2d 102 (1993) (*K N Energy, Inc., I*). Subsequently, using the same docket and page numbers in the district court as those in the earlier actions, the municipalities filed motions for refunds to ratepayers. *K N Energy, Inc., II*. The district court found it lacked jurisdiction and dismissed the motions. *Id.* On appeal, this court determined that our opinion reinstating the district court's order was a final judgment and that, therefore, the district court lacked jurisdiction to grant motions that sought to supplement the appellate court's order when the motions were filed in a fully adjudicated cause of action. *Id.*

In *Gates v. Howell*, 204 Neb. 256, 282 N.W.2d 22 (1979) (*Gates I*), we held that statutes which defined a mobile home as a motor vehicle were unconstitutional. We reversed the judgment of the lower court and remanded the cause with directions to enter a judgment in accordance with our opinion. Following the mandate, the appellants filed a document entitled "'Application,'" in which they sought an order from the trial court regarding matters which were beyond the issues covered by our opinion. *Gates v. Howell*, 211 Neb. 85, 87, 317 N.W.2d 772, 774 (1982) (*Gates II*). We concluded that the appellants were attempting to reopen the case and obtain further relief beyond that provided by *Gates I*. The trial court entered an order which followed the mandate of this court, and the appellants filed an appeal, claiming that the trial court erred in failing to provide all the relief they had requested.

In *Gates II*, we denied the appellants any further relief and directed the trial court to enter a judgment in accordance with

Gates I. We stated that if the appellants had a further cause of action arising out of the decision in *Gates I*, they needed to file a new lawsuit and present evidence. “They may not, however, simply extend their request for relief beyond that which was initially determined by this court.” *Gates II*, 211 Neb. at 90, 317 N.W.2d at 775.

[3,4] In *State ex rel. Hilt Truck Line v. Jensen*, 218 Neb. 591, 593, 357 N.W.2d 455, 457 (1984), we stated:

Where the Supreme Court reverses and remands a cause to the district court for a special purpose, on remand the district court has no power or jurisdiction to do anything except to proceed in accordance with the mandate as interpreted in the light of the Supreme Court’s opinion. . . .

A trial court is without power to affect rights and duties outside the scope of the remand from an appellate court. No judgment other than that directed or permitted by the Supreme Court’s mandate may be rendered in the district court upon remand of a cause.

(Citations omitted.)

In the cases at bar, the prior actions were fully adjudicated when the district court spread the mandates as directed. The district court had no authority to take additional action in the cases. By filing their requests for damages after the mandates were entered, VanHorn and Brunk were attempting to obtain further relief, which they had not previously requested from the district court. Such matters were outside the mandates of this court, and the district court lacked jurisdiction to take any action other than that directed by the mandates.

[5] 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. *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006). The granting of a motion to dismiss for lack of subject matter jurisdiction under rule 12(b)(1) which is limited to a facial attack on the pleadings is subject to the same de novo standard of review as a motion brought under rule 12(b)(6). *Anderson v. Wells Fargo Fin. Accept.*, 269 Neb. 595, 694 N.W.2d 625 (2005).

Upon de novo review, we conclude that the district court properly found it lacked jurisdiction over the issues of damages, costs, and fees because the court had already entered judgment in accordance with this court's mandates. As noted earlier, this court cannot determine the merits of an issue when the lower court lacked subject matter jurisdiction. See *Kaplan v. McClurg*, 271 Neb. 101, 710 N.W.2d 96 (2006). This court has no power to consider the merits of the requests by VanHorn and Brunk for damages, costs, and fees.

CONCLUSION

Because the district court lacked jurisdiction over these matters, so too does this court. The appeals are dismissed for lack of jurisdiction.

APPEALS DISMISSED.

SAIF SAYAH ET AL., APPELLANTS, v. METROPOLITAN PROPERTY
AND CASUALTY INSURANCE COMPANY, A RHODE ISLAND
CORPORATION, APPELLEE.

733 N.W.2d 192

Filed June 8, 2007. No. S-06-162.

1. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy is a question of law. In reviewing questions of law, an appellate court resolves the question independently of the lower court's conclusion.
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 was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Insurance: Contracts.** An insurance policy is a contract, and its terms provide the scope of the policy's coverage.
4. **Insurance: Contracts: Intent: Appeal and Error.** When an appellate court reviews an insurance policy, it construes the policy as any other contract to give effect to the parties' intentions when the writing was made.
5. **Contracts.** When the terms of a contract are clear, they are to be accorded their plain and ordinary meaning.
6. **Contracts: Insurable Interest.** A claimant under an insurance contract must show an interest in the contract that would be recognized and protected by the courts.
7. **Property: Insurable Interest.** Under Nebraska law, to have an insurable interest, the claimant must have some legally enforceable right that would be recognized and enforced in the property at issue.

8. ____: ____: Neither family use of property nor the family relationship alone gives automatic rise to an insurable property interest.
9. **Parent and Child: Property.** A parent has no legal recourse in an adult child's property simply by being a parent, without some other legally enforceable right.
10. **Insurable Interest.** When no legally enforceable interest exists, no insurable interest exists.

Appeal from the District Court for Lancaster County:
EDWARD E. HANNON, Court of Appeals Judge, Retired. Affirmed.

Stanley D. Cohen, of Law Office of Stan Cohen, for appellants.

Dean J. Sitzmann and Renee Eveland, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellee.

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

CONNOLLY, J.

The appellants, Saif Sayah and his parents, Ali Sayah and Fadhila Haddad, sued Metropolitan Property and Casualty Insurance Company (Metropolitan). Metropolitan denied the appellants' claims for physical damage involving a Jeep owned by Saif. The district court granted Metropolitan's motion for summary judgment. It found that the physical damage portion of the policy covered only automobiles owned by Ali and Fadhila. In addition, the court found that Ali and Fadhila did not have an insurable interest in Saif's automobile and that the policy did not cover Saif's automobile for physical damage because he was not a named insured. We affirm because (1) Saif did not have a contract of insurance for physical damage with Metropolitan and (2) Ali and Fadhila did not have an insurable interest in Saif's Jeep.

BACKGROUND

Saif purchased a 1999 Jeep Grand Cherokee Laredo. After he bought the Jeep, Saif spent \$5,000 on wheels, tires, and spinners. Ali and Fadhila purchased an insurance policy with Metropolitan that covered the Jeep and two other vehicles. The policy listed Ali and Fadhila as the named insured and household drivers, but

it listed Saif only as a household driver. The policy did not cover a household driver for physical damage.

The police found Saif's stolen Jeep burned, on blocks, and with its wheels, tires, and spinners missing. Metropolitan initially denied the claim because of "inconsistencies in the facts of the loss reported by [Saif] with the physical evidence [they] have gathered." Metropolitan later denied the claim, asserting that Ali and Fadhila did not have an insurable interest in the Jeep.

The appellants sued Metropolitan, claiming \$22,950 in damages. In his affidavit, Ali averred that he sometimes drove Saif's Jeep; that he gave Saif money to help make payments for the Jeep; that he notified his insurance agent he wanted Saif's wheels, tires, and spinners added to the policy; and that when the Jeep was stolen, Saif lived at home. Neither Ali nor Fadhila, however, had a security interest in the Jeep, and their names were not on the Jeep's title.

Metropolitan moved for summary judgment because Saif was the sole owner of the Jeep and Ali and Fadhila had no insurable interest. The district court granted Metropolitan's motion for summary judgment, finding the physical damage part of the policy covered only automobiles owned by Ali and Fadhila. The court also found that Ali and Fadhila did not have an insurable interest in Saif's Jeep and that Saif was not a named insured. The court found the appellants did not have a cause of action and that Metropolitan was entitled to judgment as a matter of law.

ASSIGNMENTS OF ERROR

The appellants assign that the district court erred in granting Metropolitan's motion for summary judgment.

STANDARD OF REVIEW

[1] The interpretation of an insurance policy is a question of law. In reviewing questions of law, we resolve the question independently of the lower court's conclusion.¹

¹ See *Peterson v. Ohio Casualty Group*, 272 Neb. 700, 724 N.W.2d 765 (2006).

[2] In reviewing a summary judgment, we view the evidence in the light most favorable to the party against whom the judgment was granted and give such party the benefit of all reasonable inferences deducible from the evidence.²

ANALYSIS

SAIF HAD NO INSURANCE POLICY WITH METROPOLITAN FOR PHYSICAL DAMAGE

[3-5] Saif alleges he had a valid claim for physical damage and that Metropolitan wrongly denied it. An insurance policy is a contract, and its terms provide the scope of the policy's coverage. When we review an insurance policy, we construe the policy as any other contract to give effect to the parties' intentions when the writing was made. When the terms of a contract are clear, they are to be accorded their plain and ordinary meaning.³

Here, the policy's plain language shows that Metropolitan did not insure Saif's Jeep for physical damage. Ali and Fadhila were the only named insureds on the policy. The policy's physical damage coverage only insured vehicles owned by them. In contrast, the policy named Saif as a household driver. Under the policy, household drivers had different rights than named insureds. As a household driver, the policy provided Saif with liability coverage, but it did not provide his Jeep with physical damage coverage.

Metropolitan had a right to limit its liability by including limitations in the policy. The only named insureds on the policy were Ali and Fadhila, and the contract for physical damage was with only them. The policy did not cover Saif's Jeep for physical damage, and Metropolitan was under no duty to pay Saif for a claim not covered by the policy.

ALI AND FADHILA DO NOT HAVE AN INSURABLE INTEREST IN SAIF'S JEEP

Ali and Fadhila claim that the policy obligated Metropolitan to pay for the physical damage claim because they had had an

² *Geddes v. York County*, ante p. 271, 729 N.W.2d 661 (2007).

³ *Olson v. Le Mars Mut. Ins. Co.*, 269 Neb. 800, 696 N.W.2d 453 (2005).

insurable interest in the Jeep. Ali and Fadhila argue that they had an insurable interest in the Jeep because they paid for the Jeep's insurance, Ali occasionally used the Jeep, and Metropolitan issued the policy with the understanding that the family would be using the Jeep.

[6] But a claimant under an insurance contract must show an interest in the contract that would be recognized and protected by the courts.⁴ An insurable interest is "every interest in property or any relation thereto, or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured."⁵

[7-10] Section 44-375 provides: "[w]hen the name of the party intended to be insured is specified in a policy, such insurance can be applied only to his own proper interest." Under Nebraska law, to have an insurable interest, the claimant must have some legally enforceable right that would be recognized and enforced in the property at issue.⁶ Neither family use of property nor the family relationship alone gives automatic rise to an insurable property interest.⁷ A parent has no legal recourse in an adult child's property simply by being a parent, without some other legally enforceable right. Nor does Nebraska law recognize Ali's occasional use of Saif's Jeep as a legal interest. When no legally enforceable interest exists, no insurable interest exists.⁸ Without having had an insurable interest in the property

⁴ Neb. Rev. Stat. § 44-375 (Reissue 2004); *Wriedt v. Beckenhauer*, 183 Neb. 311, 159 N.W.2d 822 (1968); *Bassett v. Farmers & Merchants Ins. Co.*, 85 Neb. 85, 122 N.W. 703 (1909).

⁵ Neb. Rev. Stat. § 44-103(13)(a) (Reissue 2004).

⁶ See *id.* See, also, *Tri-Par Investments v. Sousa*, 268 Neb. 119, 680 N.W.2d 190 (2004); *Jindra v. Clayton*, 247 Neb. 597, 529 N.W.2d 523 (1995); *Design Data Corp. v. Maryland Cas. Co.*, 243 Neb. 945, 503 N.W.2d 552 (1993); *Howard v. State Farm Mut. Auto. Ins. Co.*, 242 Neb. 624, 496 N.W.2d 862 (1993); *Wriedt v. Beckenhauer*, *supra* note 4; *Krug Park Amusement Co. v. New York Underwriters Ins. Co.*, 129 Neb. 239, 261 N.W. 364 (1935); *Bassett v. Farmers & Merchants Ins. Co.*, *supra* note 4.

⁷ See *Bassett v. Farmers & Merchants Ins. Co.*, *supra* note 4.

⁸ § 44-375; *Wriedt v. Beckenhauer*, *supra* note 4; *Bassett v. Farmers & Merchants Ins. Co.*, *supra* note 4.

sought to be covered, Ali and Fadhila did not have property insurance on Saif's Jeep.

THE DOCTRINE OF MENDING ONE'S HOLD
DOES NOT APPLY

Metropolitan initially denied the appellants' claim because it was based on "inconsistencies in the facts of the loss reported by [Saif] with the physical evidence [they] have gathered." Metropolitan later denied the claim, asserting that Ali and Fadhila did not have an insurable interest in the Jeep.

The appellants argue that Metropolitan cannot raise the insurable interest defense because of the doctrine of mending one's hold. The appellants cite this court's opinion in *Howard v. State Farm Mut. Auto. Ins. Co.* that "it has long been the rule in this state that an insurer which gives one reason for its conduct and decision as to a matter of controversy cannot, after litigation has begun, defend upon another and different ground."⁹

In *Design Data Corp.*, however, we refined the doctrine:

While the rule as to "mending one's hold" *may* be alive and well as to conditions of forfeiture, generally it has no application to matters relating to coverage, and estoppel cannot be invoked to expand the scope of coverage of an insurance contract absent a showing of detrimental good faith reliance upon statements or conduct of the party against whom estoppel is invoked which reasonably led an insured to believe coverage was present.¹⁰

The appellants did not suffer detrimental reliance when Metropolitan asserted the insurable interest defense because the appellants had notice that Metropolitan could assert the defense. First, the insurance policy addressed the insurable interest issue. The policy provides no coverage if an insured does not have an insurable interest in the covered automobile. Second, Metropolitan expressly reserved the right to assert additional defenses in its denial letter. The appellants, therefore, had

⁹ *Howard v. State Farm Mut. Auto. Ins. Co.*, *supra* note 6, 242 Neb. at 637, 496 N.W.2d at 870.

¹⁰ *Design Data Corp. v. Maryland Cas. Co.*, *supra* note 6, 243 Neb. at 957, 503 N.W.2d at 560.

notice that Metropolitan reserved the right to assert additional defenses. The district court properly found that Metropolitan was not estopped from asserting its insurable interest defense.

CONCLUSION

We conclude that Metropolitan was under no duty to pay for the property stolen from Saif's Jeep because Saif had no insurance policy with Metropolitan for physical damage and Ali and Fadhila had no insurable interest in Saif's Jeep. Also, the district court properly found that Metropolitan was not estopped from asserting its insurable interest defense. We, therefore, affirm the district court's decision to grant Metropolitan's motion for summary judgment.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JOE R. CLAPPER, APPELLANT.
732 N.W.2d 657
Filed June 8, 2007. No. S-06-406.

1. **Constitutional Law: Criminal Law: Jury Trials.** Whether a criminal defendant has been denied a constitutional right to a jury trial presents a question of law.
2. **Judgments: Appeal and Error.** When an appellate court reviews questions of law, it resolves the questions independently of the lower court's conclusions.
3. **Sentences: Restitution.** When a court orders restitution to a crime victim under Neb. Rev. Stat. § 29-2280 (Reissue 1995), restitution is a criminal penalty imposed as punishment and is part of the criminal sentence imposed by the sentencing court.
4. **Constitutional Law: Criminal Law: Jury Trials.** Both the Sixth Amendment to the U.S. Constitution and article I, §§ 6 and 11, of the Nebraska Constitution guarantee a criminal defendant the right to trial by an impartial jury for serious offenses.
5. **Constitutional Law: Jury Trials.** The 6th Amendment's jury trial guarantee is made applicable to the states by the 14th Amendment.
6. **Criminal Law: Sentences: Prior Convictions: Proof.** Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.
7. **Constitutional Law: Restitution: Jury Trials.** The Sixth Amendment's jury trial guarantee does not extend to restitution hearings because a judge's factfinding required for restitution does not result in a sentence that exceeds a statutory maximum.

8. **Restitution: Sentences.** A sentencing court's factfinding to determine restitution does not expose the defendant to any greater punishment than Neb. Rev. Stat. § 29-2280 (Reissue 1995) authorizes, which is for the full amount of the victim's actual damages.
9. **Restitution: Courts.** The U.S. Supreme Court's holding in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), does not apply to a judge's factfinding to determine restitution.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays for appellant.

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

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

PER CURIAM.

After Joe R. Clapper pleaded guilty to third degree assault, the district court overruled Clapper's demand for a jury trial and ordered him to pay restitution. In *Blakely v. Washington*,¹ the U.S. Supreme Court held that a criminal sentence violates a defendant's Sixth Amendment right to a jury trial if it exceeds the "statutory maximum." The Court defined "statutory maximum" as the maximum sentence a court may impose without any additional findings beyond those supported by the jury's verdict or the defendant's admissions. Relying on *Blakely*, Clapper argues that because Nebraska's restitution statutes² allow the district court to find facts that increase a criminal sentence beyond the statutory maximum, restitution facts must be determined by a jury.

We affirm. We determine that restitution does not increase a defendant's sentence beyond what his or her conviction authorizes because the conviction itself authorizes the court to impose restitution.

¹ *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

² Neb. Rev. Stat. §§ 29-2280 to 29-2289 (Reissue 1995).

BACKGROUND

In 2003, under a plea agreement, Clapper pled guilty to a reduced charge of third degree assault. The charges arose from a bizarre incident in which Clapper attempted suicide and the bullet ricocheted off his skull and struck his girlfriend in the chest. The court sentenced Clapper to 1 year in the county jail and ordered him to pay \$18,862.72 in restitution to the victim for medical expenses. The Nebraska Court of Appeals, in an unpublished memorandum opinion, vacated the restitution order and remanded the cause for further proceedings.³ It determined that the record showed insufficient evidence to support either the amount of the restitution or Clapper's ability to pay it.

On remand, in June 2004, Clapper filed an "Objection to Restitution Hearing," alleging that the restitution statutes were unconstitutional under Neb. Const. art. VII, § 5(1). That provision states (with certain exceptions not applicable here) that "all fines, penalties, and license money arising under the general laws of the state . . . shall be appropriated exclusively to the use and support of the common schools in the respective subdivisions where the same may accrue." After a hearing, the district court overruled Clapper's motion to quash. It found that § 29-2280 provides for restitution as compensation only and therefore is not a penalty. The court then set a date for the restitution hearing.

Before the restitution hearing, Clapper moved for a jury trial. The State argued that *Blakely*⁴ did not apply to restitution. Clapper countered that because restitution is a criminal penalty, under *Blakely*, a jury must determine restitution. The court overruled Clapper's demand for a jury trial.

Clapper appealed the court's order denying him a jury trial, but the Court of Appeals summarily dismissed the appeal for lack of jurisdiction under Neb. Ct. R. of Prac. 7(A)2 (rev. 2001).⁵ On remand, in March 2006, the State agreed that Clapper could stipulate to the facts at the restitution hearing without waiving

³ *State v. Clapper*, 12 Neb. App. xxii (No. A-03-1308, June 14, 2004).

⁴ *Blakely v. Washington*, *supra* note 1.

⁵ *State v. Clapper*, 13 Neb. App. liv (No. A-05-075, Mar. 18, 2005).

his right to a jury to determine restitution. Clapper stipulated that the victim would testify that she had incurred \$749.52 in medical expenses and that he could pay \$500 in restitution. At the hearing, the court approved the stipulation and later ordered \$500 in restitution.

ASSIGNMENTS OF ERROR

Clapper assigns, restated, that the district court erred in (1) ruling that restitution under § 29-2280 is not a penalty; (2) failing to conclude that under the federal and Nebraska Constitutions, he had a right to have a jury determine restitution as provided for in §§ 29-2280 to 29-2289; and (3) overruling his demand for a jury trial on the issue of restitution.

STANDARD OF REVIEW

[1,2] Whether a criminal defendant has been denied a constitutional right to a jury trial presents a question of law.⁶ When we review questions of law, we resolve the questions independently of the lower court's conclusions.⁷

ANALYSIS

Clapper argues that under *Blakely*,⁸ restitution is a penalty above the prescribed statutory maximum for his offense and that a jury must therefore determine restitution. The State, however, argues that restitution does not increase a defendant's punishment beyond what is authorized by a defendant's conviction.

Nebraska's restitution statute provides in relevant part:

A sentencing court may order the defendant to make restitution for the actual . . . loss sustained by the victim as a direct result of the offense for which the defendant has been convicted. . . . Whenever the court believes that restitution may be a proper sentence . . . the court shall order that the presentence investigation report include

⁶ See *State v. Delgado*, 269 Neb. 141, 690 N.W.2d 787 (2005).

⁷ See *State v. Tompkins*, 272 Neb. 547, 723 N.W.2d 344 (2006).

⁸ *Blakely v. Washington*, *supra* note 1.

documentation regarding the nature and amount of the actual damages sustained by the victim.⁹

In addition, “[t]o determine the amount of restitution, the court may hold a hearing at the time of sentencing.”¹⁰

[3] We agree with Clapper that restitution is criminal punishment in this jurisdiction. This court has held that when a court orders restitution to a crime victim under § 29-2280, restitution is a criminal penalty imposed as punishment and is part of the criminal sentence imposed by the sentencing court.¹¹

SIXTH AMENDMENT’S JURY TRIAL REQUIREMENT

[4,5] Both the Sixth Amendment to the U.S. Constitution and article I, §§ 6 and 11, of the Nebraska Constitution guarantee a criminal defendant the right to trial by an impartial jury for serious offenses.¹² The 6th Amendment’s jury trial guarantee is made applicable to the states by the 14th Amendment.¹³ And the U.S. Supreme Court established the contours of the Sixth Amendment’s guarantee in three recent cases.

In *Apprendi v. New Jersey*,¹⁴ the U.S. Supreme Court first held that a sentence violates a defendant’s constitutional rights if the sentencing court has imposed a greater sentence than the maximum it could have imposed without the challenged finding. The defendant pled guilty to the possession of a firearm for an unlawful purpose. The sentencing court then found by a preponderance of the evidence that the defendant’s actions warranted an enhanced sentence under the state’s hate crime statute. The defendant had not admitted that his actions were racially

⁹ § 29-2280.

¹⁰ § 29-2281.

¹¹ *State v. Dittoe*, 269 Neb. 317, 693 N.W.2d 261 (2005); *State v. Holecek*, 260 Neb. 976, 621 N.W.2d 100 (2000).

¹² *State v. Cozzens*, 241 Neb. 565, 490 N.W.2d 184 (1992). See, also, *Blanton v. North Las Vegas*, 489 U.S. 538, 109 S. Ct. 1289, 103 L. Ed. 2d 550 (1989).

¹³ *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

¹⁴ *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

motivated. The Court determined that the enhanced sentence violated the Sixth Amendment's jury trial guarantee. It held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."¹⁵

Four years later, in *Blakely*,¹⁶ the U.S. Supreme Court decided whether a defendant is entitled to have a jury determine the aggravating factors. The facts admitted in the defendant's guilty plea authorized the court to sentence him to a standard sentencing range. The sentencing court, however, increased the maximum standard sentence by more than 3 years. It found that the defendant had acted with deliberate cruelty, an aggravating factor for an exceptional sentence under the sentencing statutes. The Court held that this enhanced sentence also violated the Sixth Amendment right to a jury trial. It clarified that

the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. . . . In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment" . . . and the judge exceeds his proper authority.¹⁷

[6] Finally, in *United States v. Booker*,¹⁸ the Court applied its holding in *Blakely* to the federal sentencing guidelines. The Court stated: "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict

¹⁵ *Id.*, 530 U.S. at 490.

¹⁶ *Blakely v. Washington*, *supra* note 1.

¹⁷ *Id.*, 542 U.S. at 303-04 (emphasis in original).

¹⁸ *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005).

must be admitted by the defendant or proved to a jury beyond a reasonable doubt.”¹⁹ The sentencing court found the defendant possessed a larger quantity of drugs than the quantity presented to the jury. The larger quantity was a fact that enhanced his sentence under the guidelines.

In a separate, remedial opinion, a majority of the Court in *Booker* concluded it could preserve the federal sentencing guidelines by severing and deleting the statutory provision that made the guidelines mandatory.²⁰ It reasoned that engrafting its constitutional jury trial requirements onto sentencing statutes would prevent a sentencing court from relying on any information that a prosecutor had not alleged and proved to a jury beyond a reasonable doubt. The Court noted that the prohibition could extend even to information in a presentence report. This result would undermine the purpose of the guidelines, which was to ensure “similar sentences for those who have committed similar crimes in similar ways.”²¹

But, in *Cunningham v. California*,²² the Court recently reiterated that

broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted . . . does not shield a sentencing system from the force of our decisions. If the jury’s verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied.

In *Cunningham*, the Court concluded that the defendant’s sentence violated the Sixth Amendment. The state court had sentenced him to the upper term of a three-tiered sentencing statute after it found the existence of aggravating circumstances.

[7] *Apprendi* and *Blakely* did not involve restitution, and all federal courts of appeals have held that they do not apply to

¹⁹ *Id.*, 543 U.S. at 244.

²⁰ *United States v. Booker*, *supra* note 18.

²¹ *Id.*, 543 U.S. at 252.

²² *Cunningham v. California*, 549 U.S. 270, 290, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007), citing *Blakely v. Washington*, *supra* note 1.

restitution orders.²³ Although we reject the rationale that *Blakely* has no application because restitution is a civil remedy,²⁴ we agree that the U.S. Supreme Court did not intend to extend the Sixth Amendment's jury trial guarantee to restitution hearings. We reach this conclusion because we agree that a judge's fact-finding for restitution does not result in a sentence that exceeds a statutory maximum.

The "hate crime" statute in *Apprendi* authorized an additional punishment if the sentencing court found there was racial animus, just as Nebraska's restitution statute authorizes additional punishment if the sentencing court concludes that that sentence is proper.²⁵ And, as noted, under Nebraska's restitution statutes, a court may engage in factfinding to determine restitution.²⁶ But the critical distinction is that for restitution, the sentencing court is not required to make any additional finding of fact regarding the defendant's conduct or offense.

The U.S. Supreme Court's holdings in *Apprendi*, *Blakely*, and *Booker* focused on a defendant's conduct or motivations, or other facts related to the crime, such as a victim's vulnerability. The Court's Sixth Amendment decisions responded to an increased emphasis on sentencing factors by legislatures. This has meant that for sentencing, the jury's role in finding guilt is diminished.²⁷ "As the enhancements became greater, the jury's finding of the underlying crime became less significant.

²³ See, *U.S. v. Milkiewicz*, 470 F.3d 390 (1st Cir. 2006); *U.S. v. Reifler*, 446 F.3d 65 (2d Cir. 2006); *U.S. v. Leahy*, 438 F.3d 328 (3d Cir. 2006) (en banc); *U.S. v. Nichols*, 149 Fed. Appx. 149 (4th Cir. 2005); *U.S. v. Garza*, 429 F.3d 165 (5th Cir. 2005); *U.S. v. Sosebee*, 419 F.3d 451 (6th Cir. 2005); *U.S. v. Swanson*, 394 F.3d 520 (7th Cir. 2005); *U.S. v. Carruth*, 418 F.3d 900 (8th Cir. 2005) (rehearing en banc denied); *U.S. v. Bussell*, 414 F.3d 1048 (9th Cir. 2005); *U.S. v. Visinaiz*, 428 F.3d 1300 (10th Cir. 2005); *U.S. v. Williams*, 445 F.3d 1302 (11th Cir. 2006).

²⁴ See, *U.S. v. George*, 403 F.3d 470 (7th Cir. 2005); *U.S. v. Carruth*, *supra* note 23; *U.S. v. Visinaiz*, *supra* note 23.

²⁵ See § 29-2280.

²⁶ See § 29-2281.

²⁷ See *United States v. Booker*, *supra* note 18.

And the enhancements became very serious indeed.”²⁸ Thus, all the facts found by trial judges that rendered the sentences unconstitutional were facts that made the defendant’s offense more serious or culpable and hence exposed the defendant to a greater sentencing range.

In contrast, a court’s factfinding regarding restitution is limited to determining the victim’s actual damages and the defendant’s ability to pay. When a sentencing court concludes the punishment warrants restitution, it does so based only on the fact of conviction. As federal courts have noted, it is the conviction that authorizes restitution.²⁹

Section 29-2280 authorizes a court to order restitution for “actual . . . loss sustained by the victim as a direct result of the offense *for which the defendant has been convicted.*” (Emphasis supplied.) Therefore, the district court could properly order restitution because Clapper admitted that he had recklessly caused bodily injury to the victim.

[8,9] Further, a sentencing court’s factfinding in determining restitution does not expose the defendant to any greater punishment than § 29-2280 authorizes, which is for the full amount of the victim’s actual damages.³⁰ “[W]hen the court determines the amount of loss, it is merely giving definite shape to the restitution penalty born out of the conviction.”³¹ Thus, “a restitution order for the amount of loss cannot be said to ‘exceed the statutory maximum’ provided under the penalty statutes.”³² We determine that because a defendant’s conviction authorizes restitution for the full amount of the victim’s losses, a judge’s factfinding to determine restitution does not result in punishment that exceeds any statutory maximum imposed on the defendant’s

²⁸ *Id.*, 543 U.S. at 236.

²⁹ See, *U.S. v. Milkiewicz*, *supra* note 23; *U.S. v. Reifler*, *supra* note 23; *U.S. v. Leahy*, *supra* note 23.

³⁰ See § 29-2281. See, also, *U.S. v. Reifler*, *supra* note 23; *U.S. v. Leahy*, *supra* note 23.

³¹ *U.S. v. Leahy*, *supra* note 23, 438 F.3d at 337.

³² *U.S. v. Sosebee*, *supra* note 23, 419 F.3d at 462.

punishment. Thus, the U.S. Supreme Court's holding in *Blakely v. Washington* does not apply.

CONCLUSION

We conclude that Clapper's Sixth Amendment right to a jury trial was not violated by the district court's order of restitution. We join the majority of courts which have considered this issue and conclude that the U.S. Supreme Court's decision in *Blakely v. Washington*³³ does not apply to restitution.

AFFIRMED.

³³ *Blakely v. Washington*, *supra* note 1.

CONNOLLY, J., dissenting.

I concede that all federal courts of appeals have concluded that either *Blakely v. Washington*¹ or *United States v. Booker*² does not require a jury to determine the facts supporting restitution.³ But, under *Blakely*, I believe that allowing a sentencing court to order restitution without the defendant's admitting the facts or a jury's deciding the facts supporting restitution violates a defendant's constitutional right to have a jury find any fact "which the law makes essential to the punishment."⁴

Although the U.S. Supreme Court has not yet decided whether a defendant has a right to a jury trial to determine restitution,

¹ *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

² *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005).

³ See, *U.S. v. Milkiewicz*, 470 F.3d 390 (1st Cir. 2006); *U.S. v. Reifler*, 446 F.3d 65 (2d Cir. 2006); *U.S. v. Leahy*, 438 F.3d 328 (3d Cir. 2006) (en banc); *U.S. v. Nichols*, 149 Fed. Appx. 149 (4th Cir. 2005); *U.S. v. Garza*, 429 F.3d 165 (5th Cir. 2005); *U.S. v. Sosebee*, 419 F.3d 451 (6th Cir. 2005); *U.S. v. Swanson*, 394 F.3d 520 (7th Cir. 2005); *U.S. v. Carruth*, 418 F.3d 900 (8th Cir. 2005) (rehearing en banc denied); *U.S. v. Bussell*, 414 F.3d 1048 (9th Cir. 2005); *U.S. v. Visinaiz*, 428 F.3d 1300 (10th Cir. 2005); *U.S. v. Williams*, 445 F.3d 1302 (11th Cir. 2006).

⁴ *Blakely v. Washington*, *supra* note 1, 542 U.S. at 304.

it seems to me that many courts are too quick to apply their *Apprendi* rationales and too reluctant to consider the effect of *Blakely* on restitution. Because we have held that restitution is criminal punishment, this court should decline to join the parade.

Restitution under Neb. Rev. Stat. § 29-2280 (Reissue 1995) is a criminal penalty imposed as punishment for a crime and is part of the criminal sentence.⁵ Under Neb. Rev. Stat. § 29-2281 (Reissue 1995), before restitution can be properly ordered, the trial court must consider: (1) whether restitution should be ordered, (2) the amount of actual damages sustained by the victim of a crime, and (3) the amount of restitution a criminal defendant is capable of paying.⁶

These factors indisputably require factfinding.⁷ And we have held that because restitution is punishment, “the certainty and precision prescribed for the criminal sentencing process applies to criminal sentences containing restitution ordered pursuant to § 29-2280.”⁸

In contrast, some of the federal courts of appeals that have concluded *Blakely* does not require a jury to find the facts supporting restitution have reasoned that restitution is a civil remedy.⁹ In *U.S. v. Carruth*, a three-judge panel of the Eighth Circuit reached this conclusion,¹⁰ despite the court’s earlier holding that restitution is a criminal penalty.¹¹

⁵ *State v. Dittoe*, 269 Neb. 317, 693 N.W.2d 261 (2005); *State v. Holecek*, 260 Neb. 976, 621 N.W.2d 100 (2000).

⁶ *State v. Holecek*, *supra* note 5.

⁷ See, *State v. Wells*, 257 Neb. 332, 598 N.W.2d 30 (1999); *State v. McLain*, 238 Neb. 225, 469 N.W.2d 539 (1991); *State v. Yost*, 235 Neb. 325, 455 N.W.2d 162 (1990).

⁸ *State v. Holecek*, *supra* note 5, 260 Neb. at 981, 621 N.W.2d at 104, quoting *State v. McGinnis*, 2 Neb. App. 77, 507 N.W.2d 46 (1993).

⁹ See, *U.S. v. George*, 403 F.3d 470 (7th Cir. 2005); *U.S. v. Carruth*, *supra* note 3; *U.S. v. Visinaiz*, *supra* note 3.

¹⁰ See *U.S. v. Carruth*, *supra* note 3.

¹¹ See *U.S. v. Ross*, 279 F.3d 600 (8th Cir. 2002).

The dissent in *Carruth* argued that “there is no principled basis on which to distinguish punishment for Ex Post Facto Clause and Sixth Amendment purposes.”¹² It concluded that in *Blakely*, the term “statutory maximum” dictated “a conclusion that any dispute over the amount of restitution due and owing a victim of crime must be submitted to a jury and proved beyond a reasonable doubt.”¹³ I agree. I also note that the U.S. Supreme Court has recently characterized restitution as criminal punishment.¹⁴

As the majority opinion states, the U.S. Supreme Court held in *Apprendi v. New Jersey*¹⁵ that any fact, other than a prior conviction, that increases the penalty for a crime beyond a prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi* was intended as a bright-line rule protecting the right to a jury trial under the Sixth Amendment.¹⁶ In commenting on the Sixth Amendment’s protection in *Blakely*, the Court distinguished civil law traditions and explained that the right to a jury trial is a fundamental reservation of power in our constitutional structure to ensure the people’s control in the judiciary branch: “*Apprendi* carries out this design by ensuring that the judge’s authority to sentence derives wholly from the jury’s verdict.”¹⁷

In the wake of *Apprendi*, some circuit courts rejected challenges to a judge’s factfinding for determining restitution. They concluded that any statutory maximum must be found in the applicable restitution statute and that these statutes do not have a

¹² *U.S. v. Carruth*, *supra* note 3, 418 F.3d at 905 (Bye, Circuit Judge, dissenting).

¹³ *Id.*

¹⁴ See *Pasquantino v. United States*, 544 U.S. 349, 125 S. Ct. 1766, 161 L. Ed. 2d 619 (2005).

¹⁵ *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

¹⁶ See *Blakely v. Washington*, *supra* note 1.

¹⁷ *Id.*, 542 U.S. at 306.

prescribed statutory maximum.¹⁸ For example, in *U.S. v. Ross*,¹⁹ after the jury convicted the defendant of wire fraud, the court ordered restitution of \$2.7 million “to victims beyond those affected by the specific wire transactions submitted to the jury to prove wire fraud.” The defendant argued that the order violated *Apprendi* because a jury did not determine the facts regarding restitution. The Eighth Circuit rejected that argument and held that an order of restitution does not increase the penalty for the crime of wire fraud beyond the prescribed statutory maximum because the restitution statute had no definite amount that could be exceeded.²⁰

After the U.S. Supreme Court decided *Blakely*²¹ and *Booker*,²² many circuit courts adopted the same rationale that restitution statutes contained no statutory maximum; most of those circuits cited to their sister circuits or omitted any comprehensive analysis of the *Blakely* definition of “statutory maximum.”²³ Only two of these circuit courts even stated or discussed the *Blakely* definition of “statutory maximum.”²⁴ Of these two courts, the Second Circuit conceded that “[t]he matter of whether the substantive holding of *Booker* applies to orders of restitution is not entirely clear from some of the language of *Blakely* and *Booker*.”²⁵

But as the dissent in *Carruth* concluded, the U.S. Supreme Court’s decision in *Blakely* meant that “the notion *Apprendi*

¹⁸ See, e.g., *U.S. v. Syme*, 276 F.3d 131 (3d Cir. 2002); *U.S. v. Bearden*, 274 F.3d 1031 (6th Cir. 2001); *U.S. v. Ross*, *supra* note 11.

¹⁹ *U.S. v. Ross*, *supra* note 11, 279 F.3d at 608.

²⁰ *U.S. v. Ross*, *supra* note 11.

²¹ *Blakely v. Washington*, *supra* note 1.

²² *United States v. Booker*, *supra* note 2.

²³ See, *U.S. v. Milkiewicz*, *supra* note 3; *U.S. v. Nichols*, *supra* note 3; *U.S. v. Garza*, *supra* note 3; *U.S. v. Sosebee*, *supra* note 3; *U.S. v. Swanson*, *supra* note 3; *U.S. v. Carruth*, *supra* note 3; *U.S. v. Bussell*, *supra* note 3; *U.S. v. Williams*, *supra* note 3.

²⁴ See, *U.S. v. Reifler*, *supra* note 3; *U.S. v. Leahy*, *supra* note 3.

²⁵ *U.S. v. Reifler*, *supra* note 3, 446 F.3d at 115.

does not apply to restitution because restitution statutes do not prescribe a maximum amount . . . is no longer viable.”²⁶ There now exists “a completely different understanding of the term prescribed statutory maximum.”²⁷ It is difficult to ignore what the Court emphatically stated in *Blakely*:

[T]he relevant “statutory maximum” [for *Apprendi* purposes] is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts ‘which the law makes essential to the punishment.’ . . .”²⁸

“That right [to have the jury find the existence of any particular fact that the law makes essential to a defendant’s punishment] is implicated whenever a judge seeks to impose a sentence that is not solely based on ‘facts reflected in the jury verdict or admitted by the defendant.’”²⁹

Under our case law, we do know this: There is no question that restitution is the infliction of punishment, nor is there any question under our statutes that a jury does not find the relevant facts regarding restitution. I conclude that other courts’ nuanced dances around *Blakely* are not persuasive.

First, I disagree with the observation made in *U.S. v. Leahy* that a distinction exists between restitution and prison sentences for *Blakely* purposes: “orders of restitution have little in common with the prison sentences challenged by the defendants in *Jones*,^[30] *Apprendi*, *Blakely* and *Booker*.”³¹ I do not read

²⁶ *U.S. v. Carruth*, *supra* note 3, 418 F.3d at 906 (Bye, Circuit Judge, dissenting).

²⁷ *Id.*

²⁸ *Blakely v. Washington*, *supra* note 1, 542 U.S. at 303-04 (emphasis in original).

²⁹ *United States v. Booker*, *supra* note 2, 543 U.S. at 232, quoting *Blakely v. Washington*, *supra* note 1.

³⁰ *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999).

³¹ *U.S. v. Leahy*, *supra* note 3, 438 F.3d at 338.

Blakely as limited to statutory sentencing schemes with multiple offense levels; it applies to “punishment” broadly. As the dissent in the Third Circuit case noted, the majority’s reasoning does not comport with the U.S. Supreme Court’s reasoning in *Pasquantino*³²: “The purpose of awarding restitution [for the crime of wire fraud was] not to [benefit the foreign government defrauded of tax revenues], but to mete out appropriate criminal punishment for that conduct.”³³

Before finishing, I note the U.S. Supreme Court has held that restitution imposed as a condition of probation in a criminal sentence may not be discharged as a debt in bankruptcy under a provision that preserves debts for criminal fines, penalties, and forfeiture:

The criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole. . . . Although restitution does resemble a judgment “for the benefit of” the victim . . . the decision to impose restitution generally does not turn on the victim’s injury, but on the penal goals of the State and the situation of the defendant.³⁴

Because the Court has equated restitution with criminal fines and penalties, it seems unlikely that it would exempt restitution under *Blakely* as a type of punishment that does not invoke a defendant’s right to a jury trial.

The relevant question under *Blakely* is whether the sentencing court has imposed punishment without making any findings in addition to those supported by the jury’s verdict or the defendant’s admissions. That question must be answered affirmatively when a court, on its own findings, imposes restitution, regardless of whether restitution is considered an enhancement to a term of imprisonment or is simply part of the sentence. Restitution is unquestionably punishment that is part of the defendant’s

³² *Pasquantino v. United States*, *supra* note 14.

³³ *U.S. v. Leahy*, *supra* note 3, 438 F.3d at 341 (McKee, Circuit Judge, concurring in part, and in part dissenting; Rendell, Ambro, Smith, and Becker, Circuit Judges, join).

³⁴ *Kelly v. Robinson*, 479 U.S. 36, 52, 107 S. Ct. 353, 93 L. Ed. 2d 216 (1986).

sentence, and “every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment.”³⁵ I would reverse.

³⁵ *Blakely v. Washington*, *supra* note 1, 542 U.S. at 313 (emphasis in original).

OTTACO ACCEPTANCE, INC., A MICHIGAN CORPORATION,
APPELLEE, V. TERESA G. LARKIN ET AL., APPELLEES,
AND SIGMA INVESTMENTS, INC., APPELLANT.
733 N.W.2d 539

June 22, 2007. No. S-05-854.

1. **Equity: Quiet Title.** A quiet title action sounds in equity.
2. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. ____: _____. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
5. **Actions: Parties: Standing.** Before a court can exercise jurisdiction, a party must have standing, and either a party or the court can raise a question of standing at any time during the proceeding.
6. **Standing.** In order to have standing to invoke a tribunal’s jurisdiction, one must have some legal or equitable right, title, or interest in the subject of the controversy.
7. **Tax Sale: Deeds: Title: Proof.** In order to question title under a tax deed, the party questioning title must show that it had title to the property at the time of the sale or acquired it after the sale from this state or the United States after the sale and that all taxes due upon the property had been paid.
8. **Standing: Claims: Parties.** In order to have standing, a litigant must assert the litigant’s own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties.
9. **Deeds: Intent.** In the construction of a deed, courts will give effect to the intent of the parties.

10. **Deeds.** A mistake, even though a material one, does not render a deed void, but at most, voidable in equity.
11. _____. Where it appears that a mistake has been made, a court will order the cancellation or the reformation of a deed.
12. **Statutes.** It is not within the province of an appellate court to read a meaning into a statute which is not there.

Appeal from the District Court for Douglas County: J RUSSELL DERR, Judge. Affirmed.

Thomas J. Young for appellant.

Robert S. Lannin and Patrick M. Driver, of Shively Law Offices, P.C., L.L.O., for appellee Ottaco Acceptance, Inc.

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

McCORMACK, J.

I. NATURE OF CASE

Sigma Investments, Inc. (Sigma), appeals from a judgment entered against it by the Douglas County District Court. Ottaco Acceptance, Inc. (Ottaco), sought to quiet title to real property located in Omaha, Nebraska, claiming that it was the owner of the property by virtue of a treasurer's tax deed. Sigma, which was issued a trustee's deed on the property, claimed title adverse to Ottaco's title. Sigma argued that its lien on the property was not extinguished by the issuance of Ottaco's tax deed and that Ottaco's tax deed was void or voidable. The district court found that Ottaco's tax deed was not void and that Sigma failed to prove it had redeemed the property.

II. BACKGROUND

1. STATUTORY FRAMEWORK

This case involves the "certificate method" for handling delinquent real estate taxes. Under the certificate method, when a county treasurer sells real property for delinquent taxes under chapter 77, article 18, of the Nebraska Revised Statutes, the purchaser receives a certificate commonly known as a "tax certificate" or "tax sale certificate." This certificate describes the property, the amount paid by the purchaser, and the date that

the purchaser will be entitled to a deed.¹ Tax certificates can be assigned by endorsement, and the assignee steps into the shoes of the purchaser.²

As we explained in *INA Group v. Young*,³ the owner of the property can redeem the property before delivery of a deed by paying the treasurer the amount shown on the certificate and all subsequent taxes, along with the interest specified by Neb. Rev. Stat. § 45-104.01 (Reissue 2004). If the property is not redeemed, the owner of the certificate may proceed in one of two ways: The owner can wait and obtain a deed of conveyance for the property, commonly known as a tax deed, or can obtain an order of foreclosure and compel the sale of the property.⁴ In this case, Ottaco followed the first course of action.

Under the first course of action, obtaining a tax deed, the holder of the certificate must wait 3 years from the date of the sale of the property. At any time within 6 months after the 3-year period expires, the treasurer can, upon request, issue a deed of conveyance to the holder of the certificate.⁵ If the certificate holder waits longer than 3 years 6 months from the sale, the certificate ceases to be valid and the lien of taxes for which the property was sold is discharged.⁶

2. FACTUAL BACKGROUND

On March 3, 1997, Equifunding, Inc., was issued the tax certificate for the property in question by the Douglas County treasurer. Although the assignment of the tax certificate is not contained in the record, it is undisputed in the present appeal that Equifunding assigned the tax certificate to Ottaco. Pursuant to Neb. Rev. Stat. § 77-1831 (Reissue 2003), in April and May

¹ See, *INA Group v. Young*, 271 Neb. 956, 716 N.W.2d 733 (2006); *Ottaco Acceptance, Inc. v. Huntzinger*, 268 Neb. 258, 682 N.W.2d 232 (2004).

² *INA Group v. Young*, *supra* note 1.

³ *Id.*

⁴ *Id.*

⁵ *Id.* See Neb. Rev. Stat. § 77-1837 (Reissue 1996).

⁶ *INA Group v. Young*, *supra* note 1. See Neb. Rev. Stat. § 77-1856 (Reissue 2003).

2000, notice was personally served upon Martin Sylvester and Connie Sylvester, the tenants of the property. Notice was sent via certified mail on December 7, 1999, to Teresa Larkin, record title owner of the property; on January 3, 2000, to Industry Mortgage Company, L.P. (Industry Mortgage), a beneficiary under a trust deed issued on the property; and on January 3 to Steffi Swanson, trustee under the trust deed. In a letter dated August 25, 2000, Ottaco requested a tax deed for the property from the Douglas County treasurer. On September 5, the treasurer issued a tax deed to Ottaco. The deed states in pertinent part that the property in question was sold for nonpayment of taxes to Ottaco on March 3, 1997. The tax deed was recorded on September 7, 2000.

On August 29, 2000, Swanson, as trustee, sold the property to Sigma at a trustee's sale for \$29,000 pursuant to the trust deed for breach and default under the terms of the deed. Sigma, as purchaser, was issued a trustee's deed on August 29, and the same was recorded on September 6. The record reflects that Kiely Sindelar, a shareholder of Sigma, had researched the property on the computerized Douglas County information system prior to Sigma's purchase of the property at the trustee's sale and knew the property was subject to a tax sale certificate for delinquent taxes.

On August 31, 2000, Ottaco filed a petition with the district court requesting (1) an accounting of the amount due under the tax certificate; (2) that its lien be adjudged a first lien; (3) that the property be sold for satisfaction of the lien; (4) that the rights of various defendants, including Larkin, the Sylvesters, Industry Mortgage, Swanson, and Sigma, be determined and found to be subsequent to Ottaco's; (5) that the defendants be foreclosed from redemption; and (6) that Ottaco recover its costs. Pursuant to a request by Sigma, the court, in July 2001, entered an order authorizing Sigma to make repairs to the property and authorizing the sale of the property. Sigma claims to have spent approximately \$36,818.25 to repair the property which was then sold to a third party for \$66,295.73. The proceeds of the sale were paid to the clerk of the district court to be held in a trust account. After the issuance and filing of its tax deed, Ottaco filed the operative petition, wherein Ottaco

requests that title to the property be quieted in its name and that all proceeds from the sale of the property be distributed to it.

Swanson disclaimed any interest in the property, and default judgment was entered against Larkin, Industry Mortgage, and the Sylvesters. Sigma is the only remaining defendant. In its answer, Sigma alleged that Ottaco's tax deed was void because Ottaco failed to provide Sigma with notice pursuant to § 77-1831 and because Ottaco failed to produce to the treasurer its tax certificate pursuant to § 77-1837. Sigma also alleged that Ottaco's tax deed represented a lien for the taxes paid, interest, attorney fees, and costs. Sigma claimed that it was entitled to reimbursement for the \$29,000 it purchased the property for at the trustee's sale and the \$36,818.25 it expended for repairs, because (1) Ottaco did not notify it of Ottaco's intent to seek a tax deed; (2) Ottaco's interest in the tax deed is a lien interest in the property; (3) Sigma's interest, in the property is derivative of Industry Mortgage's interest, and Sigma's interest should be considered superior; and (4) it would be unjust and unfair for Ottaco to benefit at Sigma's expense. Sigma also counterclaimed, alleging unjust enrichment on the part of Ottaco for the amount expended by Sigma, and cross-claimed against Industry Mortgage and Swanson. Sigma's cross-claim is not at issue in this case.

On June 2, 2004, the district court held a bifurcated trial on what it described as the issue of the validity of Ottaco's tax deed. Evidence adduced at trial included the testimony of Sindelar. Sindelar testified that on August 29, 2000, he mailed a check in the amount of \$6,491.35 to the Douglas County treasurer's office to redeem the property, but that the check was never cashed. Aside from Sindelar's testimony and copies of Sindelar's August and September 2000 bank statements, no other evidence was submitted to the court evidencing Sindelar's attempted redemption of the property. Sindelar also testified that in April 2004, he again tendered payment for taxes on the property to the treasurer's office, but that the treasurer's office returned his check to him with a letter stating the taxes had been paid.

On February 16, 2005, the district court entered an order in favor of Ottaco. In response to an assertion by Ottaco that Sigma failed to meet its burden of proof to raise its challenges to Ottaco's tax deed, the court found that under Neb. Rev. Stat.

§ 77-1843 (Reissue 2003), Sigma was required to prove that it had properly redeemed the property. The court found that Sigma failed to meet its burden under § 77-1843 and, therefore, could not defeat Ottaco's tax deed. The court further found that even assuming that Sigma did meet its burden to prove that the property was properly redeemed, Sigma had not proved that Ottaco's deed was invalid. Sigma had argued to the court that Ottaco's deed was invalid because Larkin had not been personally served notice, Sigma had not been served notice prior to Ottaco's application for the tax deed, Ottaco failed to produce the tax certificate to the county treasurer, the tax deed lacks a legible seal, and the deed does not accurately identify Equifunding as the original purchaser. The district court also found that Sigma's allegation that Ottaco's interest in the property is limited to a lien interest is without merit because Nebraska law provides that a deed creates in the holder a more significant interest than a lien. With regard to Sigma's claim for reimbursement for repairs and maintenance on the property, the court found that Sigma had previously been reimbursed for \$10,000. Finally, with regard to Sigma's claim for reimbursement for the purchase price paid for the property, the court found that Sigma failed to identify any viable basis for a claim that Ottaco should somehow repay Sigma for an amount paid to third-party defendant, Industry Mortgage. The court found that because Ottaco received no benefit from the purchase price, Sigma was not entitled to recover any of that amount from Ottaco. The district court then ordered that title be quieted in Ottaco in fee simple absolute. At this juncture, we point out that the district court's determinations as to Sigma's claims for reimbursement for repairs and maintenance on the property and the purchase price paid for the property have not been assigned as error by Sigma in the matter presently before this court.

On June 20, 2005, the district court entered an order of final judgment in favor of Ottaco and against Sigma pursuant to Neb. Rev. Stat. §§ 25-1315 (Cum. Supp. 2006) and 25-1902 (Reissue 1995).

III. ASSIGNMENTS OF ERROR

Sigma's assignments of error, consolidated, restated, and renumbered for our review, are that the district court erred in

(1) failing to determine that treasurer's tax deeds only convey title and do not extinguish lien interests; (2) determining that Sigma was required to comply with § 77-1843 and Neb. Rev. Stat. § 77-1844 (Reissue 2003); (3) failing to determine that the tax deed issued to Ottaco was void or voidable; (4) not determining that the treasurer's tax deed issued to Ottaco, as it related to Sigma, only represented a lien for taxes, interest, attorney fees, and costs; (5) failing to determine Sigma's interest was derivative of Industry Mortgage and was not extinguished by the treasurer's tax deed issued in Ottaco's favor; and (6) failing to determine that a purchaser at a trust deed liquidation of a mortgage, which occurs within the last 3 months during which a tax sale certificate holder could request a treasurer's tax deed, retains the lien interest of the mortgage.

IV. STANDARD OF REVIEW

[1,2] A quiet title action sounds in equity.⁷ In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.⁸

[3] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.⁹

V. ANALYSIS

1. DOES OTTACO'S TAX DEED, AS IT RELATES TO SIGMA, ONLY REPRESENT LIEN FOR TAXES, INTEREST, ATTORNEY FEES, AND COSTS?

Sigma first contends that Ottaco's tax deed merely represented a lien on the property. Section 77-1837 provides that during the 6 months after the expiration of 3 years from the date

⁷ *Ottaco Acceptance, Inc. v. Huntzinger*, *supra* note 1.

⁸ *Id.*

⁹ *Zach v. Eacker*, 271 Neb. 868, 716 N.W.2d 437 (2006).

of the tax sale, the treasurer shall, upon the production of the tax sale certificate, execute and deliver to the purchaser or his or her heirs or assigns a deed of conveyance for the real property described in the tax certificate if the property has not been redeemed. “Conveyance” has been defined by Black’s Law Dictionary¹⁰ as “[t]he voluntary transfer of a right or of property,” as well as “[t]he transfer of an interest in real property from one living person to another, by means of an instrument such as a deed.”

Considering what we described in *Strunk v. Chromy-Strunk*¹¹ as the “well-understood legal meaning of the term ‘convey,’” it is clear that a tax deed conveys title to the property in question, and not merely a lien interest in the property. We, therefore, conclude that the tax deed conveyed title to Ottaco and not merely a lien interest in the property.

2. WAS SIGMA OBLIGATED TO COMPLY WITH §§ 77-1843 AND 77-1844?

[4] Sigma next contends that it was not required to comply with §§ 77-1843 and 77-1844 because Ottaco’s tax deed was void or voidable. We disagree. Section 77-1843 sets forth those conditions precedent a party seeking to *defeat* title conveyed under a treasurer’s deed must prove. Section 77-1844 sets forth those conditions precedent a party seeking to *question* title conveyed under a treasurer’s deed must prove. Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.¹² It is clear from the language of §§ 77-1843 and 77-1844 that even if title under a tax deed is void or voidable, the conditions precedent set forth in those statutes must be met in order to first question and then defeat title. As we explain more fully below, Sigma’s contentions that Ottaco’s tax deed is void or voidable are without merit. However, even assuming that Ottaco’s tax

¹⁰ Black’s Law Dictionary 357-58 (8th ed. 2004).

¹¹ *Strunk v. Chromy-Strunk*, 270 Neb. 917, 941, 708 N.W.2d 821, 841 (2006).

¹² *Turco v. Schuning*, 271 Neb. 770, 716 N.W.2d 415 (2006).

deed was void or voidable, Sigma was required to show that it satisfied the conditions precedent in §§ 77-1843 and 77-1844. We now address whether Sigma has satisfied the requirements of those statutes.

[5,6] Because title must be questioned before it may be defeated, we first address § 77-1844. Before doing so, we point out that the district court did not address whether Sigma was required to comply with § 77-1844. However, before a court can exercise jurisdiction, a party must have standing, and either a party or the court can raise a question of standing at any time during the proceeding.¹³ In order to have standing to invoke a tribunal's jurisdiction, one must have some legal or equitable right, title, or interest in the subject of the controversy.¹⁴

[7] Section § 77-1844 provides:

No person shall be permitted to question the title acquired by a treasurer's deed without first showing that he, or the person under whom he claims title, had title to the property at the time of the sale, or that the title was obtained from the United States or this state after the sale, and that all taxes due upon the property had been paid by such person or the persons under whom he claims title as aforesaid.

Larkin, the titleholder to the property at the time of the tax certificate sale, defaulted under the terms of a trust deed which named Swanson as trustee and Industry Mortgage as beneficiary. As a result of Larkin's default, the property was sold at a trustee's sale by Swanson and title was transferred by trustee's deed to Sigma. Sigma's trustee's deed was recorded on September 6, 2000, 1 day before Ottaco's tax deed was recorded. Sigma, as the grantee under the trustee's deed, obtained title to the property. We conclude, therefore, that for purposes of § 77-1844, Sigma stands in the shoes of Larkin and that Sigma has satisfied the title requirement of § 77-1844.

¹³ *In re Application of Metropolitan Util. Dist.*, 270 Neb. 494, 704 N.W.2d 237 (2005).

¹⁴ *Spring Valley IV Joint Venture v. Nebraska State Bank*, 269 Neb. 82, 690 N.W.2d 778 (2005).

In *Ottaco Acceptance, Inc. v. Huntzinger*,¹⁵ and before that, in *Cornell v. Maverick Loan & Trust Co.*,¹⁶ we explained that “[t]he “showing” of taxes paid is at the trial, and if all taxes are paid before or during the trial, or before final judgment, that is enough. The “showing” is made by the evidence, and not by the pleadings alone.” We have held, however, that the tender of payment of taxes to the treasurer is sufficient to lay foundation for the institution of a suit to redeem property from a tax sale.¹⁷ The evidence presented at trial showed that Sigma tendered payment in the amount of \$7,458.09 to the county treasurer, but that Sigma’s payment was rejected. This evidence is sufficient under § 77-1844. Because Sigma has satisfied both requirements of § 77-1844, Sigma may question Ottaco’s title.

We next turn to the determination of whether Sigma may defeat Ottaco’s title. Section 77-1843 enumerates the conditions precedent to defeat title “[i]n all controversies and suits involving the title to real property claimed and held under and by virtue of a deed made substantially by the treasurer in the manner provided by sections 77-1831 to 77-1842” Sigma contends that Ottaco’s tax deed is void for the following reasons: (1) Ottaco failed to personally serve notice to the record titleholder, (2) Ottaco failed to submit the original tax sale certificate to the treasurer, (3) the tax deed fails to identify the original purchaser, and (4) the tax deed lacks a legible treasurer’s seal. As we read it, these assertions also go to whether Ottaco’s tax deed was made “substantially by the treasurer in the manner provided by sections 77-1831 to 77-1842.” Accordingly, before we address whether Sigma may defeat Ottaco’s title under § 77-1843, we must determine whether Ottaco’s tax deed substantially complies with the aforesaid sections.

¹⁵ *Ottaco Acceptance, Inc. v. Huntzinger*, *supra* note 1, 268 Neb. at 262, 682 N.W.2d at 236 (emphasis omitted).

¹⁶ *Cornell v. Maverick Loan & Trust Co.*, 95 Neb. 842, 147 N.W. 697 (1914).

¹⁷ *Brokaw v. Cottrell*, 114 Neb. 858, 211 N.W. 184 (1926).

(a) Ottaco's Failure to Personally Serve
Notice to Record Titleholder

Sigma first argues that Ottaco failed to personally serve notice on Larkin pursuant to § 77-1831, Neb. Rev. Stat. § 77-1832 (Reissue 1996), and article VIII, § 3, of the Nebraska Constitution.

[8] "In order to have standing, a litigant must assert the litigant's own legal rights and interests and cannot rest his or her claim on the legal rights or interests of third parties."¹⁸ In *In re Petition of SID No. 1*, objectors to the formation of a sanitary and improvement district argued that the district court lacked personal jurisdiction over proceedings to form the sanitary and improvement district because service was not properly served on individuals who were not objectors. We held that the objectors could not assert a claim based on defective service to other parties.

Here, Sigma does not assert on appeal that service of process on it was defective. Rather, it asserts that service on Larkin was defective. Because Sigma cannot assert a claim based on improper service to another party, we do not address Sigma's claim.

(b) Ottaco's Failure to Submit
Original Tax Certificate

Sigma next argues that Ottaco failed to submit the original tax certificate to the treasurer as required by § 77-1837. Section 77-1837 provided in part that if real property has not been redeemed, "the county treasurer, on request, on production of the certificate of purchase, and upon compliance with the provisions of sections 77-1801 to 77-1837, shall execute and deliver to the purchaser . . . a deed of conveyance for the real estate described in such certificate." As early as 1884, this court stated that the presentation of the tax certificate is a condition precedent to the execution of the tax deed and unless a tax certificate is presented to the county treasurer, the treasurer has

¹⁸ *In re Petition of SID No. 1*, 270 Neb. 856, 861, 708 N.W.2d 809, 815 (2006).

no authority to execute a tax deed.¹⁹ “In other words, the law makes the return of the certificate the evidence upon which the treasurer has authority to act.”²⁰

In this case, Ottaco did not return the original tax certificate to the treasurer because the original tax certificate was already in the treasurer’s possession. Instead, Ottaco presented the treasurer with a copy of the tax certificate. As indicated by this court in *Thompson v. Merriam*,²¹ the presented tax certificate is the evidence upon which the treasurer has authority to issue a tax deed. Where the original tax certificate is in the possession of the treasurer, we conclude that the holder of the certificate is not obligated to undertake the formalistic procedure of requesting the return of the original tax certificate only to “present” the tax certificate back to the treasurer.

(c) Tax Deed’s Failure to Identify Original Purchaser

Neb. Rev. Stat. § 77-1839 (Reissue 2003) provides that the conveyance by a tax deed shall be substantially in the form set forth in that statute. Among other things, the form in § 77-1839 identifies to whom the property was sold at the tax sale.

Sigma asserts that Ottaco’s deed incorrectly identifies Ottaco as the purchaser of the property in question on March 3, 1997. In fact, Equifunding was the purchaser of the property on that date and later assigned its interest in the property to Ottaco.

[9-11] In the construction of a deed, courts will give effect to the intent of the parties.²² A mistake, even though a material one, does not render a deed void, but at most, voidable in equity.²³ Where it appears that a mistake has been made, a court will order the cancellation or the reformation of a deed.²⁴

¹⁹ See *Thompson v. Merriam*, 15 Neb. 498, 20 N.W. 24 (1884).

²⁰ *Id.* at 499, 20 N.W. at 25.

²¹ *Id.*

²² *Anson v. Murphy*, 149 Neb. 716, 32 N.W.2d 271 (1948).

²³ 23 Am. Jur. 2d *Deeds* § 184 (2002). See, also, *Woodring v. Swieter*, 180 N.C. App. 362, 637 S.E.2d 269 (2006).

²⁴ 23 Am. Jur. 2d, *supra* note 23.

The cancellation of a deed is permissible when there exists a mutual mistake between the parties to the conveyance. In order to be entitled to a decree rescinding a deed on the grounds of mutual mistake, it must appear that the mistake was such that, if the true facts had been known, the deed would not have been executed Reformation is the appropriate remedy when a deed is not drafted in conformity with the parties' intentions and is marred by mistake which becomes mutual when the deed is executed and accepted by the parties.²⁵

Ottaco's tax deed misidentifies Ottaco as the purchaser of the property at the March 3, 1997, sale. There is no indication in the record that either Ottaco or the treasurer was unaware that Equifunding was the original purchaser at the tax sale or that the tax deed would not have been executed had Equifunding been properly identified. At most, the misidentification of Ottaco as the purchaser at the tax sale necessitates reformation of the tax deed. We, therefore, conclude that notwithstanding the tax deed's misidentification of Ottaco as the purchaser of the property at the tax sale, the tax deed is made in compliance with § 77-1839.

(d) Lack of Legible Treasurer's Seal on Tax Deed

Finally, Sigma argues that Ottaco's tax deed lacks a legible treasurer's seal as required by Neb. Rev. Stat. § 77-1857 (Reissue 2003). Section 77-1857 provides that the county treasurer shall affix an impression or representation of its official seal to every tax sale certificate and tax deed made by him or her. This official seal is called for in the form set forth in § 77-1839.

[12] Sections 77-1839 and 77-1857 merely require that the treasurer's seal be affixed. They do not require that the treasurer's seal be entirely legible. Because it is not within the province of this court to read a meaning into the statute which is not there,²⁶ we conclude that Ottaco's tax deed is substantially in compliance with § 77-1839.

²⁵ *Id.* at 197-98.

²⁶ See *KN Energy v. Village of Ansley*, 266 Neb. 164, 663 N.W.2d 119 (2003).

Because we have determined that Sigma's contentions are without merit, we find that Ottaco's tax deed was made substantially in the manner provided by Neb. Rev. Stat. §§ 77-1831 to 77-1842 (Reissue 1996). We now turn to the question of whether Sigma may defeat Ottaco's title under § 77-1843.

Section 77-1843 provides that in order to defeat title under a tax deed,

the person claiming the title adverse to the title conveyed by such deed shall be required to prove, in order to defeat the title, either (1) that the real property was not subject to taxation for the years or year named in the deed; (2) that the taxes had been paid before the sale; (3) that the property has been redeemed from the sale . . . and that such redemption was had or made for the use and benefit of persons having the right of redemption under the laws of this state; or (4) that there had been an entire omission to list or assess the property, or to levy the taxes, or to sell the property.

Sigma does not argue, nor has it presented any evidence, that any of the four conditions in § 77-1843 have been satisfied. Because Sigma has not satisfied the requirements of § 77-1843, we conclude that Sigma cannot defeat Ottaco's title.

3. REMAINING ASSIGNMENTS OF ERROR

In its three remaining assignments of error, Sigma argues that the district court erred in (1) failing to determine that tax deeds only convey title and do not extinguish lien interests, (2) failing to determine Sigma's interest was derivative of Industry Mortgage and was not extinguished by the treasurer's tax deed issued in Ottaco's favor, and (3) failing to determine that a purchaser at a trust deed liquidation of a mortgage, which occurs within the last 3 months during which a tax sale certificate holder could request a treasurer's tax deed, retains the lien interest of the mortgage. The bifurcated trial was held only on the issue of the validity of Ottaco's tax deed. Accordingly, these claims were not passed upon by the district court. We, therefore, do not reach these assignments of error.

VI. CONCLUSION

For the reasons discussed above, we affirm the decision of the district court.

AFFIRMED.

WILLIAM JAPP AND MARI JAPP, HUSBAND AND WIFE, ET AL.,
APPELLANTS, v. PAPIO-MISSOURI RIVER NATURAL RESOURCES
DISTRICT, A POLITICAL SUBDIVISION OF NEBRASKA, APPELLEE,
AND SHADOW LAKE DEVELOPMENT, LLC, A NEBRASKA
LIMITED LIABILITY COMPANY, INTERVENOR-APPELLEE.

733 N.W.2d 551

June 22, 2007. No. S-06-045.

1. **Judgments: Statutes: Appeal and Error.** Concerning questions of law and statutory interpretation, an appellate court resolves the issues independently of the lower court's conclusion.
2. **Natural Resources Districts: Political Subdivisions: Legislature.** A natural resources district, as a political subdivision, has only that power delegated to it by the Legislature, and courts strictly construe a grant of power to a political subdivision.
3. **Natural Resources Districts.** A natural resources district possesses and can exercise the following powers and no others: (1) those granted in express words; (2) those implied in or incident to the powers expressly granted; and (3) those essential to the declared objects and purposes of the district, not simply convenient, but indispensable.
4. **Statutes: Appeal and Error.** In construing a statute, a court will give it its plain and ordinary meaning. And a court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
5. **Natural Resources Districts.** Under Neb. Rev. Stat. § 2-3235(1) (Cum. Supp. 2006), a natural resources district has express authority to cooperate, enter agreements, and furnish aid to private developers and landowners to carry out projects that benefit the district.
6. **Rules of Evidence: Appeal and Error.** In proceedings where the Nebraska Evidence Rules apply, the rules control the admissibility of evidence; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
7. ____: _____. When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.

8. ____: ____: Because the exercise of judicial discretion is implicit in determinations of relevancy, an appellate court will not reverse the trial court's decision absent an abuse of discretion.
9. **Judges: Words and Phrases.** An abuse of discretion occurs when the trial judge's reasons or rulings are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
10. **Rules of Evidence: Words and Phrases.** Under Neb. Rev. Stat. § 27-401 (Reissue 1995), relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
11. **Evidence.** Evidence which is not relevant is inadmissible.
12. **Constitutional Law: States: Debtors and Creditors: Guaranty.** Neb. Const. art. XIII, § 3, prevents the state or any of its governmental subdivisions from extending the state's credit to private enterprise; it is designed to prohibit the state from acting as a surety or guarantor of the debt of another.
13. **Constitutional Law: Proof.** To establish a violation of Neb. Const. art. XIII, § 3, a plaintiff must prove three elements: (1) The credit of the state (2) was given or loaned (3) in aid of any individual, association, or corporation.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

LeRoy W. Sievers, Kevin R. McManaman, and Jocelyn Walsh Golden, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellants.

Paul F. Peters, P.C., L.L.O., of Taylor, Peters & Drews, for appellee.

David L. Welch, of Pansing, Hogan, Ernst & Bachman, L.L.P., for intervenor-appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, McCORMACK, and MILLER-LERMAN, JJ., and CARLSON, Judge.

CONNOLLY, J.

The appellants are resident landowners and taxpayers within the Papio-Missouri River Natural Resources District (District). They object to a development agreement in which the District agreed to provide funds to construct two dams in a private commercial and residential development in Papillion, Sarpy County, Nebraska. The district court denied the appellants' complaint for a declaratory judgment and an injunction. The appellants argue the agreement calls for illegal expenditures that benefit

private developers. This appeal presents two questions: whether the District (1) had statutory authority to enter the agreement and (2) violated article XIII, § 3, of the Nebraska Constitution, which prohibits the state from giving or lending its credit to private parties. We affirm because (1) Neb. Rev. Stat. § 2-3235(1) (Cum. Supp. 2006) gives the District authority to enter contracts with private developers to fulfill its statutory purposes and (2) the District would not give or loan the state's credit under the agreement.

BACKGROUND

THE DEVELOPMENTS

Shadow Lake Development, LLC (SLD), a Nebraska limited liability company, develops real estate. SLD owns land located between 72d and 84th Streets north of Capehart Road in Sarpy County, which is the site of a residential development known as Shadow Lake. SLD formed sanitary and improvement district No. 264 of Sarpy County to construct, operate, and maintain public infrastructure in its development.

Another private developer, 370 LLC, owns the land north of Shadow Lake and south of Nebraska State Highway 370 and has plans for a commercial development for that site known as Shadow Lake Towne Center (Towne Center). Sanitary and improvement district No. 267 of Sarpy County was formed by 370 LLC to construct, operate, and maintain public infrastructure in its development. Midlands Creek, a tributary of the west branch of Papillion Creek, flows through Shadow Lake and Towne Center.

WATER PROJECTS AND THE COOPERATIVE AGREEMENT

The District and the U.S. Department of Agriculture's Natural Resources Conservation Service, a federal agency involved in water resource projects, had previously planned a grade stabilization structure at the proposed developments. The District also wanted to incorporate flood control into the plan at that location. Marlin J. Petermann, the assistant general manager for the District, testified that increased development in the area had created a greater need for flood control. In addition,

the city of Papillion has required the construction of dams and reservoirs as flood control and grade stabilization structures in the developments.

After negotiations, the District, the city of Papillion, the developers, and the sanitary and improvement districts drafted a "Cooperative Agreement" (Agreement) providing for the construction of the dams and reservoirs. The proposed Agreement requires that SLD and sanitary and improvement district No. 264 build two dams: the Midlands Lake dam at Shadow Lake, and the Shadow Lake dam, which would span both Shadow Lake and Towne Center. The reservoirs created by these dams would be primarily in Shadow Lake.

The Agreement would require the District to contribute to the costs of design, construction, project administration, permits, and project land rights. The District agreed to pay 75 percent of the cost of the Shadow Lake dam and 100 percent of the engineering and construction costs of the Midlands Lake dam, up to a maximum of \$3,357,278. The Agreement also required the District to permanently operate and maintain the dams; SLD, 370 LLC, and the sanitary improvement districts would contribute the land rights required for the project and the remaining costs.

Petermann testified that the Shadow Lake project is a multi-purpose project and that its purposes include "[f]lood control, water quality, recreation, [and] sediment/erosion control" The appellants' expert, an engineer employed by an environmental management consulting firm, opined that the proposed dams could help control erosion and would provide some flood control for the area. The Agreement does not include requirements for recreational facilities, but Petermann stated that the plan includes about 60 acres around the reservoirs that would be accessible to the public. The city of Papillion would determine the specific details about access and facilities.

THE APPELLANTS OBJECT TO THE AGREEMENT

In May 2005, the appellants learned that the District planned to enter the Agreement to construct the Shadow Lake and Midlands Lake dams. They wrote letters to the District's board of directors (Board) objecting that it would be an illegal expenditure of taxpayer money. They also attended Board meetings to

voice their complaints. Nevertheless, on June 9, the Board voted to authorize the District's general manager to execute the Agreement. On June 10, the appellants sued the District, seeking an injunction and a declaration that the Agreement violates Nebraska's statutes and constitution. They contended that Nebraska law does not permit the District to enter development agreements with private developers.

ASSIGNMENTS OF ERROR

The appellants assign, restated and consolidated, that the district court erred in (1) finding that the District had statutory authority to enter the development agreement, (2) failing to admit a proposed legislative bill (L.B. 552) into evidence, and (3) finding that the District had constitutional authority to enter the development agreement.

STANDARD OF REVIEW

[1] Concerning questions of law and statutory interpretation, we resolve the issues independently of the lower court's conclusion.¹

ANALYSIS

THE DISTRICT HAS STATUTORY AUTHORITY TO ENTER THE AGREEMENT

The appellants contend that the District lacks statutory authority to enter development agreements with private developers. They argue that § 2-3235 does not allow the District to contract with private developers, either expressly or impliedly.

Regarding the power of a natural resources district (NRD) to contract with outside parties, § 2-3235(1) provides:

Each district shall have the power and authority to cooperate with or to enter into agreements with and, within the limits of appropriations available, to furnish financial or other aid to any cooperator, any agency, governmental or otherwise, or any owner or occupier of lands within the district for the carrying out of projects for benefit of the

¹ See *Gilbert & Martha Hitchcock Found. v. Kountze*, 272 Neb. 251, 720 N.W.2d 31 (2006).

district as authorized by law, subject to such conditions as the board may deem necessary.

[2,3] An NRD, as a political subdivision, has only that power delegated to it by the Legislature,² and we strictly construe a grant of power to a political subdivision.³ An NRD possesses and can exercise the following powers and no others: (1) those granted in express words; (2) those implied in or incident to the powers expressly granted; and (3) those essential to the declared objects and purposes of the district, not simply convenient, but indispensable.⁴

Neb. Rev. Stat. § 2-3229 (Reissue 1997) lists the purposes of NRD's. Under this section, NRD's may develop and execute plans, facilities, works, and programs relating to

(1) erosion prevention and control, (2) prevention of damages from flood water and sediment, (3) flood prevention and control, (4) soil conservation, (5) water supply for any beneficial uses, (6) development, management, utilization, and conservation of ground water and surface water, (7) pollution control, (8) solid waste disposal and sanitary drainage, (9) drainage improvement and channel rectification, (10) development and management of fish and wildlife habitat, (11) development and management of recreational and park facilities, and (12) forestry and range management.

The record shows that the Shadow Lake and Midlands Lake projects will achieve several of these purposes. Petermann testified that these projects would provide flood control, sediment and erosion control, recreation, and water quality benefits. The appellants acknowledge that regarding these purposes, the

² *Metropolitan Utilities Dist. v. Twin Platte NRD*, 250 Neb. 442, 550 N.W.2d 907 (1996); *Wagoner v. Central Platte Nat. Resources Dist.*, 247 Neb. 233, 526 N.W.2d 422 (1995); *In re Applications A-15145, A-15146, A-15147, and A-15148*, 230 Neb. 580, 433 N.W.2d 161 (1988).

³ *Metropolitan Utilities Dist. v. Twin Platte NRD*, *supra* note 2; *Wagoner v. Central Platte Nat. Resources Dist.*, *supra* note 2; *In re Applications A-15145, A-15146, A-15147, and A-15148*, *supra* note 2.

⁴ See, *Metropolitan Utilities Dist. v. Twin Platte NRD*, *supra* note 2; *Wagoner v. Central Platte Nat. Resources Dist.*, *supra* note 2.

projects are within the District's judgment. Thus, we do not pass on the wisdom of the projects.⁵

But the appellants contend that although the projects fulfill the District's statutory purposes, it could not contract with private developers to accomplish these purposes. They argue that § 2-3235(1) does not include "developers" among the parties with which the District may contract and provide financial aid. And they urge us to consider the historical context in construing this statute, citing *Allen v. Tobin*.⁶ Historically, NRD's assisted farmers and rural landowners under § 2-3235(1).

[4,5] In construing a statute, we will give it its plain and ordinary meaning. And we will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.⁷ Here, we need not look to history for the meaning of § 2-3235(1) because its language is clear. It applies to any "owner or occupier of lands within the district." An "owner" is "[o]ne who has the right to possess, use, and convey something"⁸ However transient their ownership may be, SLD and 370 LLC are the owners of the project lands. Thus, under § 2-3235(1), the District has express authority to cooperate, enter agreements, and furnish aid to them to carry out projects that benefit the District.

Principled adherence to statutory interpretation need not prevent a court from questioning the policy and breadth of a statute. Reasonable minds may disagree whether it is good policy for NRD's to contract with private developers. That decision, however, is for the Legislature.

THE DISTRICT COURT PROPERLY EXCLUDED
EVIDENCE OF L.B. 552

The appellants offered into evidence L.B. 552, which the District introduced to the Nebraska Legislature in 2005. L.B. 552 would have allowed an NRD encompassing a metropolitan

⁵ See *Winter v. Lower Elkhorn Nat. Resources Dist.*, 206 Neb. 70, 291 N.W.2d 245 (1980).

⁶ *Allen v. Tobin*, 155 Neb. 212, 51 N.W.2d 338 (1952).

⁷ *Turco v. Schuning*, 271 Neb. 770, 716 N.W.2d 415 (2006).

⁸ Black's Law Dictionary 1137 (8th ed. 2004).

class city to “enter into cost-sharing agreements with land-owners, *developers*, and other cooperators in connection with . . . dam and reservoir projects.” (Emphasis supplied.) The Legislature did not pass the bill. The district court excluded the evidence as irrelevant. The appellants argue that L.B. 552 was relevant as an admission by the District that it lacks authority to enter into the Agreement with the private developers. Appellee SLD argues, however, “The only fact LB 552 may have made more probable was that [the District] was concerned that a court may not interpret the Nebraska statutes as expressly granting [the District] authority to enter into agreements” with developers.⁹

[6-9] In proceedings where the Nebraska Evidence Rules apply, the rules control the admissibility of evidence; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.¹⁰ When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, we review the admissibility of evidence for an abuse of discretion.¹¹ Because the exercise of judicial discretion is implicit in determinations of relevancy, we will not reverse the trial court’s decision absent an abuse of discretion.¹² An abuse of discretion occurs when the trial judge’s reasons or rulings are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.¹³

[10,11] Under Nebraska law, 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.¹⁴ Evidence which is not relevant is inadmissible.¹⁵

⁹ Brief for appellee SLD at 18.

¹⁰ See *Curran v. Buser*, 271 Neb. 332, 711 N.W.2d 562 (2006).

¹¹ See *id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Neb. Rev. Stat. § 27-401 (Reissue 1995); *Curran v. Buser*, *supra* note 10.

¹⁵ See Neb. Rev. Stat. § 27-402 (Reissue 1995).

Whether the District believed, or even questioned, that it lacked authority to enter agreements with private developers is not relevant to whether it had such authority under current Nebraska law. The district court did not abuse its discretion in excluding L.B. 552.

THE DISTRICT WOULD NOT VIOLATE THE NEBRASKA
CONSTITUTION BY ENTERING THE AGREEMENT

The appellants contend that the proposed Agreement between the District and the private developers violates article XIII, § 3, of the Nebraska Constitution. With certain exceptions not applicable here, article XIII, § 3, provides that “[t]he credit of the state shall never be given or loaned in aid of any individual, association, or corporation” The appellants argue that the Agreement requires the District to extend its credit for the sole benefit of a private entity.

[12] Article XIII, § 3, of the Nebraska Constitution prevents the state or any of its governmental subdivisions from extending the state’s credit to private enterprise.¹⁶ It is designed to prohibit the state from acting as a surety or guarantor of the debt of another.¹⁷

[13] In *Haman v. Marsh*,¹⁸ we addressed the constitutionality of legislation that would have provided state tax money to depositors who suffered losses from failed industrial loan and investment companies. The Legislature passed 1990 Neb. Laws, L.B. 272A, to fulfill the guaranties made to depositors by a private corporation. We stated that a plaintiff must prove three elements: (1) The credit of the state (2) was given or loaned (3) in aid of any individual, association, or corporation.¹⁹ Regarding the first element, “credit of the state,” we stated,

¹⁶ *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991); *Lenstrom v. Thone*, 209 Neb. 783, 311 N.W.2d 884 (1981); *United Community Services v. The Omaha Nat. Bank*, 162 Neb. 786, 77 N.W.2d 576 (1956). See, also, *State ex rel. Beck v. City of York*, 164 Neb. 223, 82 N.W.2d 269 (1957).

¹⁷ *Callan v. Balka*, 248 Neb. 469, 536 N.W.2d 47 (1995); *Haman v. Marsh*, *supra* note 16.

¹⁸ *Haman v. Marsh*, *supra* note 16.

¹⁹ *Id.* See, also, *Callan v. Balka*, *supra* note 17.

The state's credit is inherently the power to levy taxes and involves the obligation of its general fund. . . . There is a distinction between the loaning of state funds and the loaning of the state's credit. When a state loans funds it is in the position of creditor, whereas the state is in the position of debtor upon a loan of credit.²⁰

We decided that there was "no question" the legislation in *Haman* unconstitutionally involved the state's credit.²¹ L.B. 272A would have obligated the state's general fund to pay off the guaranties of a private corporation.

We have also found an extension of state credit when the state has agreed to obtain property for a private project financed by issuing revenue bonds in its name. In *State ex rel. Beck v. City of York*,²² we explained that issuance of bonds by the state or a political subdivision gives the bonds greater marketability and value and acts as an inducement to gain financing. Thus, if the bonds are used for a private project, the city has loaned its credit for the benefit of the private party.

In summary, article XIII, § 3, seeks to prevent the state from loaning its credit to an individual, association, or corporation with the concomitant possibility that the state might ultimately pay that entity's obligations. In addressing a similar constitutional provision, the New York Court of Appeals in *Wein v. Levitt*²³ concisely summarized that "[s]ubsidy by loan of credit was the evil sought to be eradicated" by such a prohibition.

Here, the District did not lend or give state credit by agreeing to pay for the Shadow Lake and Midlands Lake dams. The District did not use its credit to secure capital for a private project or agree to act as a guarantor for a private company. Instead, the District agreed to provide funds for a project that

²⁰ *Haman v. Marsh*, *supra* note 16, 237 Neb. at 719-20, 467 N.W.2d at 850.

²¹ *Id.*, 237 Neb. at 720, 467 N.W.2d at 850.

²² *State ex rel. Beck v. City of York*, *supra* note 16. Compare *State ex rel. Douglas v. Nebraska Mortgage Finance Fund*, 204 Neb. 445, 283 N.W.2d 12 (1979).

²³ See *Wein v Levitt*, 42 N.Y.2d 300, 306, 366 N.E.2d 847, 850, 397 N.Y.S.2d 758, 762 (1977).

would carry out its statutory purposes. The appellants contend that the Agreement would cause the District to become a debtor of sanitary and improvement district No. 264 because under the Agreement, the District is obligated to reimburse it for project costs. But this arrangement did not involve the use of the state's credit. The state merely agreed to *expend funds*; it did not pledge its credit as an inducement to gain benefit or provide financial backing for the private developers.²⁴

Because the appellants have failed to meet the first prong of the *Haman* test, further analysis is unnecessary.²⁵ The expenditure did not violate article XIII, § 3, of the Nebraska Constitution.

CONCLUSION

Section 2-3235(1) expressly permitted the District to enter into the Agreement with private developers to construct the Shadow Lake and Midlands Lake dams. And the proposed L.B. 552 was not relevant evidence to show that the District lacked authority to enter the Agreement. Further, the District did not extend its credit to the private developers by agreeing to pay for the construction of the dams. We affirm.

AFFIRMED.

STEPHAN, J., not participating.

²⁴ See *State ex rel. Beck v. City of York*, *supra* note 16.

²⁵ See *Callan v. Balka*, *supra* note 17.

WILLIAM STEVENSON, APPELLANT AND CROSS-APPELLEE, v.

MICHAEL WRIGHT, APPELLEE AND CROSS-APPELLANT.

733 N.W.2d 559

Filed June 22, 2007. No. S-06-320.

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 judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

3. **Convictions: Evidence: Proof.** Generally, evidence of a final judgment, entered after a trial or upon a plea of guilty, adjudging a person guilty of a crime punishable by death or imprisonment in excess of 1 year, is admissible to prove any fact essential to sustain the judgment.
4. **Convictions: Motor Vehicles: Evidence: Damages.** Evidence of conviction for a traffic infraction is not admissible in a civil suit for damages arising out of the same traffic infraction.
5. **Convictions: Rules of Evidence: Collateral Estoppel: Res Judicata.** The rules of evidence with respect to the admissibility of a conviction as evidence for the trier of fact do not determine the collateral estoppel or res judicata effect to which such a judgment may be entitled.
6. **Judgments: Collateral Estoppel: Words and Phrases.** Collateral estoppel means that when an issue of ultimate fact has been determined by a valid and final judgment, that issue cannot again be litigated between the same parties or their privies in any future lawsuit.
7. **Judgments: Collateral Estoppel.** Collateral estoppel may be applied where an identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the doctrine is to be applied is a party or is in privity with a party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior litigation.
8. **Criminal Law: Collateral Estoppel.** Prior criminal proceedings can work an estoppel in a subsequent civil proceeding, so long as the question involved was distinctly put in issue and directly determined in the criminal action.
9. **Collateral Estoppel: Res Judicata: Proof.** For application of the doctrines of collateral estoppel or res judicata, the party relying on either of those principles in a present proceeding has the burden to show that a particular issue was involved and necessarily determined in a prior proceeding.
10. **Pleadings: Notice.** The key to determining the sufficiency of pleading an affirmative defense is whether it gives the plaintiff fair notice of the defense.

Appeal from the District Court for Lancaster County, JODI NELSON, Judge, on appeal thereto from the County Court for Lancaster County, JAMES L. FOSTER, Judge. Judgment of District Court affirmed in part and in part reversed, and cause remanded with directions.

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

Cathy S. Trent and Melanie J. Whittamore-Mantzios, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellee.

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

GERRARD, J.

William Stevenson and Michael Wright were involved in a traffic accident in Lincoln, Nebraska, and Wright was found guilty of operating his vehicle in a careless, reckless, or negligent manner, in violation of Lincoln Mun. Code § 10.14.290 (1990). Stevenson then brought a civil action against Wright for the damage to Stevenson's vehicle. The issues presented in this appeal are whether Wright's conviction for the traffic infraction of operating his vehicle in a careless, reckless, or negligent manner (1) is admissible against him in the civil action as evidence of negligence or (2) collaterally estops him from denying negligence or alleging Stevenson's negligence.

BACKGROUND

After the accident, Wright was ticketed for operating his vehicle in a careless, reckless, or negligent manner. Wright pleaded not guilty, and the matter went to trial in the county court.

At trial, Stevenson testified that on November 29, 2003, he was driving his Chevrolet Suburban west on Vine Street toward his residence, which was on the north side of Vine Street between East Avon and Colony Lanes. Vine Street, at the time of the accident, had three lanes at that location: one traffic lane in each direction and a middle turn lane. Stevenson testified that he signaled a right turn and was in the right lane, turning into his driveway, when his vehicle was struck on the right side by another vehicle that approached from behind. Stevenson's son, who was waiting in a parking lot across the street for his father to pull into the driveway, testified that he witnessed the accident, and he corroborated his father's testimony.

Wright, the driver of the other vehicle, testified that he was driving west on Vine Street behind Stevenson when Stevenson's vehicle went into the middle turn lane. Wright said he did not see a turn signal. Wright testified that Stevenson made a right turn from the middle lane and that Wright was unable to stop, resulting in a collision in the right lane. Essentially, Wright's theory was that in order for Stevenson's Chevrolet Suburban to make a 90-degree right turn into his driveway, Stevenson had been required to take his vehicle into the center lane and make a wide right turn, causing the collision.

The county court found Wright guilty of operating his vehicle in a careless, reckless, or negligent manner in violation of § 10.14.290 and fined him \$60 plus court costs. Later, Stevenson brought a civil action against Wright in the county court for the damages allegedly caused to Stevenson's vehicle by Wright's negligence. Wright denied that he was negligent, alleged as an affirmative defense that Stevenson's own negligence was the cause of the accident, and specifically alleged the ways in which he claimed Stevenson was negligent. Stevenson filed a motion for summary judgment based on the traffic infraction conviction.

The county court found that the issue of Wright's negligence as the proximate cause of Stevenson's damages was finally resolved in the traffic infraction proceeding. The county court concluded that Wright was collaterally estopped from asserting that Stevenson's negligence was the cause of the collision. Because Wright had admitted that the amount of Stevenson's damages was \$2,708.70, the county court entered summary judgment in that amount, plus court costs and postjudgment interest.

On appeal, the district court partly reversed the judgment of the county court. The district court found that although evidence of the traffic infraction conviction was admissible, the issues in that proceeding were not identical to those in the civil action, because the issues of contributory negligence and allocation of liability were not presented in the traffic infraction proceeding. The district court also noted that although Stevenson testified in the traffic infraction proceeding, he was not a party to that proceeding. The district court concluded that collateral estoppel was inapplicable and affirmed the county court's order with respect to the admissibility of the conviction, but reversed the order with respect to the summary judgment.

ASSIGNMENTS OF ERROR

Stevenson assigns that the district court erred in (1) concluding that collateral estoppel was not applicable because Stevenson was not a party to the traffic court prosecution, (2) concluding that contributory negligence and comparison of negligence were issues to be resolved in the county court civil action, and (3) failing to conclude that the factual findings of the traffic court necessarily result in a finding that Stevenson

was not negligent or a cause of the collision with Wright. On cross-appeal, Wright contends that the district court erred in affirming the county court's decision to receive into evidence, for purposes of the summary judgment motion, evidence of Wright's traffic infraction conviction.

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.¹ In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.²

ANALYSIS

ADMISSIBILITY OF CONVICTION FOR TRAFFIC INFRACTION AS EVIDENCE OF NEGLIGENCE

We begin with the issue presented by Wright's cross-appeal—the admissibility of Wright's conviction as evidence of negligence. Wright relies on Neb. Rev. Stat. § 60-693 (Reissue 2004), which provides that “[n]o evidence of the conviction of any person for any violation of any provision of the Nebraska Rules of the Road³ shall be admissible in any court in any civil action.” Had Wright been convicted of violating a Nebraska state traffic regulation, § 60-693 would be dispositive of this issue. But Wright was convicted of violating a Lincoln city ordinance. Strictly speaking, § 60-693 does not apply to a conviction for violating a municipal ordinance. But the rule stated in § 60-693 is representative of the general rule followed by the overwhelming majority of jurisdictions to have considered the admissibility of a traffic conviction in a subsequent civil

¹ *Malolepszy v. State*, ante p. 313, 729 N.W.2d 669 (2007).

² *Id.*

³ See Neb. Rev. Stat. ch. 60, art. 6 (Reissue 2004 & Cum. Supp. 2006).

proceeding. The general rule is that traffic convictions are not admissible in later civil proceedings as evidence of the facts that serve as a basis for the conviction.⁴ As explained by the Illinois Supreme Court:

Ultimately, the danger of unfair prejudice from a traffic conviction outweighs its probative value. . . . A conviction conveys a deceptive sense of certainty to the jury in a civil case that is difficult to challenge. “[J]uries may have difficulty grasping the distinction between a prior judgment offered as evidence and one that is conclusive, giving the judgment binding effect even if this is contrary to substantive law.” . . . The jury in a civil action may substitute the opinion of the police officer who issued the ticket or the opinion of the traffic judge for its own. . . . Traffic court may therefore become “the cornerstone of a significant civil action filed after the conclusion of the criminal proceedings.”⁵

[3] Generally, evidence of a final judgment, entered after a trial or upon a plea of guilty, adjudging a person guilty of

⁴ See, *Hadley v. Maxwell*, 144 Wash. 2d 306, 27 P.3d 600 (2001); *Johnson v. Leuthongchak*, 772 A.2d 249 (D.C. 2001); *Thurmond v. Monroe*, 159 Ill. 2d 240, 636 N.E.2d 544, 201 Ill. Dec. 112 (1994); *Williams v. Brown*, 860 S.W.2d 854 (Tenn. 1993); *O’Neal v. Joy Dependent School Dist.*, 820 P.2d 1334 (Okla. 1991); *Briggeman v. Albert*, 322 Md. 133, 586 A.2d 15 (1991); *Eaton v. Eaton*, 119 N.J. 628, 575 A.2d 858 (1990); *Ruthardt v. Tennant*, 252 La. 1041, 215 So. 2d 805 (1968); *Kirkendall v. Korseberg*, 247 Or. 75, 427 P.2d 418 (1967); *Loughner, Appellant v. Schmelzer*, 421 Pa. 283, 218 A.2d 768 (1966); *Beanblossom v. Thomas*, 266 N.C. 181, 146 S.E.2d 36 (1966); *Garver v. Utyesonich*, 235 Ark. 33, 356 S.W.2d 744 (1962); *Anderson v. Saunders*, 16 Wis. 2d 55, 113 N.W.2d 831 (1962); *Friesen v. Schmelzel*, 78 Wyo. 1, 318 P.2d 368 (1957); *Utah Farm Bureau Ins. Co. v. Chugg*, 6 Utah 2d 399, 315 P.2d 277 (1957); *Ripple v. Brack*, 132 Colo. 125, 286 P.2d 625 (1955); *Stevens v. Duke*, 42 So. 2d 361 (Fla. 1949); *Warren v. Marsh*, 215 Minn. 615, 11 N.W.2d 528 (1943); *Myers v. Barnard*, 180 Ga. App. 192, 348 S.E.2d 733 (1986); *Lucas v. Carson*, 38 Mich. App. 552, 196 N.W.2d 819 (1972); *Hannah v. Steel Co.*, 120 Ohio App. 44, 201 N.E.2d 63 (1963). But see, *Durham v. Farabee*, 481 So. 2d 885 (Ala. 1985); *Asato v. Furtado*, 52 Haw. 284, 474 P.2d 288 (1970). See, generally, Annot., 73 A.L.R.4th 691 (1989 & Supp. 2006).

⁵ *Thurmond*, *supra* note 4, 159 Ill. 2d at 247, 636 N.E.2d at 548, 201 Ill. Dec. at 116 (citations omitted).

a crime punishable by death or imprisonment in excess of 1 year, is admissible to prove any fact essential to sustain the judgment.⁶ But traffic infractions, including violation of the municipal ordinance under which Wright was convicted, are not punishable by imprisonment in excess of 1 year.⁷ And this rule is based on the valid distinction between a conviction for a more serious offense and for a relatively minor matter such as a traffic infraction.⁸ “Especially in traffic violations, expediency and convenience, rather than guilt, often control the defendant’s ‘trial technique.’”⁹

Stevenson points out, correctly, that unlike a conviction based on a plea or payment of a fine, Wright’s conviction was based on a trial in the county court. But it is unrealistic and impractical to examine a prior conviction to determine whether the defendant vigorously defended himself, and to do so would amount to penalizing individuals who exercised their right to defend against the charges against them. Wright should not be penalized for having an attorney to defend him.¹⁰ And we note that this case does not involve a plea of guilty and, thus, does not implicate the use, in a subsequent action, of a plea of guilty entered by the defendant in a criminal action as an admission that the defendant committed the acts charged.¹¹

Fundamentally, there is no principled reason for us to distinguish a traffic infraction conviction under state law from one under a municipal ordinance. While municipal ordinances regulating traffic are not technically part of the Nebraska Rules of the Road, such ordinances exist only because they are *authorized*

⁶ See Neb. Evid. R. 803(21), Neb. Rev. Stat. § 27-803(21) (Reissue 1995).

⁷ See, § 60-689; Lincoln Mun. Code §§ 10.06.160 and 10.14.300 (1990).

⁸ See Fed. R. Evid. 803 advisory committee note.

⁹ *Loughner, Appellant, supra* note 4, 421 Pa. at 285, 218 A.2d at 769. See, also, *Ruthardt, supra* note 4.

¹⁰ See *Thurmond, supra* note 4.

¹¹ See, *Schaefer v. McCreary*, 216 Neb. 739, 345 N.W.2d 821 (1984); *Remmenga v. Selk*, 150 Neb. 401, 34 N.W.2d 757 (1948); *Piechota v. Rapp*, 148 Neb. 442, 27 N.W.2d 682 (1947); *Wisniewski v. Vanek*, 5 Neb. (Unoff.) 512, 99 N.W. 258 (1904).

by those rules.¹² And the admissibility of a conviction should not depend on the charging authority's decision whether to prosecute an alleged offender under state law or a functionally equivalent local ordinance. In this case, Wright was convicted of violating § 10.14.290, which provides:

It shall be unlawful for any person to drive, use, operate, park, cause to be parked, or stop any vehicle (a) in a careless manner, or (b) in a reckless manner, or (c) in a negligent manner, or (d) in such manner as to endanger life, limb, person, or property, or (e) in such a manner as to endanger or interfere with the lawful traffic or use of the streets, or (f) in such a condition as to endanger or interfere with the lawful traffic or use of the streets.

Section 10.14.290 has no precise analog in the Nebraska Rules of the Road, but § 60-6,212 provides that “[a]ny person who drives any motor vehicle in this state carelessly or without due caution . . . shall be guilty of careless driving.” And we have held that “[t]he words ‘carelessly or without due caution’ are synonymous with ‘negligently or without due care’”¹³ Wright could just as easily have been charged with violating state law, and it would make little sense to give greater effect to his conviction under local law for the same conduct.

[4] But more importantly, while § 60-693 “‘may not be literally applicable, [it is] clearly indicative of legislatively approved public policy,’” and this determination is one that we are bound to respect.¹⁴ Based on the policy underlying § 60-693, and the overwhelming weight of authority from other jurisdictions, we hold that evidence of conviction for a traffic infraction¹⁵ is not admissible in a civil suit for damages arising out of the same traffic infraction. The district court erred in concluding that Wright's conviction under § 10.14.290 was admissible against him as evidence of negligence.

¹² See § 60-680(1)(x).

¹³ *State v. Merithew*, 220 Neb. 530, 533, 371 N.W.2d 110, 112 (1985).

¹⁴ See *Munstermann v. Alegent Health*, 271 Neb. 834, 846, 716 N.W.2d 73, 84 (2006).

¹⁵ See § 60-672 (defining “traffic infraction”).

COLLATERAL ESTOPPEL IS INAPPLICABLE
UNDER THESE CIRCUMSTANCES

[5] We turn now to Stevenson's appeal, which presents a similar, but analytically distinct issue—whether operating his vehicle in a careless, reckless, or negligent manner collaterally estops him from denying his liability in the instant case. Although implicating some similar policy concerns, the rules of evidence with respect to the admissibility of a conviction as evidence for the trier of fact do not determine the collateral estoppel or res judicata effect to which such a judgment may be entitled.¹⁶

[6-8] Collateral estoppel means that when an issue of ultimate fact has been determined by a valid and final judgment, that issue cannot again be litigated between the same parties or their privies in any future lawsuit.¹⁷ Collateral estoppel may be applied where an identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the doctrine is to be applied is a party or is in privity with a party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior litigation.¹⁸ Prior criminal proceedings can work an estoppel in a subsequent civil proceeding, so long as the question involved was distinctly put in issue and directly determined in the criminal action.¹⁹

[9] But for application of the doctrines of collateral estoppel or res judicata, the party relying on either of those principles in a present proceeding has the burden to show that a particular issue was involved and necessarily determined in a prior proceeding.²⁰ Here, we agree with the district court that the issues

¹⁶ See *Lichon v American Ins Co*, 435 Mich. 408, 459 N.W.2d 288 (1990). See, also, *Robinson v. Globe Newspaper Co.*, 26 F. Supp. 2d 195 (D. Me. 1998); *Banek v. Thomas*, 733 P.2d 1171 (Colo. 1986); *Pattershall v. Jenness*, 485 A.2d 980 (Me. 1984); *Crowall v. Heritage Mut. Ins. Co.*, 118 Wis. 2d 120, 346 N.W.2d 327 (Wis. App. 1984).

¹⁷ *State v. Gerdes*, 233 Neb. 528, 446 N.W.2d 224 (1989).

¹⁸ *Id.*

¹⁹ See *Fowler v. Nat. Bank of Commerce*, 209 Neb. 861, 312 N.W.2d 269 (1981).

²⁰ See *Gerdes*, *supra* note 17.

presented in the present case were not determined in the traffic infraction proceedings. While the contributory acts of a victim are usually immaterial to the issue of criminal guilt, the contributory negligence of an injured or damaged party in a civil action is vital to the ultimate issue of a defendant's liability.²¹ And the proximate relation of the traffic infraction to the accident is not involved in the criminal proceeding, whereas it is an important issue in the civil case.²²

Stevenson argues that the county court judge, in the traffic infraction proceeding, was required to decide that Stevenson was not negligent or a cause of the collision. Stevenson claims that the court "affirmatively rejected" Wright's "testimony and contention that the sole cause of the accident was . . . Stevenson's conduct."²³ We disagree. In order to convict Wright of the offense with which he was charged, the court was required to conclude only that Wright operated his vehicle in a careless, reckless, or negligent manner.²⁴ The court was not required to consider whether Stevenson was also negligent, nor was the court required to consider whose negligence was the cause (or greater cause) of the accident. The court could well have believed Wright's testimony about the accident, but still concluded that Wright's inability to stop his vehicle before the collision was evidence of negligence. And in point of fact, collateral estoppel is not based on what the trier of fact in the prior proceeding may have believed, but what findings were necessary to the judgment rendered.²⁵

[10] Stevenson also contends that his own negligence, if any, was not at issue in *this* proceeding, because Wright "completely failed to affirmatively set forth the defense of contributory negligence in his answer."²⁶ Again, we disagree. The key to

²¹ *O'Neal*, *supra* note 4. See, *Warren*, *supra* note 4; *Nationwide Ins. Co. v. Isreal*, 116 Ohio App. 3d 671, 688 N.E.2d 1126 (1996).

²² *Warren*, *supra* note 4.

²³ Brief for appellant at 14.

²⁴ See § 10.14.290.

²⁵ See *Gerdes*, *supra* note 17.

²⁶ Brief for appellant at 11.

determining the sufficiency of pleading an affirmative defense is whether it gives the plaintiff fair notice of the defense.²⁷ In this case, Wright's answer denied his own negligence, but alleged as an "affirmative defense" that Stevenson's negligence was the cause of the accident, and specified the ways in which Stevenson was allegedly negligent. That was sufficient to give fair notice to Stevenson that his own negligence was at issue and plead the defense of contributory negligence.²⁸

The district court correctly concluded that on the facts of this case, collateral estoppel was not applicable. We are aware that some jurisdictions have concluded that even where identical issues were decided in a prior criminal proceeding, a conviction for a minor offense is insufficient to support collateral estoppel, because the defendant may lack incentive to vigorously defend, and the conviction may not derive from full and fair litigation.²⁹ We do not find it necessary to decide that question in this case. Stevenson also contends that the district court erred in concluding that collateral estoppel was not applicable because Stevenson was not a party to the traffic infraction proceedings. But, given our disposition of this appeal, we have no need to consider that question.

CONCLUSION

The district court correctly determined that collateral estoppel was inapplicable in this case and correctly reversed the county court's summary judgment. The district court erred, however, in concluding that Wright's traffic infraction conviction was admissible evidence of negligence. The district court's

²⁷ See, Neb. Ct. R. of Pldg. in Civ. Actions 8(a) (rev. 2003); *Wyshak v. City Nat. Bank*, 607 F.2d 824 (9th Cir. 1979); *Weeder v. Central Comm. College*, 269 Neb. 114, 691 N.W.2d 508 (2005).

²⁸ See, e.g., *Fidelity & Deposit Co. of Md. v. Bank of Bladenboro*, 596 F.2d 632 (4th Cir. 1979); *American Motorists Ins. Co. v. Napoli*, 166 F.2d 24 (5th Cir. 1948); *Brown v. Billy Marlar Chevrolet, Inc.*, 381 So. 2d 191 (Ala. 1980). Cf., *Woodfield v. Bowman*, 193 F.3d 354 (5th Cir. 1999); *Weeder*, *supra* note 27.

²⁹ See, *Hadley*, *supra* note 4; *Anderson v. City of Pocatello*, 112 Idaho 176, 731 P.2d 171 (1986).

decision is affirmed in part and in part reversed, and the cause is remanded with directions to remand the case to the county court for further proceedings.

AFFIRMED IN PART, AND IN PART REVERSED
AND REMANDED WITH DIRECTIONS.

MELVIN R. CERNY AND LINDA CERNY, APPELLANTS AND
CROSS-APPELLEES, AND GEOTECHNICAL SERVICES, INC., A
NEBRASKA CORPORATION, APPELLEE, V. TODCO BARRICADE
COMPANY, APPELLEE AND CROSS-APPELLANT.

733 N.W.2d 877

Filed June 29, 2007. No. S-05-877.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **Final Orders: Appeal and Error.** A trial court's decision to certify a final judgment pursuant to Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006) is reviewed for an abuse of discretion.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.
4. ____: _____. An appellate court, on its own motion, may examine and determine whether jurisdiction is lacking as the result of a procedural defect which prevents acquisition of appellate jurisdiction.
5. **Final Orders: Words and Phrases.** The term "final judgment" as used in Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006) is the functional equivalent of a "final order" within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995).
6. **Jurisdiction: Final Orders: Appeal and Error.** A "final order" is a prerequisite to an appellate court's obtaining jurisdiction of an appeal initiated pursuant to Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006).
7. **Actions: Parties: Final Orders: Appeal and Error.** With the enactment of Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006), one may bring an appeal pursuant to such section only when (1) multiple causes of action or multiple parties are present, (2) the court enters a final order within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995) as to one or more but fewer than all of the causes of action or parties, and (3) the trial court expressly directs the entry of such final order and expressly determines that there is no just reason for delay of an immediate appeal.
8. **Final Orders: Appeal and Error.** To be appealable, an order must satisfy the final order requirements of Neb. Rev. Stat. § 25-1902 (Reissue 1995) and, additionally, where implicated, Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006).
9. **Summary Judgment: Final Orders: Appeal and Error.** A denial of a motion for summary judgment is an interlocutory order, not a final order, and therefore not appealable.

10. **Courts: Judgments: Words and Phrases.** In deciding whether to grant Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006) certification, a trial court must address two distinct issues. A trial court must first determine that it is dealing with a “final judgment.” It must be a “judgment” in the sense that it is a decision upon a cognizable claim for relief, and it must be “final” in the sense that it is an ultimate disposition of an individual claim entered in the course of a multiple claims action. Once having found finality, the trial court must go on to determine whether there is any just reason for delay.
11. **Judgments: Parties: Appeal and Error.** Certification of a final judgment must be reserved for the unusual case in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early and separate judgment as to some claims or parties.
12. **Judges: Judgments.** The power Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006) confers upon the trial judge should only be used in the infrequent harsh case as an instrument for the improved administration of justice, based on the likelihood of injustice or hardship to the parties of a delay in entering a final judgment as to part of the case.
13. ____: _____. When a trial court concludes that entry of judgment under Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006) is appropriate, it should ordinarily make specific findings setting forth the reasons for its order.
14. **Courts: Judgments.** A trial court considering certification of a final judgment should weigh factors such as (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the trial court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in setoff against the judgment sought to be made final; and (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.
15. **Courts: Judgments: Appeal and Error.** As a starting point for considering certification of a final judgment, it is appropriate for the trial court to consider whether the claims under review are separable from the others remaining to be adjudicated and whether the nature of the claims already determined was such that no appellate court would ever have to decide the same issues more than once even if there were subsequent appeals.
16. **Claims: Courts: Appeal and Error.** The potential that claims remaining in the trial court could obviate claims in the appellate court is a consideration against immediate appealability.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Order vacated, and appeal dismissed.

James D. Sherrets and Theodore R. Boecker, of Sherrets & Boecker, L.L.C., for appellants and appellee Geotechnical Services, Inc.

Thomas J. Culhane, of Erickson & Sederstrom, P.C., for appellee Todco Barricade Company.

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

GERRARD, J.

Melvin R. Cerny and Linda Cerny appeal from a partial summary judgment order of the district court, which entered judgment against some of their claims, but reserved one claim for trial. The court certified its partial summary judgment as a final judgment pursuant to Neb. Rev. Stat. § 25-1315(1) (Cum. Supp. 2006), but we conclude that the court abused its discretion in doing so. We vacate the court's certification of final judgment and dismiss the appeal.

BACKGROUND

Melvin Cerny was injured in a traffic accident in Omaha, Nebraska, on August 7, 1998. At the time, Interstate 680 was under reconstruction, and Melvin was driving on one of the temporary entrance ramps that had been built to facilitate the project. Melvin slowed his vehicle in order to merge with traffic on Interstate 680 and was struck from behind by a vehicle driven by Curt Coffman. Melvin was seriously injured and suffered permanent disability. Generally summarized, the Cernys claim that the design and implementation of the temporary entrance ramp was a proximate cause of the accident.

The project, including the temporary ramp, was planned by the State Department of Roads (the State). Hawkins Construction Company (Hawkins) was the State's general contractor with respect to the temporary entrance ramp. Todco Barricade Company (Todco), the defendant in this action, was a subcontractor hired by Hawkins and approved by the State to perform work on the temporary entrance ramp.

In other proceedings, Melvin and his wife, Linda (hereinafter collectively Cerny), sued Coffman and his wife, Tammy Coffman (collectively Coffman). Cerny also sued Hawkins and the State. Cerny settled his claims with Coffman, Hawkins, and the State; as part of the settlement, each of those defendants assigned Cerny their claims for contribution and indemnity from Todco. Cerny brought the instant case against Todco as assignee

of those claims. In other words, this case involves six claims—a claim for contribution and a claim for indemnity on behalf of each of the three assignors.

Todco moved for summary judgment, which was granted in part by the district court. With respect to the contribution claims, the court found it was undisputed that Todco's alleged negligence, in the placement of temporary signs and barricades on the entrance ramp, was done at the express direction of Hawkins or the State. The court reasoned that Hawkins and the State were estopped from seeking contribution from Todco for acts performed at their direction, and entered judgment against Cerny on those assigned claims. Because that reasoning did not extend to Coffman, the court denied summary judgment on Coffman's assigned claim for contribution.

The court entered judgment against Cerny on all of the assigned indemnity claims. The court reasoned that Coffman was not contractually obligated to indemnify Todco, and a common-law indemnity claim failed because Coffman was actively negligent. The court concluded that under Todco's contract with Hawkins, Todco was required to indemnify Hawkins and the State only for damages resulting from breach of the contract, and Todco had not breached the contract. Although Todco deviated from the original plans for the entrance ramp without receiving a written change order, the court concluded that Hawkins and the State had waived any such requirement under the contract and had caused Todco to deviate from the plans by directing it to do so. In short, the court concluded that Hawkins and the State were estopped from seeking contribution from Todco for a breach of contract that they ordered, approved, and accepted.

After entering the partial summary judgment described above, the court entered an order, pursuant to § 25-1315(1), stating that there was no just reason for delay and directing the entry of final judgment with respect to the claims against which summary judgment had been entered. The court's order did not articulate the basis for this conclusion. The court further concluded that the remaining claim, Coffman's assigned claim for contribution from Todco, was an equitable claim that would be tried to the court, and not to a jury. Cerny appeals.

ASSIGNMENTS OF ERROR

Cerny assigns, consolidated, that the court erred in (1) admitting portions of the affidavits offered by Todco at the summary judgment hearing, (2) concluding Todco was entitled to partial summary judgment on the indemnity and contribution claims assigned by Hawkins and the State, and (3) finding Cerny was not entitled to a jury trial on the Coffman contribution claim. Although Cerny also assigned error to the partial summary judgment on the Coffman indemnity claim, the argument in Cerny's appellate brief does not discuss that issue, so we do not discuss it either.¹ On cross-appeal, Todco assigns that the court erred in denying Todco's motion for summary judgment on the Coffman contribution claim because (1) Coffman is not entitled to contribution and (2) Coffman's contribution claim should have been decided in the underlying lawsuit.

STANDARD OF REVIEW

[1,2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.² A trial court's decision to certify a final judgment pursuant to § 25-1315(1) is reviewed for an abuse of discretion.³

ANALYSIS

LACK OF FINAL ORDER ON COFFMAN CONTRIBUTION CLAIM

[3,4] Before reaching the legal issues presented for review, it is the duty of an appellate court to settle jurisdictional issues presented by a case.⁴ In this case, Todco argues that Cerny's assignment of error with respect to a jury trial on the Coffman contribution claim is not properly presented on appeal, because it was not part of the partial summary judgment that the district court certified for appeal under § 25-1315(1). Our inquiry into

¹ See *Epp v. Lauby*, 271 Neb. 640, 715 N.W.2d 501 (2006).

² *Cumming v. Red Willow Sch. Dist. No. 179*, ante p. 483, 730 N.W.2d 794 (2007).

³ See *Bailey v. Lund-Ross Constructors Co.*, 265 Neb. 539, 657 N.W.2d 916 (2003).

⁴ *Betterman v. Department of Motor Vehicles*, ante p. 178, 728 N.W.2d 570 (2007).

jurisdiction, however, is broader than Todco's argument. An appellate court, on its own motion, may examine and determine whether jurisdiction is lacking as the result of a procedural defect which prevents acquisition of appellate jurisdiction.⁵ The procedural posture of this case presents several issues arising under § 25-1315(1).

Section 25-1315(1) provides that

[w]hen more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Section 25-1315 permits a judgment to become final only under the limited circumstances set forth in the statute.⁶ By its terms, § 25-1315(1) is implicated only where multiple causes of action are presented or multiple parties are involved, and a final judgment is entered as to one of the parties or causes of action.⁷

[5-8] The term "final judgment" as used in § 25-1315(1) is the functional equivalent of a "final order" within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995). Thus, a "final order" is a prerequisite to an appellate court's obtaining jurisdiction of an appeal initiated pursuant to § 25-1315(1).⁸ With

⁵ *Manske v. Manske*, 246 Neb. 314, 518 N.W.2d 144 (1994). See, also, *Gerardi v. Pelullo*, 16 F.3d 1363 (3d Cir. 1994); *Spiegel v. Trustees of Tufts College*, 843 F.2d 38 (1st Cir. 1988).

⁶ *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

⁷ *Id.*

⁸ *Bailey*, *supra* note 3.

the enactment of § 25-1315(1), one may bring an appeal pursuant to such section only when (1) multiple causes of action or multiple parties are present, (2) the court enters a “final order” within the meaning of § 25-1902 as to one or more but fewer than all of the causes of action or parties, and (3) the trial court expressly directs the entry of such final order and expressly determines that there is no just reason for delay of an immediate appeal.⁹ In other words, to be appealable, an order must satisfy the final order requirements of § 25-1902 and, additionally, where implicated, § 25-1315(1).¹⁰

Neither Cerny’s assignment of error with respect to the denial of a jury trial on the Coffman contribution claim nor Todco’s cross-appeal with respect to the denial of its motion for summary judgment on the Coffman contribution claim is properly appealable pursuant to §§ 25-1902 and 25-1315(1). The district court did not enter a “final judgment,” i.e., final order, with respect to the Coffman contribution claim. The district court’s order directing final judgment pursuant to § 25-1315(1) expressly directed that “the summary judgments previously entered herein” should be considered final judgments, but did not direct a final judgment with respect to the Coffman contribution claim.¹¹ Nor could it have done so.

[9] A denial of a motion for summary judgment is an interlocutory order, not a final order, and therefore not appealable.¹² The court’s denial of a jury trial did not determine the action and prevent a judgment, was not made during a special proceeding, and was not made on summary application in an action after judgment had been rendered.¹³ Nor do the issues raised on appeal with respect to the Coffman contribution claim bear

⁹ *Id.*

¹⁰ *Malolepszy, supra* note 6.

¹¹ See *Allied Mut. Ins. Co. v. City of Lincoln*, 269 Neb. 631, 694 N.W.2d 832 (2005).

¹² *Big River Constr. Co. v. L & H Properties*, 268 Neb. 207, 681 N.W.2d 751 (2004).

¹³ See, § 25-1902; *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004).

directly on the correctness of the claims against which a final judgment was directed.¹⁴ In short, because no final order was entered on the Coffman contribution claim as required by § 25-1902, the court could not have directed a final judgment as to that claim within the meaning of § 25-1315(1), and no issue bearing on that claim is before us in this appeal.

ABUSE OF DISCRETION IN CERTIFYING FINAL
JUDGMENT ON OTHER CLAIMS

The contribution and indemnification claims assigned by Hawkins and the State present more difficult issues. Contribution is defined as a sharing of the cost of an injury as opposed to a complete shifting of the cost from one to another, which is indemnification.¹⁵ Under Nebraska law, indemnification is available when one party is compelled to pay money which in justice another ought to pay, or has agreed to pay, unless the party making the payment is barred by the wrongful nature of his or her conduct.¹⁶ Indemnification is distinguishable from the closely related remedy of contribution in that the latter involves a sharing of the loss between parties jointly liable.¹⁷

It is questionable whether contribution and indemnity are separate causes of action, as opposed to theories of recovery,¹⁸ and our research has revealed no authority helpful to deciding whether similar claims that had previously belonged to separate parties remain separate “claims for relief” when they are assigned to one party. But we do not find it necessary to decide these issues in this proceeding, because we conclude that even if the district court’s partial summary judgment *could* be designated as a final judgment pursuant to § 25-1315(1), the court

¹⁴ See, *In re Guardianship & Conservatorship of Larson*, 270 Neb. 837, 708 N.W.2d 262 (2006); *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005).

¹⁵ *Smith v. Kellerman*, 4 Neb. App. 178, 541 N.W.2d 59 (1995).

¹⁶ *Warner v. Reagan Buick*, 240 Neb. 668, 483 N.W.2d 764 (1992).

¹⁷ *Id.*

¹⁸ See *Saunders County v. City of Lincoln*, 263 Neb. 170, 638 N.W.2d 824 (2002). See, also, *Sussex Drug Products v. Kanasco, Ltd.*, 920 F.2d 1150 (3d Cir. 1990).

abused its discretion in doing so.¹⁹ Although Todco has not challenged the certification on appeal, we address the issue because our ability to review the merits of the appeal depends on whether it was properly certified.²⁰

[10] In deciding whether to grant § 25-1315(1) certification, a trial court must address two distinct issues. A trial court must first determine that it is dealing with a “final judgment.” It must be a “judgment” in the sense that it is a decision upon a cognizable claim for relief, and it must be “final” in the sense that it is an ultimate disposition of an individual claim entered in the course of a multiple claims action.²¹ Once having found finality, the trial court must go on to determine whether there is any just reason for delay. Not all final judgments on individual claims should be immediately appealable, even if they are in some sense separable from the remaining unresolved claims.²² It is left to the trial court’s discretion, to be exercised in the interest of sound judicial administration, to determine the appropriate time when each final decision in a multiple claims action is ready for appeal.²³

We have not previously considered a trial court’s determination that there is no just reason to delay the entry of a final judgment. Because § 25-1315(1) is substantially similar to Fed. R. Civ. P. 54(b), we look to federal cases applying rule 54(b), and state cases arising under similar rules, for guidance in applying § 25-1315(1).²⁴

¹⁹ See *Bailey*, *supra* note 3. See, also, *Gerardi*, *supra* note 5; *Kersey v. Dennison Mfg. Co.*, 3 F.3d 482 (1st Cir. 1993).

²⁰ See, *Credit Francais Intern., S.A. v. Bio-Vita, Ltd.*, 78 F.3d 698 (1st Cir. 1996); *Monument Mgt. Ltd. Partnership v. Pearl, Miss.*, 952 F.2d 883 (5th Cir. 1992); *Indiana Harbor Belt R. Co. v. American Cyanamid*, 860 F.2d 1441 (7th Cir. 1988); *Spiegel*, *supra* note 5; *Long v. Wickett*, 50 Mass. App. 380, 737 N.E.2d 885 (2000).

²¹ *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 100 S. Ct. 1460, 64 L. Ed. 2d 1 (1980).

²² *Id.*

²³ See *id.*

²⁴ See *Malolepszy*, *supra* note 6.

Prior to the enactment of § 25-1315, an order that effected a dismissal with respect to one of multiple parties was a final, appealable order, and the complete dismissal with prejudice of one of multiple causes of action was a final, appealable order, but an order dismissing one of multiple theories of recovery, all of which arose from the same set of operative facts, was not a final order for appellate purposes.²⁵ Section 25-1315 was an evident attempt by the Legislature to simplify the issue and clarify many of the questions regarding final orders when there are multiple parties and claims.²⁶ In other words, § 25-1315(1) was intended to *prevent* interlocutory appeals, not make them easier.²⁷ It attempts to strike a balance between the undesirability of piecemeal appeals and the potential need for making review available at a time that best serves the needs of the parties.²⁸

[11,12] Therefore, it is well established in every other jurisdiction to have considered a similar rule that certification of a final judgment must be reserved for the “unusual case” in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early and separate judgment as to some claims or parties.²⁹ The power § 25-1315(1) confers upon the trial judge should only be used ““in the infrequent harsh case”” as an instrument for the improved administration of justice, based on the likelihood of injustice or

²⁵ *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

²⁶ *Id.*

²⁷ See, *Astro-Med, Inc. v. R. Moroz, Ltd.*, 811 A.2d 1154 (R.I. 2002); *Planning Board v. Mortimer*, 310 Md. 639, 530 A.2d 1237 (1987).

²⁸ See, *Corrosioneering v. Thyssen Environmental Systems*, 807 F.2d 1279 (6th Cir. 1986); *Jasmin v. Dumas*, 726 F.2d 242 (5th Cir. 1984); *Noble v. Colwell*, 44 Ohio St. 3d 92, 540 N.E.2d 1381 (1989); *Cox v. Howard, Weil, Labouisse, et al.*, 512 So. 2d 897 (Miss. 1987).

²⁹ See *Morrison-Knudsen Co., Inc. v. Archer*, 655 F.2d 962, 965 (9th Cir. 1981). Accord, e.g., *Ebrahimi v. City of Huntsville Bd. of Educ.*, 114 F.3d 162 (11th Cir. 1997); *Spiegel*, *supra* note 5; *Peterson v. Zerr*, 443 N.W.2d 293 (N.D. 1989). See, also, *Dzwonkowski v. Sonitrol of Mobile, Inc.*, 892 So. 2d 354 (Ala. 2004); *Cox*, *supra* note 28.

hardship to the parties of a delay in entering a final judgment as to part of the case.³⁰

As a general principle, in deciding whether there are no just reasons to delay the appeal of individual final judgments, a trial court must take into account judicial administrative interests as well as the equities involved.³¹ Consideration of the former is necessary to ensure that application of § 25-1315(1) effectively preserves the general policy against piecemeal appeals.³² Plainly, sound judicial administration does not require that certification requests be granted routinely.³³ Therefore, entry of judgment under § 25-1315(1) should not be indulged as a matter of routine.³⁴ Section 25-1315(1) was simply not meant to be employed in the absence of sufficiently compelling circumstances.³⁵

But there is nothing in the record in this case supporting a conclusion that this is a special case deserving of certification as a final judgment.³⁶ Nothing in the record “suggests a pressing, exceptional need for immediate appellate intervention, or grave injustice of the sort remediable only by allowing an appeal to be taken forthwith, or dire hardship of a unique kind.”³⁷

³⁰ See *Corrosioneering*, *supra* note 28, 807 F.2d at 1282, quoting Fed. R. Civ. P. 54 advisory committee note. See, e.g., *Ebrahimi*, *supra* note 29; *Bank of Lincolnwood v. Federal Leasing, Inc.*, 622 F.2d 944 (7th Cir. 1980); *Davis v. Farmland Mut. Ins. Co.*, 669 N.W.2d 713 (S.D. 2003); *Weinstein v. Univ. of Mont.*, at *Missoula*, 271 Mont. 435, 898 P.2d 101 (1995); *Noble*, *supra* note 28; *Peterson*, *supra* note 29; *Planning Board*, *supra* note 27.

³¹ *Curtiss-Wright Corp.*, *supra* note 21. See, also, *Cox*, *supra* note 28.

³² See *Curtiss-Wright Corp.*, *supra* note 21. See, also, *State of Florida v. Countrywide Truck Ins. Agency*, 270 Neb. 454, 703 N.W.2d 905 (2005).

³³ See *Curtiss-Wright Corp.*, *supra* note 21.

³⁴ See, *Spiegel*, *supra* note 5; *Hardie v. Cotter and Co.*, 819 F.2d 181 (8th Cir. 1987); *Corrosioneering*, *supra* note 28; *Long*, *supra* note 20; *Sundial Press v. City of Albuquerque*, 114 N.M. 236, 836 P.2d 1257 (N.M. App. 1992); *Allstate Ins. Co. v. Angeletti*, 71 Md. App. 210, 524 A.2d 798 (1987).

³⁵ See, *Spiegel*, *supra* note 5; *Long*, *supra* note 20.

³⁶ See *Hardie*, *supra* note 34. See, also, *Long*, *supra* note 20.

³⁷ See *Spiegel*, *supra* note 5, 843 F.2d at 45-46. Accord *Peterson*, *supra* note 29.

There is no evidence, or even argument, establishing any injustice or hardship to the parties from a delay in entering final judgment, and as will be explained more fully below, the inter-relationship of the issues remaining for trial weighs heavily against certification.

[13] We note, however, that our review of the district court's certification would have been greatly assisted had the district court explained its reasoning for concluding that there was no just reason to delay the entry of final judgment. When a trial court concludes that entry of judgment under § 25-1315(1) is appropriate, it should ordinarily make specific findings setting forth the reasons for its order.³⁸ The reason for this is twofold: it helps the trial judge to sort out and weigh the competing considerations in his or her own mind, and it permits an appellate court to effectively review the ruling.³⁹ Here, the district court's order simply quoted the statutory language, but did not explain why, on the facts of this case, the court concluded certification was appropriate. It is difficult to review the trial court's exercise of discretion when the court does not explain its reasoning.⁴⁰

The record does contain Cerny's motion requesting certification, and in the absence of any other explanation, we assume that the trial court adopted Cerny's reasoning. But the grounds for Cerny's motion not only fail to show that certification was appropriate, they affirmatively demonstrate that it was not. Cerny contended that the "remaining claims pending pursuant to [Coffman's] assignment arise out of the same incident, and would be predicated on the same witnesses and testimony, including expert witness testimony, as the claims assigned by the State . . . and Hawkins." Courts have uniformly held that the

³⁸ See *id.* See, also, *Corrosioneering*, *supra* note 28; *Davis*, *supra* note 30; *Cox*, *supra* note 28; *Cole v. Peterson Realty, Inc.*, 432 A.2d 752 (Me. 1981); *Sundial Press*, *supra* note 34; *Acme Engineering & Mfg. v. Airadyne Co., Inc.*, 9 Mass. App. 762, 404 N.E.2d 693 (1980).

³⁹ See, *Spiegel*, *supra* note 5; *Brunswick Corp. v. Sheridan*, 582 F.2d 175 (2d Cir. 1978).

⁴⁰ See *Corrosioneering*, *supra* note 28.

presence of such overlapping claims counsels against certification, not in favor of it.⁴¹

[14] As previously explained, certification of a final judgment requires a court to determine whether the case is the “unusual case” in which potential hardship to the litigants outweighs the strong policy against piecemeal appeals.⁴² Courts considering certification of a final judgment have weighed factors such as (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the trial court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in setoff against the judgment sought to be made final; and (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.⁴³

[15] The U.S. Supreme Court has observed that as a starting point, it is appropriate for the trial court to consider whether the claims under review are separable from the others remaining to be adjudicated and whether the nature of the claims already determined was such that no appellate court would ever have to decide the same issues more than once even if there were subsequent appeals.⁴⁴ The trial court should carefully compare the dismissed and unadjudicated claims for indications of substantial overlap to ensure that the appellate court is not confronted in successive appeals with common issues of law or fact, to the

⁴¹ See *Kersey*, *supra* note 19.

⁴² See, *Ebrahimi*, *supra* note 29; *Spiegel*, *supra* note 5; *Morrison-Knudsen Co., Inc.*, *supra* note 29; *Dzwonkowski*, *supra* note 29; *Peterson*, *supra* note 29; *Cox*, *supra* note 28.

⁴³ See, e.g., *Corrosionengineering*, *supra* note 28; *Bank of Lincolnwood*, *supra* note 30; *Urban Renewal v. Oklahoma City*, 110 P.3d 550 (Okla. 2005); *Davis*, *supra* note 30; *Weinstein*, *supra* note 30; *Fleet Bank of Maine v. Hoff*, 580 A.2d 690 (Me. 1990); *Peterson*, *supra* note 29.

⁴⁴ *Curtiss-Wright Corp.*, *supra* note 21.

detriment of judicial efficiency.⁴⁵ An appellate court must then scrutinize the trial court's evaluation of such factors as the interrelationship of the claims so as to prevent piecemeal appeals in cases which should be reviewed only as single units.⁴⁶

A court should be particularly cautious in certifying as final a judgment on a claim which is not truly distinct from the claims on remaining issues, for even if the certified judgment is inherently final, the facts underlying the claim resulting in that judgment may be intertwined with the remaining issues.⁴⁷ In a case in which the issues are intertwined, the trial court might wish to reconsider its dismissal of certain claims on the complete fact record developed at trial—an option permanently foreclosed by certification of a final judgment.⁴⁸ A complete factual record will also assist in final appellate review and decrease the likelihood of inconsistent decisions.⁴⁹ When the dismissed and surviving claims are factually and legally overlapping or closely related, fragmentation of the case is to be avoided except in “‘unusual and compelling circumstances.’”⁵⁰

[16] Furthermore, judicial administrative interests may not be served if the possibility exists that the need to review the issues appealed may be mooted by future developments in the trial court.⁵¹ The potential that claims remaining in the trial court

⁴⁵ See, *AmerisourceBergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946 (9th Cir. 2006); *Kersey*, *supra* note 19; *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698 (7th Cir. 1984); *Urban Renewal*, *supra* note 43; *Davis*, *supra* note 30; *Astro-Med, Inc.*, *supra* note 27; *Peterson*, *supra* note 29.

⁴⁶ *Sussex Drug Products*, *supra* note 18. See, also, *Astro-Med, Inc.*, *supra* note 27.

⁴⁷ *Gerardi*, *supra* note 5.

⁴⁸ *Interstate Power v. Kansas City Power*, 992 F.2d 804 (8th Cir. 1993). See, also, *Milbank Mut. Ins. Co. v. Carrier Corp.*, 112 Idaho 27, 730 P.2d 947 (1986).

⁴⁹ See *Davis*, *supra* note 30. See, also, *Peterson*, *supra* note 29.

⁵⁰ *Long*, *supra* note 20, 50 Mass. App. at 389, 737 N.E.2d at 896, quoting *Spiegel*, *supra* note 5, and *Kersey*, *supra* note 19. Accord *Astro-Med, Inc.*, *supra* note 27.

⁵¹ See, *Gerardi*, *supra* note 5; *Cole*, *supra* note 38; *Long*, *supra* note 20.

could obviate claims in the appellate court is a consideration against immediate appealability.⁵² Another factor that has been considered is whether, notwithstanding the entry of partial judgment, the action remains pending for trial below as to all of the parties. This alone counsels hesitation in the use of § 25-1315(1). It will be a rare case where § 25-1315(1) can appropriately be applied when the contestants on appeal remain, at the same time, contestants below.⁵³

When these principles are applied to the instant case, it appears that the district court did not fully consider the interrelationship between the claims when it certified its partial summary judgment. When Cerny explains that the disposition of the claims assigned by Hawkins and the State “would effect [sic] the trial and the manner” in which the Coffman claim is adjudicated, Cerny is confirming an interrelationship among the claims that militates *against* certification of a final judgment.⁵⁴ “It does not strike us as betokening sound judicial administration for an appellate court and a trial court to be simultaneously passing upon different legal theories in a situation involving the same parties and, basically, the same facts.”⁵⁵ Relying on such considerations would lead to requests of appellate courts to render advisory opinions in order to facilitate settlement or speed the process in trial courts.⁵⁶ This is beyond the scope of § 25-1315(1), and trial courts should resist the temptation to certify difficult issues for interlocutory review.⁵⁷

Cerny also contended that certification of a final judgment would potentially resolve one of Todco’s defenses to the Coffman contribution claim and would “likely give guidance to the question as to whether or not the matter should be

⁵² See, *Spiegel*, *supra* note 5; *Fleet Bank of Maine*, *supra* note 43; *Peterson*, *supra* note 29; *Sundial Press*, *supra* note 34.

⁵³ See *Spiegel*, *supra* note 5. See, also, *Brunswick Corp.*, *supra* note 39.

⁵⁴ See *Spiegel*, *supra* note 5.

⁵⁵ *Id.* at 45. Accord *Urban Renewal*, *supra* note 43.

⁵⁶ See *Weinstein*, *supra* note 30. See, also, *Cole*, *supra* note 38.

⁵⁷ See *id.*

tried as one in equity or at law to a jury.” This is incorrect. As previously explained, the Coffman contribution claim could not be certified as a final judgment, even if a summary judgment as to other claims could be properly certified. As we have stated, § 25-1315(1) “does not . . . provide ‘magic words,’ the invocation of which transforms any order into a final judgment for purposes of appeal.”⁵⁸

Cerny also contended that permitting an interlocutory appeal would prevent the need for a retrial, should a reversal result from an appeal of a judgment disposing of all the claims alleged. But such a potential is rarely, if ever, a sufficient basis for a § 25-1315(1) certification, because virtually *any* interlocutory appeal from a dispositive ruling said to be erroneous contains the potential for requiring a retrial.⁵⁹ Every party seeking certification may eventually appeal the judgment in question. If the promise of an appeal were seriously considered in analyzing every request for certification, then virtually every party seeking certification would be successful. But the benefit of potentially avoiding a retrial is generally outweighed by the certainty of fracturing the case’s appellate review with an interlocutory appeal.

Simply stated, while there are variations among the assigned claims that Cerny alleges, the underlying issues are basically the same: Did Todco act wrongfully and did Todco’s actions cause damages to Cerny that other parties were compelled to pay? The court’s findings with respect to Todco’s negligence could, conceivably, moot the issues raised in this appeal, and render our judgment advisory. Furthermore, where multiple tort-feasors are alleged, apportionment issues are presented that make it difficult, if not impossible, to separate the claims with respect to the different alleged tort-feasors.⁶⁰

⁵⁸ *Keef*, *supra* note 25, 262 Neb. at 629, 634 N.W.2d at 758.

⁵⁹ See, *Kersey*, *supra* note 19; *Spiegel*, *supra* note 5; *Weinstein*, *supra* note 30; *Peterson*, *supra* note 29.

⁶⁰ See, generally, Neb. Rev. Stat. § 25-21,185.10 (Reissue 1995); *Harsh International v. Monfort Indus.*, 266 Neb. 82, 662 N.W.2d 574 (2003); *Maxwell v. Montey*, 262 Neb. 160, 631 N.W.2d 455 (2001); *Lackman v. Rousselle*, 257 Neb. 87, 596 N.W.2d 15 (1999).

That situation is even more pronounced in this case, because it seems clear that Todco's defense, even to the Coffman contribution claim, will involve the extent to which it could justifiably rely on instructions it claims to have received from Hawkins or the State. The questions we are asked to decide now, on a summary judgment record, are in effect still pending for a trial that will, presumably, further illuminate the issues, both for the trial court and this court. "The interlocking factual relationship of the various counts leading to the likelihood that a subsequent appeal would again seek review of the issues presented here also suggests that it was not in the interests of sound judicial administration for the district court to certify this judgment as final."⁶¹ Because the claims have so much factual overlap, for the purpose of requiring their adjudication prior to an appeal, they should be treated as the functional equivalent of nonseverable claims.⁶²

In short, we conclude that the court abused its discretion in certifying its partial summary judgment as final under § 25-1315(1). There is nothing in the record suggesting unusual hardship for the parties in the absence of an immediate appeal, and the interrelationship of the factual and legal issues presented in the adjudicated and pending claims is too pronounced for this to be the unusual case in which the general policy against piecemeal appeals is outweighed.⁶³ Since § 25-1315(1) was erroneously applied, there is no final order present in this case. We vacate the court's order certifying a final judgment and, lacking jurisdiction, dismiss this appeal.

CONCLUSION

For the reasons stated above, we vacate the district court's certification of final judgment and dismiss the appeal.

ORDER VACATED, AND APPEAL DISMISSED.

⁶¹ *Sussex Drug Products*, *supra* note 18, 920 F.2d at 1156. See *Factory Mut. Ins. Co. v. Bobst Group USA, Inc.*, 392 F.3d 922 (7th Cir. 2004).

⁶² See *Urban Renewal*, *supra* note 43.

⁶³ See, *Curtiss-Wright Corp.*, *supra* note 21; *Morrison-Knudsen Co., Inc.*, *supra* note 29.

STATE OF NEBRASKA, APPELLANT, v.
JUNEAL DALE PRATT, APPELLEE.
733 N.W.2d 868

Filed June 29, 2007. No. S-05-1207.

1. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
2. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower courts.
3. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal under the provisions of Neb. Rev. Stat. § 25-1902 (Reissue 1995) are (1) an order which affects a substantial right in an action and which in effect determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.
4. **Postconviction: DNA Testing: Collateral Attack.** An action under the DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 to 29-4125 (Cum. Supp. 2006), is a collateral attack on a conviction and is therefore similar to a postconviction action and is not part of the criminal proceeding itself.
5. **Postconviction.** Postconviction relief is not part of a criminal proceeding and is considered civil in nature.
6. **DNA Testing.** The purpose of the DNA Testing Act is to provide an opportunity for persons who may have been wrongfully convicted to establish their innocence through DNA testing.
7. **Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
8. **Final Orders: Appeal and Error.** A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing.
9. **Pretrial Procedure: Appeal and Error.** Ordinarily, an order regarding discovery against a person not a party to the action is not appealable.
10. **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.

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

Jon Bruning, Attorney General, J. Kirk Brown, Donald W. Kleine, and Susan J. Gustafson for appellant.

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

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

WRIGHT, J.

NATURE OF CASE

Juneal Dale Pratt was convicted in 1975 of sodomy, forcible rape, and two counts of robbery. The victims of Pratt's crimes were sisters, and we will refer to them throughout this opinion individually as "Victim A" and "Victim B."

In June 2004, Pratt filed a motion under the DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 to 29-4125 (Cum. Supp. 2006). The Douglas County District Court authorized DNA testing of the victims' clothing still remaining in the custody of the State. After receiving these test results, Pratt sought a certification from the district court authorizing an out-of-state deposition with a subpoena duces tecum of Victim A in order to obtain a known sample of her DNA. The district court granted Pratt's motion, and from this order, the State appeals.

SCOPE OF REVIEW

[1] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006).

[2] When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower courts. *In re Interest of Jedidiah P.*, 267 Neb. 258, 673 N.W.2d 553 (2004).

FACTS

Pratt was convicted in 1975 of sodomy, forcible rape, and two counts of robbery. See, generally, *State v. Pratt*, 197 Neb. 382, 249 N.W.2d 495 (1977) (affirming convictions and sentences on direct appeal); *State v. Pratt*, 224 Neb. 507, 398 N.W.2d 721 (1987) (affirming denial of motion for postconviction relief).

In June 2004, Pratt filed his operative motion requesting DNA testing. In accordance with the DNA Testing Act, the State filed an inventory of evidence in the State's custody. Pratt then moved the district court to authorize DNA testing of the victims' clothing that was within the control and custody of the State. He alleged that the results of such testing could exclude him as the assailant.

The district court authorized DNA testing, and the University of Nebraska Medical Center's human DNA identification laboratory conducted tests on shirts worn by the victims the day of the crime. The laboratory employed an extraction procedure to separate epithelial fractions from sperm fractions. Only one specimen generated an inconclusive, partial DNA profile coming from sperm. DNA profiles from epithelial (skin) cells were detected and referenced against a buccal swab sample provided by Pratt. Pratt was excluded as the source of the only specimen that generated an epithelial DNA profile most consistent with a profile originating from a male individual. Several specimens generated partial epithelial DNA profiles consistent with originating from a mixture of female and male individuals. Given the absence of female reference profiles, results concerning any male contributors were inconclusive.

After receiving the results from the DNA tests, Pratt filed a motion in June 2005 seeking certification for an out-of-state witness under Neb. Rev. Stat. §§ 29-1904 and 29-1906 to 29-1911 (Reissue 1995). He asked the district court to authorize a deposition duces tecum of Victim A, who resided in Colorado, in order to obtain a known sample of her DNA. Pratt alleged that the prior DNA test results showed the presence of mixed samples of DNA and that known DNA profiles from the victims would make it possible to determine which alleles on the victims' clothing could have been left by the assailant and whether Pratt could be excluded as the source of the male component of the mixed samples. The State moved the court for a protective order, alleging that the requested deposition would cause annoyance, embarrassment, and an undue burden on Victim A.

At a hearing, Pratt introduced the DNA test results and a copy of a Colorado statute that prescribed the manner in which

a resident could be summoned to testify in another state in a pending criminal prosecution or an ongoing grand jury investigation. Pratt's attorney explained that he wanted to obtain DNA profiles from the victims so their DNA could be eliminated from the mixed samples. Pratt's attorney asserted that if the court authorized the requested deposition of Victim A, she would be asked to provide a DNA swab from the inside of her cheek and would be asked for the current address of Victim B, her sister.

The State argued that DNA samples from the victims were unnecessary because the test results had already excluded Pratt as the donor of the tested epithelial cells. The State claimed however that the DNA test results failed to exculpate Pratt from the crime because the laboratory had tested skin cells on shirts that had been handled by many people, possibly including police officers, prosecutors, or jurors. It argued that additional evidence in the record, including evidence that Pratt was found with a ring belonging to one of the victims, proved Pratt was the perpetrator.

The district court sustained Pratt's motion and issued an order captioned "Certification for Out-of-State Witness [Victim A]." Therein, the district court requested that the appropriate court of record in the State of Colorado issue a subpoena duces tecum, along with a copy of the district court's certificate, ordering Victim A to attend a deposition and provide a sample of DNA. (We note that on page 3 of the order, the court incorrectly made reference to Victim B.)

The State appealed the district court's order to the Nebraska Court of Appeals. We granted Pratt's petition to bypass review by the Court of Appeals, and the appeal was transferred to our docket.

ASSIGNMENTS OF ERROR

The State asserts that the district court erred (1) in finding that the DNA Testing Act provides for obtaining and testing new evidence that has not been in the custody and control of the State and (2) in finding that criminal procedure rules are applicable to proceedings under the DNA Testing Act.

ANALYSIS

FINAL ORDER RULE

Under Nebraska law, an appellate court acquires no jurisdiction if no final order has been entered by the court from which the appeal was taken. Discovery orders are generally not considered final orders and, therefore, are not normally appealable. The district court sustained Pratt's motion for certification for an out-of-state witness, which was a discovery request. The question is whether the order for discovery was a final, appealable order, conferring appellate jurisdiction on this court.

[3] Pratt argues that no appellate jurisdiction exists because the order appealed from was not a final 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. Bronson*, 267 Neb. 103, 672 N.W.2d 244 (2003). The State concedes that the order at issue did not determine the action and prevent a judgment. Nor was the order made on summary application in an action after a judgment was issued. Accordingly, the order in this case was a final order only if it affected a substantial right and was made during a special proceeding. We begin by considering the proceeding in which the order was entered.

Special proceedings entail civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes and have also been described as every special statutory remedy which is not in itself an action. *Bronson, supra*. In *Bronson*, we concluded that a hearing under § 29-4123(2) is a "special proceeding" within the meaning of the final order statute. Subsection 29-4123(2) provides for a hearing under the DNA Testing Act if test results exonerate or exculpate a person. It is important to note that there has been no hearing in this case to vacate or set aside the judgment, as described under the DNA Testing Act in § 29-4123(2). Rather, Pratt alleged that he

intended to use the results of the requested DNA testing of new evidence to vacate his convictions pursuant to § 29-4123 or to seek a new trial pursuant to Neb. Rev. Stat. § 29-2101(6) (Cum. Supp. 2006).

Pratt argues that the district court order to secure the attendance of an out-of-state witness was not made in a special proceeding because he alleges that proceedings under the DNA Testing Act are criminal in nature, not civil. We have addressed whether proceedings under the DNA Testing Act are civil or criminal only indirectly.

[4,5] In *State v. Poe*, 271 Neb. 858, 717 N.W.2d 463 (2006), a defendant moving for postconviction DNA testing asserted that he was deprived of his right to counsel guaranteed by the Sixth Amendment to the U.S. Constitution. This court rejected that assertion and found no constitutional right to counsel in an action under the DNA Testing Act. We reasoned that an “action under the DNA Testing Act is a collateral attack on a conviction and is therefore similar to a postconviction action and is not part of the criminal proceeding itself.” *Poe*, 271 Neb. at 865, 717 N.W.2d at 469. In *State v. Stewart*, 242 Neb. 712, 496 N.W.2d 524 (1993), we held that postconviction relief is not part of the criminal proceeding and is considered civil in nature. It is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction. See, also, *Pennsylvania v. Finley*, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987) (finding that prisoners have no constitutional right to attorney when mounting collateral attacks upon their convictions).

[6] Using such reasoning, we conclude that the action before us is a collateral attack upon Pratt’s convictions. The purpose of the DNA Testing Act is to provide an opportunity for persons who may have been wrongfully convicted to establish their innocence through DNA testing. See § 29-4117. Accordingly, Pratt’s argument that the proceedings were criminal in nature is without merit. The proceedings were civil in nature, and we conclude that the certification order was made in a special proceeding.

[7,8] Because we have determined that this was a special proceeding, the certification to secure an out-of-state witness was an appealable order if it affected a substantial right. A

substantial right is an essential legal right, not a mere technical right. *State v. Bronson*, 267 Neb. 103, 672 N.W.2d 244 (2003). A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing. *State v. Meese*, 257 Neb. 486, 599 N.W.2d 192 (1999).

The State asserts that the order requiring Victim A to supply a DNA sample affected a substantial right and that the order could not be meaningfully reviewed at the conclusion of this action. The State claims the order affected the subject matter of the litigation—DNA testing of biological material under the DNA Testing Act—because if the order is allowed to stand, the State’s defense will be diminished. The State further claims that the DNA testing requested by Pratt falls outside the bounds of the act. It also claims that the victims have a constitutional right to privacy, which will be undermined if they are compelled to provide DNA samples.

In the present case, it is difficult to determine what substantial right exists *in favor of the State* to oppose the discovery request, as compared to the right which may exist *in favor of the victim* to object to the discovery request. While there may be merit to the State’s argument that the DNA Testing Act does not provide for Pratt’s discovery request, under our long-established approach to discovery issues, we do not reach that issue in this appeal.

Orders requiring or denying discovery generally do not constitute a final disposition of the proceedings and, therefore, are not normally appealable. *State v. El-Tabech*, 259 Neb. 509, 610 N.W.2d 737 (2000). In *Brozovsky v. Norquest*, 231 Neb. 731, 437 N.W.2d 798 (1989), plaintiffs in a breach-of-contract action filed a notice to take the deposition of a nonparty and a subpoena duces tecum was issued. The defendant objected and alleged that an attorney-client relationship existed between the nonparty and the defendant and that the plaintiffs sought to discover privileged information. The trial court found that the attorney-client privilege had been waived and ordered the deposition. The defendant appealed, and the issue before this court was whether a final order existed.

[9] We concluded that the order directing the nonparty to testify at the deposition was interlocutory and dismissed the appeal. In reaching this determination, we reviewed the general rules applicable to discovery orders and found:

“A discovery order . . . is normally merely an interlocutory order in the course of proceedings and is not appealable. . . .

“Ordinarily an order regarding discovery against a person not a party to the action is not appealable. The order is interlocutory insofar as it affects the party seeking discovery. It is final so far as the nonparty is concerned but if discovery is denied he has no need for review and if discovery is granted it is said that his remedy is to defy the order and appeal from a contempt judgment against him. . . .”

Brozovsky, 231 Neb. at 734, 437 N.W.2d at 800. Accord 8 Charles Alan Wright et al., *Federal Practice and Procedure* § 2006 (2d ed. 1994). We further opined that “[i]nterlocutory appeals in civil cases will place an undue burden on the courts and delay the ultimate disposition of the litigation.” *Id.* at 736, 437 N.W.2d at 801.

We conclude that the certification order was not a final, appealable order.

COLLATERAL ORDER DOCTRINE

[10] At oral argument, the State argued that if the order compelling discovery was not a final order, then it should nevertheless be immediately reviewable under the collateral order doctrine. 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. *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006).

The collateral order doctrine is not applicable in the present case. The issue involved—i.e., obtaining a DNA sample from Victim A—is not completely separate from the merits of the action. The certification order arose from proceedings initiated by Pratt under the DNA Testing Act. Pratt maintains that he is

entitled to obtain the testing under the DNA Testing Act. Thus, the issue is enmeshed in the merits of the action, not separate from them. The order regarding the discovery is effectively reviewable on appeal from the final judgment in this action. The State has no right of appeal at this point in the proceedings. Ordinarily, an order regarding discovery against a person not a party to the action is not appealable.

The U.S. Supreme Court has emphasized the narrow application of the collateral order doctrine:

[T]he “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).

CONCLUSION

The certification to secure the attendance of an out-of-state witness entered by the district court was not a final, appealable order. Therefore, this appeal is dismissed.

APPEAL DISMISSED.

HEAVICAN, C.J., concurring.

In its discovery order, the district court allowed the certification of an out-of-state witness for purposes of obtaining a DNA sample from that witness. The purported authority for such order was the DNA Testing Act.¹ Though I concur with the result reached by the majority that we are not presented with a final order, I write separately to comment upon the parameters of the DNA Testing Act.

This court has held that any rights conferred for postconviction DNA testing are statutory, not constitutional or from the common law.² Thus, a criminal defendant’s right to such testing is limited to that which is provided for by statute. Section 29-4120(1) provides that a person in custody may request DNA testing of biological material only if the biological material

¹ Neb. Rev. Stat. § 29-4116 et seq. (Cum. Supp. 2006).

² See *State v. El-Tabech*, 259 Neb. 509, 610 N.W.2d 737 (2000).

(a) [i]s related to the investigation or prosecution that resulted in such judgment;

(b) [i]s in the actual or constructive possession or control of the state or is in the possession or control of others under circumstances likely to safeguard the integrity of the biological material's original physical composition; and

(c) [w]as not previously subjected to DNA testing or can be subjected to retesting with more current DNA techniques that provide a reasonable likelihood of more accurate and probative results.

Absent a showing to the contrary, an appellate court will give statutory language its plain and ordinary meaning.³ Generally, the word “and,” used properly, is conjunctive.⁴ It is therefore clear that under § 29-4120, all three threshold requirements must be met; unless all three requirements are met, no testing is permitted.

It is also clear that the intent of the DNA Testing Act was to provide a mechanism for DNA testing of evidence retained from the original investigation and prosecution. Section 29-4120(1)(a) specifically provides that the material must be “related to the investigation or prosecution that resulted in such judgment.” In its findings, the Legislature noted that “DNA testing has emerged as the most reliable forensic technique for identifying persons *when biological material is found at a crime scene* or transferred from the victim to the person responsible and *transported from the crime scene*.”⁵ The Legislature also found “a compelling need to ensure the *preservation of biological material for postconviction DNA testing*.”⁶

A review of the DNA Testing Act reveals no provision permitting the taking of depositions, as was requested by Pratt in the instant case. Nor does the act include any mechanism by which new evidence may be gathered and tested. There is no mention in the act of granting criminal defendants the ability to

³ *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007).

⁴ See *Baker's Supermarkets v. State*, 248 Neb. 984, 540 N.W.2d 574 (1995).

⁵ § 29-4118(1) (emphasis supplied).

⁶ § 29-4118(7) (emphasis supplied).

take genetic samples from victims or witnesses, or any indication that the definition of biological materials was intended to include anything other than those materials collected in connection with the original prosecution. As such, there was no statutory basis to support the granting of Pratt's motion for certification of an out-of-state witness.

MILLER-LERMAN, J., concurring.

Although I concur in the result reached by the majority opinion to dismiss this appeal, I write separately to comment on what I believe is a fundamental problem in this matter. The proceeding giving rise to this appeal was filed under the DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 through 29-4125 (Cum. Supp. 2006). We have stated that a proceeding under the DNA Testing Act is a collateral attack on a conviction and is, therefore, similar to a postconviction action and is not part of the criminal proceeding itself. *State v. Poe*, 271 Neb. 858, 717 N.W.2d 463 (2006). Therefore, the instant matter is not a criminal proceeding.

On June 20, 2005, Juneal Dale Pratt, appellee, filed a pleading in connection with his DNA Testing Act proceeding entitled "Motion for Certification for Out-of-State Witness," stating that the "motion is filed pursuant to Neb. Rev. Stat. § 29-1904 (Reissue 1995), Neb. Rev. Stat. § 29-1906 *et seq.* (Reissue 1995)." Article 19, chapter 29, of the Nebraska Revised Statutes relating to criminal cases is entitled "Preparation for Trial," and, importantly, Neb. Rev. Stat. §§ 29-1906 to 29-1911 (Reissue 1995) are cited as the "Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings," § 29-1911. I would conclude that a motion under §§ 29-1904 and 29-1906 to 29-1911 may be filed in a criminal proceeding, but not in a DNA Testing Act proceeding which is not a part of the criminal proceeding itself. Given this conclusion, the motion filed by Pratt giving rise to this appeal was not an authorized motion in the noncriminal DNA Testing Act proceeding in connection with which it was filed. Nevertheless, the order on appeal may be characterized as an interlocutory, nonappealable discovery order and I, therefore, agree with the decision of the majority opinion which concludes that in the absence of an appealable order, this court lacks jurisdiction.

STEPHAN, J., joins in this concurrence.

IN RE ESTATE OF LLOYD E. POTTHOFF, DECEASED.
 MARIANNE K. POTTHOFF, APPELLANT, v.
 ELVIRA M. POTTHOFF, APPELLEE.
 733 N.W.2d 860

Filed June 29, 2007. No. S-05-1299.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law, which requires an appellate court to reach a conclusion independent from that of the trial court.
2. **Decedents' Estates: Appeal and Error.** Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995 & Cum. Supp. 2002) are reviewed for errors appearing on the record.
3. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
5. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the tribunal from which the appeal is taken.
6. **Final Orders: Appeal and Error.** A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken.
7. ____: _____. A substantial right is not affected when that right can be effectively vindicated in an appeal from the final judgment.
8. **Joint Tenancy.** Each tenant in a joint tenancy owns the whole of the property from the time at which the interest is created.
9. **Wills: Joint Tenancy.** Property owned in joint tenancy passes by reason of the nature of the title to the surviving joint tenant upon the death of the other and does not pass by virtue of the provisions of the will of the first joint tenant to die.
10. **Joint Tenancy.** An existing estate in joint tenancy can be destroyed by an act of one joint tenant which is inconsistent with joint tenancy, and such act has the effect of destroying the right of survivorship incidental to it.
11. _____. At common law, a joint tenancy must contain the four unities of time, title, interest, and possession.
12. _____. Any act of a joint tenant which destroys one or more of its coexisting unities operates as a severance and extinguishes the right of survivorship.

Appeal from the County Court for Red Willow County:
 CLOYD CLARK, Judge. Affirmed.

Terry L. Rogers, of Terry L. Rogers Law Firm, for appellant.

Ronald D. Mousel, and, on brief, Nancy S. Johnson, of Mousel & Garner, for appellee.

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

McCORMACK, J.

NATURE OF CASE

The county court for Red Willow County determined that Lloyd E. Potthoff did not sever the joint tenancies in personal and real property he held with his estranged wife, Elvira M. Potthoff, by the execution of two documents entitled “Notice of Severance of Joint Tenancy.” Marianne K. Potthoff, the daughter of Lloyd and Elvira, appeals the county court’s decision.

BACKGROUND

Lloyd filed a petition for dissolution of marriage from Elvira, and, on May 28, 2002, the district court for Red Willow County issued an order prohibiting Lloyd and Elvira from “transferring, encumbering, hypothecating or in any manner disposing of” any real or personal property. On August 27, 2002, Lloyd executed and had notarized two identical “Notice[s] of Severance of Joint Tenancy” which purported to sever the joint tenancies he held with Elvira in all personal property and two separate tracts of land which are located in Red Willow County, Nebraska, and Hitchcock County, Nebraska. One of the notices was filed with the county clerk’s office in Red Willow County, and the other notice was filed with the county clerk’s office in Hitchcock County.

In December 2003, while Lloyd and Elvira’s divorce proceeding was still pending, Lloyd died and the dissolution action was dismissed. Although Lloyd’s will is not contained in the record, the parties do not dispute that Lloyd died testate. In January 2004, Marianne filed a petition in the county court for Red Willow County to commence formal probate proceedings of Lloyd’s estate. It appears from the record that Elvira requested the statutory allowances and exemptions set forth in Neb. Rev. Stat. §§ 30-2322 through 30-2325 (Reissue 1995 & Cum. Supp. 2006), but did not request an elective share of the augmented estate.

During the probate proceedings, a question arose as to whether the notices to sever joint tenancies executed by Lloyd were effective to sever the joint tenancies of property held by Lloyd and Elvira. The county court found that the notices were not effective and awarded Elvira, as the surviving joint tenant, all property held by her and Lloyd in joint tenancy. Marianne now appeals.

ASSIGNMENT OF ERROR

Marianne assigns, restated, that the county court erred in finding that the “Notice[s] of Severance of Joint Tenancy,” which Lloyd filed with the offices of the county clerks of Red Willow and Hitchcock Counties, were ineffective to sever the joint tenancies held by Lloyd and Elvira in the property described in those notices.

STANDARD OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, determination of the issue is a matter of law, which requires an appellate court to reach a conclusion independent from that of the trial court.¹

[2,3] Appeals of matters arising under the Nebraska Probate Code, Neb. Rev. Stat. §§ 30-2201 through 30-2902 (Reissue 1995 & Cum. Supp. 2002) are reviewed for errors appearing on the record.² When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.³

ANALYSIS

WAS COUNTY COURT’S ORDER FINAL?

[4,5] Before reaching the legal issues presented for review, we first address whether this court has jurisdiction. It is the power and duty of an appellate court to determine whether it has

¹ *In re Estate of Rose*, ante p. 490, 730 N.W.2d 391 (2007).

² *In re Estate of Lamplough*, 270 Neb. 941, 708 N.W.2d 645 (2006).

³ *Id.*

jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.⁴ 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.⁵

In *In re Estate of Rose*, we recently considered whether a determination by a county court as to a family allowance and the inclusion of certain property in an augmented estate was a final order where the county court retained jurisdiction to determine the size of the augmented estate, which would serve as a basis for an award of a spouse's elective share. Of the three types of final orders,⁶ the county court's order in *In re Estate of Rose* could only have been one that was made during a special proceeding and affected a substantial right. We determined that the court's order was made during a special proceeding, but that it did not affect a substantial right. We explained that although the court's determination as to the family allowance and inclusion of certain property in the augmented estate both decreased and increased the augmented estate, the size of the augmented estate had not yet been determined. We further explained that the rights affected in the county court's order could be considered in an appeal from which the augmented estate is finally established.

As in *In re Estate of Rose*, the order in the present case did not determine an action and prevent a judgment, nor was it made on summary application in an action after judgment was rendered. Accordingly, in order to be final and appealable, the order in this case must have affected a substantial right and been made during a special proceeding.⁷ Our case law has established that a proceeding under the Nebraska Probate Code is a special proceeding.⁸ We are, therefore, left to determine whether the order in this case affected a substantial right.

⁴ *In re Estate of Rose*, *supra* note 1.

⁵ *Id.*

⁶ See Neb. Rev. Stat. § 25-1902 (Reissue 1995).

⁷ See *id.*

⁸ See *In re Estate of Rose*, *supra* note 1.

The record before this court does not reflect that Elvira has made a claim for an elective share. Thus, unlike *In re Estate of Rose*, the computation of the augmented estate is not the fundamental issue in this case. Rather, the fundamental issue before the county court was the computation of the probate estate.

[6,7] We have observed that 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.⁹ We have further observed that a substantial right is not affected when that right can be effectively vindicated in an appeal from the final judgment.¹⁰ In that regard, we held in *In re Estate of Rose* that because the ultimate issue had yet to be determined, the rights involved in the court's ruling could be effectively considered in an appeal from the final judgment in which the augmented estate is finally established.

That is not true in the present case. Here, the county court determined that Lloyd's notices of severance of joint tenancy were not effective and, therefore, upon Lloyd's death, the property, including Lloyd's prior interest in it, became Elvira's as the surviving joint tenant. This finding by the court resolved the separate issue of whether Lloyd's interest in the property was part of the probate estate, and following the county court's order, there was nothing left to be determined on that issue. Moreover, unlike *In re Estate of Rose*, the rights involved in this case cannot be effectively considered in an appeal from the final judgment in which the probate estate is finally established. It is not uncommon for the probate of an estate to remain open for years. If that were to be the case here, by the time the probate estate is finally settled, the property in question may have been disposed of or the value of the property may be substantially reduced. Accordingly, we determine that the court's ruling in this case does affect a substantial right and is, therefore, a final, appealable order.

⁹ *Id.*

¹⁰ *In re Estate of Rose*, *supra* note 1.

WERE NOTICES TO SEVER JOINT TENANCY EFFECTIVE?

[8,9] Each tenant in a joint tenancy owns the whole of the property from the time at which the interest is created.¹¹ Property owned in a joint tenancy passes by reason of the nature of the title to the surviving joint tenant upon the death of the other and does not pass by virtue of the provisions of the will of the first joint tenant to die.¹²

[10-12] We have explained that an existing estate in joint tenancy can be destroyed by an act of one joint tenant which is inconsistent with joint tenancy and that such act has the effect of destroying the right of survivorship incidental to it.¹³ At common law, a joint tenancy must contain the four unities of time, title, interest, and possession.¹⁴ Thus, any act of a joint tenant which destroys one or more of its coexisting unities operates as a severance and extinguishes the right of survivorship.¹⁵ In Nebraska, the common law requirement of the four unities persists subject to its modification by Neb. Rev. Stat. § 76-118 (Reissue 2003).¹⁶

Section 76-118 provides:

(1) Any person or persons owning property which he, she, or they have power to convey, may effectively convey such property *by a conveyance naming himself, herself, or themselves and another person or persons, as grantees*, and the conveyance has the same effect as to whether it creates a joint tenancy, or tenancy in common, or tenancy in partnership, as if it were a conveyance from a stranger who owned the property to the persons named as grantees in the conveyance. (2) Any two or more persons owning

¹¹ See *In re Estate of Rosso*, 270 Neb. 323, 701 N.W.2d 355 (2005).

¹² *Id.*

¹³ See, *id.*; *Krause v. Crossley*, 202 Neb. 806, 277 N.W.2d 242 (1979).

¹⁴ See, *Krause v. Crossley*, *supra* note 13; *Giles v. Sheridan*, 179 Neb. 257, 137 N.W.2d 828 (1965).

¹⁵ *In re Estate of Rosso*, *supra* note 11; *Giles v. Sheridan*, *supra* note 14.

¹⁶ See, e.g., *In re Estate of Rosso*, *supra* note 11; *White v. Ogier*, 175 Neb. 883, 125 N.W.2d 68 (1963).

property which they have power to convey, may effectively convey such property *by a conveyance naming one, or more than one, or all such persons, as grantees*, and the conveyance has the same effect, as to whether it creates a separate ownership, or a joint tenancy, or tenancy in common, or tenancy in partnership, as if it were a conveyance from a stranger who owned the property, to the persons named as grantees in the conveyance. (3) Any person mentioned in this section may be a married person, and any persons so mentioned may be persons married to each other. (4) *The conveyance of all of the interest of one joint tenant to himself or herself as grantee*, in which the intention to effect a severance of the joint tenancy expressly appears in the instrument, severs the joint tenancy.

(Emphasis supplied.)

Marianne contends that Lloyd's execution of the notices of severance severed Lloyd's joint tenancies with Elvira. While courts vary on their opinion of whether certain actions taken by a joint tenant or tenants sever a joint tenancy, court decisions reveal, as was summarized in *Powell on Real Property*,¹⁷ that in order to be effective, "[t]he act [of severance] must clearly and unequivocally signify an intent to sever. Nonetheless, mere expression of intent to sever without a legally sufficient act does not effectuate a severance."

For example, most courts agree that a joint tenancy may be severed when title to the property is changed. Such a change may result from a conveyance of a joint tenant's or tenants' full interest to a third party or directly to himself, herself, or themselves as grantee or grantees, or in some jurisdictions, the conveyance of a lesser interest, such as a life estate or lease. Courts, including ours, also agree that a joint tenancy may be severed by a final judgment or decree of partition. Other acts found in some, but not all, jurisdictions to effectuate a severance of a joint tenancy include the mutual agreement of the joint tenants; the lease of a joint tenant's interest; the filing of a bankruptcy petition by a joint tenant or the sale of a joint tenant's interest

¹⁷ 7 Richard R. Powell & Michael Allan Wolf, *Powell on Real Property* § 51.04[1] at 51-16 (2001).

in bankruptcy; divorce; the mortgage of a joint tenant's interest, particularly in those states where a mortgage or a deed of trust transfers title to the mortgagee or trustee, i.e., title-theory jurisdictions; and actions by a joint tenant or tenants which changes the nature of the property held in joint tenancy.¹⁸

As to the question now before us, whether the execution of a unilateral written notice of severance is effective to sever a joint tenancy, there is a notable lack of discussion by both courts and commentators. Most predominately, authority addressing the question of whether joint tenancy may be severed by a written declaration comes from California, which has a statutory provision allowing the severance of a joint tenancy by less than all the joint tenants by the recordation and execution of a written declaration.¹⁹ Aside from cases from California, the only other case law we were able to locate addressing a situation similar to that presented here comes from Pennsylvania. Although these cases are not directly on point, they do provide guidance.

In *Kern v. Finnegan et al.*,²⁰ and in *Stop 35, Inc. v. Haines*,²¹ the Superior Court of Pennsylvania addressed whether agreements between husbands and their wives severed the spouses' tenancies by the entireties. In *Kern*, the court held that the agreement did not. The *Kern* court explained that no authority had been cited to the court and that the court was not able to find any to support a conclusion that the written declaration in that case could convert a tenancy by the entireties to a tenancy in common with the same force and legal effect as a deed executed and recorded by the parties. In *Stop 35, Inc.*, the husband and his estranged wife recorded an agreement which provided that the net proceeds of real estate held by tenancy by the entireties would be divided equally if the property were sold. In finding

¹⁸ See, 48A C.J.S. *Joint Tenancy* § 19 (2004); 7 Powell & Wolf, *supra* note 17; William B. Stoebuck & Dale A. Whitman, *The Law of Property* § 5.4 (3d ed. 2000) (collecting cases).

¹⁹ See Cal. Civ. Code § 683.2 (West 2007). See, e.g., *In re Estate of Powell*, 83 Cal. App. 4th 1434, 100 Cal. Rptr. 2d 501 (2000).

²⁰ *Kern v. Finnegan et al.*, 192 Pa. Super. 611, 162 A.2d 93 (1960).

²¹ *Stop 35, Inc. v. Haines*, 374 Pa. Super. 604, 543 A.2d 1133 (1988).

that the agreement in that case did not sever the tenancy by the entireties, the court stated, “‘It is obvious that the effect on the title to this property by the recording of this Agreement would be chaotic. Certainly, grantor and grantee cannot merely by their own declaration effectuate the recording of a Deed affecting title to property.’”²²

Here, Lloyd’s intent to sever his joint tenancies with Elvira is clear. Nevertheless, we must conclude that the execution of the notices in this case was not a legally sufficient act to sever Lloyd and Elvira’s joint tenancies. Section 76-118 authorizes the severance of a joint tenancy by way of a conveyance of the property. The notices in question here did not convey the property held in joint tenancy and, therefore, did not sever the joint tenancy under § 76-118. That leaves us with the question of whether any of the four unities of time, title, interest, or possession were destroyed by the notices of severance. In *In re Estate of Rosso*,²³ we addressed the question of whether the disposal and failure to replace stock certificates purportedly held in joint tenancy were actions inconsistent with the joint tenancy that extinguished the right of survivorship. We noted that the disposal of the stock certificates would do nothing to alter any aspect of the stock’s ownership because the certificate was merely a token of ownership, and there was no evidence to suggest that they were destroyed in an attempt to affect actual ownership of the corporation. Because the certificates did not affect the actual ownership of the stock, we concluded in *In re Estate of Rosso* that the unities of joint tenancy had not been affected. As in *In re Estate of Rosso*, the notices in this case did not affect actual ownership of the property and, therefore, did not affect the unities of joint tenancy. Accordingly, we must conclude that the joint tenancies Lloyd held with Elvira were not severed.

CONCLUSION

For the reasons discussed above, we affirm.

AFFIRMED.

²² *Id.* at 609, 543 A.2d at 1136.

²³ *In re Estate of Rosso*, *supra* note 11.

11. **Double Jeopardy: Pleadings.** A defendant may raise a double jeopardy claim by filing a plea in bar.
12. **Theft: Value of Goods.** An act of theft involving multiple items of property stolen simultaneously at the same place constitutes one offense, in which the value of the individual stolen items may be considered collectively for the aggregate or total value of the property stolen to determine the grade of the theft offense.
13. **Double Jeopardy: Juries.** In a case tried to a jury, jeopardy attaches when the jury is impaneled and sworn.
14. **Effectiveness of Counsel: Proof.** In order to demonstrate that his or her counsel's performance was deficient in support of a claim for ineffective assistance of counsel, a defendant must show that counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area.
15. **Effectiveness of Counsel: Presumptions.** In determining whether a trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably.
16. **Criminal Law: Trial: Attorney and Client.** An appellate court gives due deference to defense counsel's discretion in formulating trial tactics.

Appeal from the District Court for Holt County: MARK D. KOZISEK, Judge. Reversed and remanded with directions.

Ronald E. Temple, of Fitzgerald, Vetter & Temple, for appellant.

Jon Bruning, Attorney General, Kimberly A. Klein, and Stacy Foust, Senior Certified Law Student, for appellee.

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

STEPHAN, J.

Following a bench trial, Dean R. Miner was convicted in the district court for Holt County of theft by unlawful taking of 62 steers belonging to Wynn Hipke from the Atkinson Livestock Market. His conviction and sentence were affirmed on appeal.¹ In this postconviction proceeding, Miner contends that he was denied effective assistance of counsel. Specifically, he alleges that his trial counsel failed to file a plea in bar to assert a double jeopardy defense, based on a prior conviction in Nance County for theft by receiving some of the same cattle. The district court denied Miner's motion for postconviction relief, reasoning that a plea in bar would have had no merit because there was no

¹ *State v. Miner*, 2004 WL 1091996, No. A-02-933 (Neb. App. May 18, 2004) (not designated for permanent publication).

double jeopardy violation. On appeal from that order, we conclude that Miner's double jeopardy defense would have been meritorious if timely raised and that he is entitled to postconviction relief because of his trial counsel's failure to assert his constitutional right not to be placed in jeopardy twice for the same offense.

BACKGROUND

On March 19, 2001, Hipke consigned cattle including 66 steers to the Atkinson Livestock Market in Holt County. The following morning, market employees discovered that 62 of the Hipke steers were missing. An investigation by a State official determined that some of the Hipke steers had been sold through a livestock market in Boone County. The remaining steers were sold through a livestock market in Nance County. The evidence showed that all of the steers recovered had purple ear tags with "D.R. Miner" printed on them. All except one steer had the Miner brand placed over the top of the Hipke brand. Separate criminal charges were filed against Miner in the district courts for Nance and Holt Counties.

NANCE COUNTY PROSECUTION

Miner was charged in Nance County with theft by receiving stolen property in violation of Neb. Rev. Stat. § 28-517 (Reissue 1995), a Class III felony. In an amended information filed March 22, 2002, the State alleged that on March 23, 2001, in Nance County, Miner received, retained, or disposed of stolen movable property consisting of "26 head of black and black white-faced steers from the Atkinson Livestock Market." The State further alleged that Miner knew or believed that the steers had been stolen and that they had a value of over \$1,500. Miner was also charged with one count of disposing of livestock without evidence of ownership in violation of Neb. Rev. Stat. § 54-1,123 (Reissue 2004), a Class III felony. On March 25, a jury found him guilty on both counts. On June 7, he received concurrent sentences of not less than 3 and not more than 6 years' imprisonment. The convictions and sentences were summarily affirmed by this court.²

² See *State v. Miner*, 265 Neb. xxi (No. S-02-666, Jan. 3, 2003).

HOLT COUNTY PROSECUTION

In June 2001, Miner was charged in Holt County with theft by unlawful taking in violation of Neb. Rev. Stat. § 28-511 (Reissue 1995), a Class III felony. The information specifically alleged that on or about March 20, 2001, in Holt County, Miner did “take or exercise control over movable property of another with the intent to deprive him or her thereof, to-wit: 62 black and black baldy steers belonging to Wynn Hipke, from the Atkinson Livestock Market, said property having a value of more than \$ 1,500.00.” Following a bench trial at which he was represented by counsel, the court found Miner guilty of the charged offense. On July 22, 2002, he was fined \$5,000 and sentenced to 60 to 120 months’ imprisonment, to be served consecutively to any other existing sentence.

Miner perfected a direct appeal *pro se*, but he was subsequently represented in the appeal by an attorney who did not represent him at trial. His claims on appeal included an assertion that the district court erred in imposing a consecutive sentence instead of a concurrent sentence and a claim that his trial counsel was ineffective for failing to file a plea in bar. Regarding sentencing, Miner argued that the presentence investigation report showed that he had previously been convicted and sentenced in Nance County for theft of some of the same steers. The Court of Appeals rejected this argument, noting that

although the presentence investigation report contains both a letter from defense counsel and other information indicating that Miner was convicted and sentenced in Nance County for theft by receiving stolen property and disposing of livestock without evidence of ownership, the report does not show that these convictions involved the same cattle as the case at bar.³

The Court of Appeals further determined that the evidence was “insufficient to establish that Miner was convicted and sentenced in Nance County as he claims.”⁴ The court also determined that the record was insufficient to adequately review Miner’s claim

³ *State v. Miner*, *supra* note 1, 2004 WL 1091996 at *5.

⁴ *Id.*

of ineffective assistance of trial counsel, and accordingly did not reach that issue. It affirmed Miner's conviction and sentence.

POSTCONVICTION PROCEEDING

Miner then initiated this action for postconviction relief. He is represented by the same attorney who represented him on direct appeal. He alleged that his trial counsel was ineffective for failing to file a plea in bar to the charges and failing "to offer evidence or remarks to the Court, at the time of sentencing, reflecting that the defendant had been sentenced in another county for charges relating to the same cattle upon which he was charged and sentenced in Holt County." He prayed for an order dismissing the charges or for a new sentencing hearing.

An evidentiary hearing was held on the postconviction motion. The district court received evidence consisting of the record from the Holt County prosecution and appeal, portions of the record from the Nance County prosecution, and the deposition of Miner's trial counsel in the Holt County prosecution. The State offered no evidence.

Subsequently, the district court entered an order denying Miner's motion for postconviction relief. The court noted that the State had conceded in its brief that "the 26 head for which the defendant was convicted of receiving in Nance County were part of the 62 head the defendant was convicted of taking in Holt County and the evidence adduced at the hearing on the defendant's motion indicates the same." However, it concluded that these facts did not subject Miner to double jeopardy in the Holt County case, reasoning:

In this case the defendant was convicted of taking 62 steers in Holt County having a value of \$39,501.60 . . . and receiving 26 steers in Nance County having a value of \$16,427.37. . . . The defendant was convicted of taking an additional 36 steers in Holt County. This distinction was recognized by defendant's trial counsel. . . . Because the Holt County case required proof of the taking of an additional 36 head of steers with a value in excess of \$1,500 that the Nance County case did not, the court finds that any plea in bar filed on that basis would not have been sustained. There was no double jeopardy violation regarding the additional 36 head of steers taken in Holt County.

Trial counsel's failure to file a plea in bar did not subject the defendant to any prejudice under the second prong of the *Strickland v. Washington*⁵ test.

The district court also rejected Miner's sentencing claim, noting the record showed that the court was aware of the Nance County conviction at the time of sentencing on the Holt County conviction.

Miner 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.⁶

ASSIGNMENTS OF ERROR

Miner assigns, restated, that the district court erred in rejecting his claims that (1) his trial counsel was ineffective for failing to file a plea in bar asserting double jeopardy and (2) his trial counsel was ineffective for failing to offer evidence of Miner's conviction and sentence in Nance County at the time of his sentencing in Holt County.

STANDARD OF REVIEW

[1] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.⁷ 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*,⁸ an appellate court reviews such legal determinations independently of the lower court's decision.⁹

ANALYSIS

[2-5] The Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 1995), is available to a defendant to show that his or her conviction was obtained in violation

⁵ *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

⁶ See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

⁷ *State v. Sims*, 272 Neb. 811, 725 N.W.2d 175 (2006).

⁸ *Strickland v. Washington*, *supra* note 5.

⁹ *State v. Sims*, *supra* note 7; *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006).

of his or her constitutional rights.¹⁰ A defendant has the right under U.S. Const. amends. VI and XIV, and Neb. Const. art. I, § 11, to be represented by an attorney in all critical stages of a criminal prosecution.¹¹ An ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.¹² 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.¹³ Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.¹⁴ The two prongs of this test, deficient performance and prejudice, may be addressed in either order.¹⁵

[6] In this case, the district court focused on the second prong of the test and concluded that the alleged performance deficiency of Miner's trial counsel did not result in prejudice. Specifically, the district court determined that counsel's failure to file a plea in bar had no adverse consequence because the convictions in Nance and Holt Counties did not subject Miner to double jeopardy. We begin our analysis with this issue, because where a defendant is unable to demonstrate sufficient prejudice in establishing a claim for ineffectiveness of counsel, no examination of whether counsel's performance was deficient is necessary.¹⁶

PREJUDICE: DOUBLE JEOPARDY

[7,8] The prejudice component of the ineffective assistance of counsel test focuses on whether counsel's performance rendered

¹⁰ *State v. Marshall*, 272 Neb. 924, 725 N.W.2d 834 (2007); *State v. McDermott*, 267 Neb. 761, 677 N.W.2d 156 (2004).

¹¹ *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001).

¹² See *Strickland v. Washington*, *supra* note 5.

¹³ *State v. Barnes*, 272 Neb. 749, 724 N.W.2d 807 (2006).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *State v. Smith*, 269 Neb. 773, 696 N.W.2d 871 (2005).

the results of the proceeding unreliable or fundamentally unfair by depriving a defendant of a substantive or procedural right.¹⁷ To prove prejudice for a claim of ineffective assistance of counsel, the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.¹⁸ A reasonable probability is a probability sufficient to undermine confidence in the outcome.¹⁹

[9-11] 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.²⁰ The protection provided by Nebraska's double jeopardy clause is coextensive with that provided by the U.S. Constitution.²¹ A defendant may raise a double jeopardy claim by filing a plea in bar.²²

We agree with the reasoning of the district court that trial counsel's failure to file a plea in bar could have prejudiced Miner only if there had been a meritorious double jeopardy defense. In order to address that issue, we must decide whether the prosecutions in Nance and Holt Counties were for the same offense.

One of Miner's convictions in Nance County was for theft by receiving stolen property, which is committed when a person "receives, retains, or disposes of stolen movable property of another knowing that it has been stolen, or believing that it has been stolen, unless the property is received, retained, or disposed

¹⁷ *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999).

¹⁸ *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006); *State v. Rieger*, 270 Neb. 904, 708 N.W.2d 630 (2006).

¹⁹ *Id.*

²⁰ *State v. Molina*, *supra* note 9; *State v. Winkler*, 266 Neb. 155, 663 N.W.2d 102 (2003).

²¹ *State v. Molina*, *supra* note 9; *State v. Winkler*, *supra* note 20. See Neb. Const. art. I, § 12.

²² See, Neb. Rev. Stat. § 29-1817 (Reissue 1995); *State v. Milenkovich*, 236 Neb. 42, 458 N.W.2d 747 (1990).

with intention to restore it to the owner.”²³ In Holt County, Miner was convicted of theft by unlawful taking, which is committed when a person “takes, or exercises control over, movable property of another with the intent to deprive him or her thereof.”²⁴ Although the two offenses are codified separately, §§ 28-511 and 28-517 must be read in conjunction with Neb. Rev. Stat. § 28-510 (Reissue 1995), which provides:

Conduct denominated theft in sections 28-509 to 28-518 constitutes a single offense embracing the separated offenses heretofore known as larceny, embezzlement, false pretense, extortion, blackmail, fraudulent conversion, receiving stolen property, and the like. An accusation of theft may be supported by evidence that it was committed in any manner that would be theft under sections 28-509 to 28-518, notwithstanding the specification of a different manner in the indictment or information, subject only to the power of the court to [e]nsure fair trial by granting a continuance or other appropriate relief where the conduct of the defense would be prejudiced by lack of fair notice or by surprise.

In *State v. Jonusas*,²⁵ we observed that § 28-510 mirrored A.L.I., Model Penal Code and Commentaries § 223.1(1) (1980). We wrote:

In effect, § 28-510 has subsumed various forms of unlawful acquisitive behavior into a single offense of theft which may be committed by taking part in any one of several activities described in §§ 28-509 to 28-517. The unifying concept in all these crimes is that each involves the involuntary transfer of property. In each case, the actor appropriates the property of the victim without his or her consent or with a consent that was obtained by fraud or coercion.²⁶

²³ § 28-517.

²⁴ § 28-511(1).

²⁵ *State v. Jonusas*, 269 Neb. 644, 694 N.W.2d 651 (2005).

²⁶ *Id.* at 649, 694 N.W.2d at 656 (citing A.L.I., Model Penal Code and Commentaries § 223.1, comment 2 (1980)).

The authors of the Model Penal Code note that consolidation of theft offenses “reduces the opportunity for technical defenses based upon legal distinctions between the closely related activities of stealing and receiving.”²⁷

One who is found in possession of stolen goods may be either the thief or the receiver. If the prosecution can prove the requisite state of mind to deprive the true owner of the property, it makes little difference whether the jury infers that the defendant took directly from the owner or acquired the goods from another person who committed the act of taking.²⁸

However, “[c]onsolidation also has a consequence favorable to the defense by precluding conviction of both offenses for the same transaction.”²⁹ Other courts in jurisdictions having consolidated theft statutes derived from the Model Penal Code have held that a defendant cannot be convicted of theft by taking and theft by receiving the same property.³⁰ Because the Legislature has unambiguously defined theft as a single offense which can be committed in several different ways, we do not employ the double jeopardy analysis established by *Blockburger v. United States*.³¹

In this case, the district court distinguished Miner’s two theft convictions by concluding that they did not involve the same property. The court reasoned that although the same 26 head of cattle were involved in each case, the Holt County case involved an additional 36 head which were not the subject of the Nance County prosecution. The court concluded that there was “no double jeopardy violation regarding the additional 36

²⁷ Model Penal Code and Commentaries, *supra* note 26, § 223.6, comment 1 at 232.

²⁸ *Id.* at 232-34.

²⁹ *Id.* at 234.

³⁰ See, *People v. Palisoc*, 2002 Guam 9 (2002); *Gibson v. State*, 643 N.E.2d 885 (Ind. 1994); *State v. Esslinger*, 357 N.W.2d 525 (S.D. 1984), *overruled on other grounds*, *State v. LaPlante*, 650 N.W.2d 305 (S.D. 2002).

³¹ *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932). See *State v. White*, 254 Neb. 566, 577 N.W.2d 741 (1998).

head of steers taken in Holt County.” In effect, the district court treated the Holt County conviction as being based on 36 head and the Nance County conviction as being based on the remaining 26 head, thus constituting two separate offenses.

[12] This reasoning is contrary to Neb. Rev. Stat. § 28-518 (Reissue 1995), which provides that theft may be classified as a Class III or IV felony or a Class I or II misdemeanor, depending on the value of the stolen property. However, § 28-518(7) adds: “Amounts taken pursuant to one scheme or course of conduct from one person may be aggregated in the indictment or information in determining the classification of the offense, *except that amounts may not be aggregated into more than one offense.*” (Emphasis supplied.) Similarly, this court has held that an act of theft involving multiple items of property stolen simultaneously at the same place constitutes one offense, in which the value of the individual stolen items may be considered collectively for the aggregate or total value of the property stolen to determine the grade of the theft offense under § 28-518.³²

The record reflects that 62 head of cattle were taken pursuant to “one scheme or course of conduct from one person” on the same day. Accordingly, § 28-518(7) permits the value of all items of property, in this case steers, to be aggregated in order to determine the classification of the theft offense. However, the same statute specifically prohibits aggregation of individual values “into more than one offense.” Thus, Miner could not have been charged with one count of theft involving 26 head and a second count involving the remaining 36 head. For that reason, the district court erred in treating the two convictions as involving separate lots of cattle and therefore separate offenses for purposes of double jeopardy.

[13] In a case tried to a jury, jeopardy attaches when the jury is impaneled and sworn.³³ Although the record before us does not reflect the precise date on which the jury in the Nance

³² *State v. Garza*, 241 Neb. 256, 487 N.W.2d 551 (1992).

³³ *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005); *State v. Bottolfson*, 259 Neb. 470, 610 N.W.2d 378 (2000).

County prosecution was sworn, we can reasonably infer that it was prior to March 25, 2002, when the jury, having been “duly impanelled and sworn,” returned its guilty verdict on the charge of theft. Trial in the Holt County prosecution began on April 30. A meritorious plea in bar could have been filed after jeopardy had attached in the Nance County case and before the commencement of trial in Holt County.

PERFORMANCE OF TRIAL COUNSEL

[14-16] In order to demonstrate that his or her counsel’s performance was deficient in support of a claim for ineffective assistance of counsel, a defendant must show that counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area.³⁴ In determining whether a trial counsel’s performance was deficient, there is a strong presumption that such counsel acted reasonably.³⁵ An appellate court gives due deference to defense counsel’s discretion in formulating trial tactics.³⁶

Miner’s trial counsel represented him only in the Holt County prosecution. However, he was aware of the Nance County conviction and understood that it involved some, but not all, of the cattle which had been stolen in Holt County. His primary strategy was to defend on the basis that the State’s circumstantial evidence was insufficient to connect Miner to the “actual taking” in Holt County. He did not file a plea in bar or research the double jeopardy issue, and he had no discussions with Miner on that subject.

At the time of his defense of Miner in 2002, counsel was charged with knowledge of the legal principles with respect to consolidation of theft offenses in Nebraska.³⁷ Counsel’s belief that the State’s evidence may have been insufficient to obtain a conviction did not preclude a pretrial filing of a plea in bar to assert the double jeopardy issue in the trial court and, if

³⁴ *State v. Moyer*, *supra* note 18.

³⁵ *State v. McHenry*, 268 Neb. 219, 682 N.W.2d 212 (2004).

³⁶ *State v. Kelley*, 265 Neb. 563, 658 N.W.2d 279 (2003).

³⁷ See, §§ 28-510 to 28-518; *State v. Garza*, *supra* note 32.

unsuccessful there, in an immediate appeal.³⁸ We conclude that trial counsel's failure to file a plea in bar constituted deficient performance under the *Strickland* standard which was prejudicial to Miner because it deprived him of a meritorious double jeopardy defense.

CONCLUSION

Having established both prongs of the *Strickland* standard, Miner has shown that he received ineffective assistance of trial counsel in violation of his rights secured by the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution which rendered the judgment of conviction void or voidable. Because of the nature of this violation, Miner was deprived of his federal and state constitutional rights not to be placed in jeopardy twice for the same offense. Accordingly, we reverse the judgment of the district court and remand the cause with directions to set aside the judgment of conviction in Holt County and discharge Miner from the sentence imposed in this cause.

REVERSED AND REMANDED WITH DIRECTIONS.

³⁸ See *State v. Rubio*, 261 Neb. 475, 623 N.W.2d 659 (2001) (holding that plea in bar filed in accordance with statutory requirements is final, appealable order).

IN RE ADOPTION OF KAILYNN D.

DAVID E. AND JENNIFER E., APPELLEES, V. RICHARD D.
AND JOHN J. KOHL, GUARDIAN AD LITEM FOR RICHARD D.,
APPELLEES, AND SARPY COUNTY, NEBRASKA, APPELLANT.

733 N.W.2d 856

Filed June 29, 2007. No. S-06-1278.

1. **Adoption: Appeal and Error.** Appeals in adoption proceedings are reviewed by an appellate court for error appearing on the record.
2. **Adoption: Statutes.** The matter of adoption is statutory, and the manner of procedure and terms are all specifically prescribed and must be followed.
3. **Statutes.** Statutory interpretation presents a question of law.
4. **Statutes: Legislature: Appeal and Error.** In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained

from the entire language of the statute considered in its plain, ordinary, and popular sense.

5. **Statutes: Legislature: Intent.** It is a court's duty to discover, if possible, legislative intent from the statute itself.
6. **Statutes: Appeal and Error.** It is not within an appellate court's province to read a meaning into a statute that is not there.
7. **Legislature: Intent.** The intent of the Legislature is expressed by omission as well as by inclusion.
8. **Rules of the Supreme Court: Appeal and Error.** A cross-appeal must be properly designated under Neb. Ct. R. of Prac. 9D(4) (rev. 2006) if affirmative relief is to be obtained.

Appeal from the County Court for Sarpy County:
TODD HUTTON, Judge. Reversed and remanded for further proceedings.

Nicole O'Keefe, Deputy Sarpy County Attorney, for appellant.

Michael L. Smart for appellee David E.

John J. Kohl, of Raynor, Rensch & Pfeiffer, pro se.

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

STEPHAN, J.

This is a private adoption proceeding in which the husband of the biological mother sought to adopt her child, alleging abandonment by the biological father. The county court for Sarpy County appointed a guardian ad litem for the biological father, who was incarcerated. The sole issue in the appeal is whether Sarpy County can be required to pay the fee of the guardian ad litem in a private adoption. We conclude that it cannot.

FACTS

Kailynn D., born October 22, 1998, is the biological child of Richard D. and Jennifer E., who never married. Jennifer married David E. on March 5, 2005. In January 2006, David filed a petition to adopt Kailynn, in which Jennifer joined. The petition filed in Sarpy County Court identified Richard as the biological father and alleged that he was incarcerated in West

Virginia. The petition requested appointment of a guardian ad litem for the child, but did not request that a guardian ad litem be appointed for Richard.

After he was served with a copy of the petition for adoption, Richard sent a letter to the court requesting that counsel be appointed to represent him and that he be subpoenaed to attend all hearings in the matter. Richard did not specifically request appointment of a guardian ad litem. The court denied Richard's request for appointment of counsel, but appointed attorney John J. Kohl to serve as his guardian ad litem pursuant to Neb. Rev. Stat. § 43-104.18 (Reissue 2004).

After Kohl filed a report, a hearing was held at which he, counsel for David and Jennifer, and the guardian ad litem for Kailynn agreed that Kohl had performed all of his statutory duties and should be discharged. The court subsequently entered an order finding that Kohl had performed all of the duties of the guardian ad litem for Richard under Neb. Rev. Stat. § 43-104.19 (Reissue 2004) and that upon notice to Richard, Kohl's appointment would terminate. In a separate order, the court granted Kohl's motion for leave to withdraw as guardian ad litem for Richard.

After his withdrawal from the case, Kohl filed an application for fees and expenses, which he served on the Sarpy County Attorney. Sarpy County filed a resistance to the application. Following a hearing, the court entered a written order awarding Kohl a fee of \$2,516. By handwritten interlineation on the order, the court stated that it was "for G.A.L. Services Rendered" and was "to be submitted to Sarpy County for payment." Sarpy County timely appealed; we moved the appeal to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.¹

ASSIGNMENT OF ERROR

Sarpy County assigns, restated, that the county court erred in ordering Sarpy County to pay the guardian ad litem fee for Richard in this private adoption matter.

¹ See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

STANDARD OF REVIEW

[1] Appeals in adoption proceedings are reviewed by an appellate court for error appearing on the record.²

ANALYSIS

[2] In Nebraska, the matter of adoption is statutory, and the manner of procedure and terms are all specifically prescribed and must be followed.³ The adoption statutes codified at Neb. Rev. Stat. §§ 43-101 to 43-116 (Reissue 2004) do not make a county a necessary party to an adoption proceeding. In this case, Sarpy County had no involvement until it was served with Kohl's application for fees.

Kohl was appointed pursuant to § 43-104.18, which provides that under certain circumstances, the court may appoint a guardian ad litem to "represent the interests of the biological father." The statute further provides that the guardian ad litem is to be "chosen from a qualified pool of local attorneys" and "shall receive reasonable compensation for the representation, the amount to be determined at the discretion of the court."⁴ The statute does not specify who is responsible for paying the fee.

[3-6] Statutory interpretation presents a question of law.⁵ In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.⁶ It is a court's duty to discover, if possible, legislative intent from the statute itself.⁷ It is not within an appellate court's province to read a meaning into a statute that is not there.⁸ We find no language in § 43-104.18 which would obligate a county to pay the fee of a guardian ad litem

² *In re Adoption of Luke*, 263 Neb. 365, 640 N.W.2d 374 (2002).

³ *Id.*

⁴ § 43-104.18.

⁵ *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007).

⁶ *In re Interest of Jeffrey K.*, ante p. 239, 728 N.W.2d 606 (2007).

⁷ *Knapp v. Village of Beaver City*, ante p. 156, 728 N.W.2d 96 (2007).

⁸ *City of Elkhorn v. City of Omaha*, supra note 5.

appointed for a biological father in a private adoption proceeding to which it is not a party.

The Nebraska Court of Appeals addressed a similar issue in *In re Guardianship of Suezanne P.*⁹ There, an attorney was appointed to represent a minor's parent in a guardianship proceeding initiated by the minor's great-grandmother. The court ordered the county to pay the attorney fee. The county had not been involved in the case prior to the fee award. The Court of Appeals noted that while various statutes grant a court authority to require counties to pay attorney fees in various circumstances, none were applicable to the case. The Court of Appeals concluded that there was "no authority for the court to order the County to pay the fees of the court-appointed attorney in this civil guardianship case in which the County was in no way involved."¹⁰

In a brief filed in this appeal, Kohl calls our attention to Neb. Rev. Stat. § 43-292.01 (Reissue 2004), a provision of the Nebraska Juvenile Code, which states that a guardian ad litem appointed in a termination of parental rights case "shall be paid a reasonable fee set by the court and paid from the general fund of the county." Kohl argues that we should read this statute in *pari materia* with § 43-104.18 so as to include a requirement that the county pay the guardian ad litem fee in this case. We note that the adoption statutes and the Nebraska Juvenile Code are two separate legislative enactments. But of greater significance, the two statutes are distinctly different. In § 43-292.01, as in certain other civil statutes, the Legislature has specifically provided that a county can be required to pay guardian ad litem or attorney fees.¹¹ No such provision is included in § 43-104.18.

[7] The intent of the Legislature is expressed by omission as well as by inclusion.¹² The fact that the Legislature expressly

⁹ *In re Guardianship of Suezanne P.*, 6 Neb. App. 785, 578 N.W.2d 64 (1998).

¹⁰ *Id.* at 789, 578 N.W.2d at 67.

¹¹ See, e.g., Neb. Rev. Stat. §§ 30-2620.01 and 42-364 (Cum. Supp. 2006) and 43-273 (Reissue 2004).

¹² *Ledwith v. Bankers Life Ins. Co.*, 156 Neb. 107, 54 N.W.2d 409 (1952).

obligated counties to pay guardian ad litem fees in some statutes, but not in § 43-104.18, reflects a legislative intent that the county cannot be ordered to pay the fees of a guardian ad litem appointed for a biological father in a private adoption case. Accordingly, we conclude that the county court erred in ordering Sarpy County to pay the fee of Kohl, the guardian ad litem appointed for Richard.

[8] Although he is an appellee, David's brief includes an "Assignment of Error" in which he asserts that the county court "did not have authority under the adoption statutes to appoint a guardian ad litem for Richard and that therefore, there is no authority to assess these costs" to David.¹³ We regard this as a request for affirmative relief in the event that Sarpy County prevails in this appeal. A cross-appeal must be properly designated under Neb. Ct. R. of Prac. 9D(4) (rev. 2006) if affirmative relief is to be obtained.¹⁴ Rule 9D(4) provides

Where the brief of appellee presents a cross-appeal, it shall be noted on the cover of the brief and it shall be set forth in a separate division of the brief. This division shall be headed "Brief on Cross-Appeal" and shall be prepared in the same manner and under the same rules as the brief of appellant.

Because David failed to properly identify his brief as a cross-appeal, we decline to address his arguments. Although we conclude that Sarpy County is not obligated to pay the fee of the guardian ad litem, we express no opinion on the question of whether the fee should be taxed as costs to David. That issue was never addressed by the county court and likely will arise on remand. An appellate court will not consider an issue on appeal that was not passed upon by the trial court.¹⁵

CONCLUSION

We conclude that the county court erred in ordering Sarpy County to pay the fee of Kohl, the guardian ad litem appointed

¹³ Brief for appellee David E. at 2.

¹⁴ *New Tek Mfg. v. Beehner*, 270 Neb. 264, 702 N.W.2d 336 (2005).

¹⁵ *In re Estate of Eriksen*, 271 Neb. 806, 716 N.W.2d 105 (2006).

for Richard, the biological father. Accordingly, we reverse, and remand to the county court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.

KIMBERLEE TROSPER, APPELLANT,
v. BAG 'N SAVE, APPELLEE.
734 N.W.2d 704

Filed July 6, 2007. No. S-05-889.

1. **Pleadings: Appeal and Error.** Whether a petition states a cause of action is a question of law which requires an appellate court to reach a conclusion independent of the trial court.
2. **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.
3. **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.
4. **Employer and Employee: Public Policy.** The public policy exception to the at-will employment doctrine is restricted to cases when a clear mandate of public policy has been violated, and it should be limited to manageable and clear standards.
5. **Employer and Employee: Public Policy: Courts.** In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme.
6. **Workers' Compensation: Employer and Employee: Public Policy.** The Nebraska Workers' Compensation Act presents a clear mandate of public policy warranting application of the public policy exception.
7. **Actions: Workers' Compensation: Employer and Employee.** A cause of action for retaliatory demotion exists when an employer demotes an employee for filing a workers' compensation claim.
8. **Workers' Compensation.** An employee's right to be free from retaliatory demotion for filing a workers' compensation claim is married to the right to be free from discharge.
9. **Workers' Compensation: Employer and Employee: Public Policy.** An employer's conduct in demoting an employee contravenes the public policy of the Nebraska Workers' Compensation Act, just as discharge does.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Reversed and remanded for further proceedings.

Michael P. Dowd, of Dowd, Howard & Corrigan, L.L.C., for appellant.

Robert F. Rossiter, Jr., and Sherman P. Willis, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

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

CONNOLLY, J.

Under Nebraska law, an employer, without incurring liability, generally may terminate an at-will employee at any time. But in *Jackson v. Morris Communications Corp.*,¹ we held a public policy exception to this rule applies when an employer wrongfully discharges an employee in retaliation for filing a workers' compensation claim. Kimberlee Trosper alleges not that she was fired, but that she was demoted because she pursued workers' compensation. This case presents the question whether we should extend the public policy exception to include retaliatory demotion. Extending our ruling in *Jackson*, we now hold that demotion, like discharge, violates public policy. We reverse, and remand for further proceedings.

BACKGROUND

Trosper filed a complaint alleging the following: Bag 'N Save employed her as a "deli manager." During the course of her employment, she suffered a work-related injury which required medical treatment. When she reported her injury to her employers, the company demoted her from "deli manager" to "deli clerk," and her annual salary decreased from \$30,100 to \$22,500. Trosper's complaint does not allege that she filed for workers' compensation. Bag 'N Save, however, acknowledges that Trosper filed a workers' compensation claim and that she reported the injury under the Nebraska Workers' Compensation Act.²

¹ *Jackson v. Morris Communications Corp.*, 265 Neb. 423, 657 N.W.2d 634 (2003).

² See Neb. Rev. Stat. §§ 48-101 to 48-1,117 (Reissue 2004 & Cum. Supp. 2006).

Trosper alleged that Bag 'N Save acted in a retaliatory manner contrary to our decision in *Jackson v. Morris Communications Corp.*³ Bag 'N Save moved to dismiss under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(6) (rev. 2003), alleging that the complaint failed to state a claim upon which relief could be granted. The trial court sustained the motion and dismissed the complaint.

[1] Whether a petition states a cause of action is a question of law which requires this court to reach a conclusion independent of the trial court.⁴

ASSIGNMENT OF ERROR

Trosper assigns, restated, that the district court erred as a matter of law in sustaining Bag 'N Save's motion to dismiss.

ANALYSIS

Trosper urges this court to adopt a cause of action for retaliatory demotion when an employer demotes an employee for filing a workers' compensation claim. She contends that demotion, like termination, frustrates the public policy behind the Nebraska Workers' Compensation Act. Bag 'N Save argues that the public policy exception should be restricted to situations involving discharge. It argues that demotion does not implicate the same concerns as discharge and that expanding the tort could cause a flood of litigation.

NEBRASKA JURISPRUDENCE ON PUBLIC POLICY EXCEPTION

[2-5] Unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason.⁵ We recognize, however, a public policy exception to the at-will employment doctrine. Under the public policy exception, we will allow an employee to claim damages for wrongful discharge when the motivation for the firing contravenes public policy.⁶ The public policy exception is restricted to cases when a clear

³ *Jackson v. Morris Communications Corp.*, *supra* note 1.

⁴ See *id.*

⁵ *Id.*; *Malone v. American Bus. Info.*, 262 Neb. 733, 634 N.W.2d 788 (2001).

⁶ *Jackson v. Morris Communications Corp.*, *supra* note 1.

mandate of public policy has been violated, and it should be limited to manageable and clear standards.⁷ In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme.⁸

We have addressed whether a public policy exception to the at-will employment doctrine should apply in several cases. We have previously recognized public policy exceptions when a statute prohibits an employer from discharging an employee.⁹ And we have recognized the exception when an employee reports, in good faith, his suspicions that his employer is violating a criminal law.¹⁰ In contrast, we determined that the Nebraska Wage Payment and Collection Act did not "represent a 'very clear mandate of public policy' which would warrant recognition of an exception to the employment-at-will doctrine."¹¹ That act did not prohibit employers from discharging employees, and it did not provide employees with any substantive rights. Instead, it was primarily remedial, providing an enforcement mechanism for rights that already exist.¹²

Recently, in *Jackson*, we recognized a public policy exception to the at-will employment doctrine and permitted a cause of action when an employer discharges an employee for filing a claim under the Nebraska Workers' Compensation Act. In *Jackson*, we acknowledged that the Nebraska Workers' Compensation Act, like the Nebraska Wage Payment and Collection Act, does not include a statutory prohibition that prevents employers from discharging employees who assert their

⁷ *Id.*; *Ambroz v. Cornhusker Square Ltd.*, 226 Neb. 899, 416 N.W.2d 510 (1987).

⁸ *Schriner v. Meginnis Ford Co.*, 228 Neb. 85, 421 N.W.2d 755 (1988).

⁹ See *Ambroz v. Cornhusker Square Ltd.*, *supra* note 7.

¹⁰ See *Schriner v. Meginnis Ford Co.*, *supra* note 8.

¹¹ *Malone v. American Bus. Info.*, *supra* note 5, 262 Neb. at 739, 634 N.W.2d at 793. Accord *Ambroz v. Cornhusker Square Ltd.*, *supra* note 7.

¹² See Neb. Rev. Stat. §§ 48-1228 to 48-1232 (Reissue 2004).

rights under the act.¹³ We, however, cited other states which recognized public policy exceptions absent a clear statutory ban.¹⁴

[6] Moreover, unlike the Nebraska Wage Payment and Collection Act, the Nebraska Workers' Compensation Act creates substantive rights to compensation arising from the statute itself. It serves the important and beneficent purpose of protecting injured workers from the adverse economic effects of work-related injuries and occupational disease and binds employers to compensate injured workers. This duty "would be seriously frustrated if employers were able to prevent employees from filing claims through the threat of discharge."¹⁵ We further explained:

To hold that there is not a clear public policy warranting an exception to the at-will employment doctrine would ignore the beneficent nature of the Nebraska Workers' Compensation Act. This, in effect, would allow an employer to say to the employee: "'Although you have no right to a tort action, you have a right to a workmen's compensation claim which, while it may mean less money, is a sure thing. However, if you exercise that right, we will fire you.'"¹⁶

Thus, we held that the Nebraska Workers' Compensation Act presented a clear mandate of public policy warranting application of the exception.

Trospers now requests that we expand our cause of action for retaliatory discharge to retaliatory demotion.

OTHER STATES' CASE LAW INVOLVING RETALIATORY CONDUCT SHORT OF DISCHARGE

We have not previously addressed whether our cause of action for retaliatory discharge should be expanded to include

¹³ Cf. *Malone v. American Bus. Info.*, *supra* note 5.

¹⁴ See, *Hansen v. Harrah's*, 100 Nev. 60, 675 P.2d 394 (1984); *Murphy v. City of Topeka*, 6 Kan. App. 2d 488, 630 P.2d 186 (1981).

¹⁵ *Jackson v. Morris Communications Corp.*, *supra* note 1, 265 Neb. at 431, 657 N.W.2d at 640.

¹⁶ *Id.* at 432, 657 N.W.2d at 640, quoting *Leach v. Lauhoff Grain Co.*, 51 Ill. App. 3d 1022, 366 N.E.2d 1145, 9 Ill. Dec. 634 (1977).

any lesser retaliatory actions against employees who file workers' compensation claims. Other jurisdictions provide some guidance.

In *Zimmerman v. Buchheit of Sparta, Inc.*,¹⁷ a plurality of the Illinois Supreme Court rejected a claim for retaliatory demotion. The court first addressed this claim as a possible extension of its retaliatory discharge tort.¹⁸ In declining to expand the tort, the court cited several Illinois cases which had narrowly interpreted the cause of action.¹⁹

The *Zimmerman* court stated that the element of discharge was essential to the tort it had created. It explained,

In our view, adoption of plaintiff's argument [a cause of action for retaliatory demotion] would replace the well-developed element of discharge with a new, ill-defined, and potentially all-encompassing concept of retaliatory conduct or discrimination. The courts then would be called upon to become increasingly involved in the resolution of workplace disputes which center on employer conduct that heretofore has not been actionable at common law or by statute.²⁰

The plaintiff's recitations of the "general principles of policy" behind retaliatory discharge did not sway the court.²¹ It held that

¹⁷ *Zimmerman v. Buchheit of Sparta, Inc.*, 164 Ill. 2d 29, 645 N.E.2d 877, 206 Ill. Dec. 625 (1994).

¹⁸ See *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353, 23 Ill. Dec. 559 (1978) (adopting exception for retaliatory discharge for filing workers' compensation claim).

¹⁹ See, e.g., *Hartlein v. Illinois Power Co.*, 151 Ill. 2d 142, 601 N.E.2d 720, 176 Ill. Dec. 22 (1992); *Hinthorn v. Roland's of Bloomington, Inc.*, 119 Ill. 2d 526, 519 N.E.2d 909, 116 Ill. Dec. 694 (1988); *Hindo v. University of Health Sciences*, 237 Ill. App. 3d 453, 604 N.E.2d 463, 178 Ill. Dec. 207 (1992) (court of appeals rejected retaliatory demotion as cause of action); *Scheller v. Health Care Service Corp.*, 138 Ill. App. 3d 219, 485 N.E.2d 26, 92 Ill. Dec. 471 (1985) (declining to expand tort to constructive discharge).

²⁰ *Zimmerman v. Buchheit of Sparta, Inc.*, *supra* note 17, 164 Ill. 2d at 39, 645 N.E.2d at 882, 206 Ill. Dec. at 630.

²¹ *Id.*

the plaintiff had not established a compelling reason to expand the cause of action.

The court also rejected the plaintiff's claim under an Illinois statutory provision which made it unlawful for an employer to "discriminate" against an employee because he exercised his rights under that state's workers' compensation act. In its discussion, the court pointed out that the "plaintiff fail[ed] to explain the manner in which demotions, as distinct from terminations, relieve employers of their responsibility to compensate employees for their work-related injuries."²²

Only two justices joined the majority decision. Two concurring justices and two dissenting justices disagreed with the plurality's decision to treat retaliatory demotion and retaliatory discharge differently. The concurring justices stated that the courts should leave recognition of both retaliatory discharge and demotion to the legislature. The concurrence pointed out, however, that refusing to recognize a tort of retaliatory demotion while maintaining the retaliatory discharge tort created a "glaring loophole" because employers could simply retaliate by demoting rather than firing employees who file workers' compensation claims.²³

The dissent argued the cause of action should be extended to demotion because there is "no principled way to distinguish the two situations."²⁴ The dissent relied on an Illinois statute which made it a crime to either discharge or discriminate against workers who filed workers' compensation claims.

In response to the concurring and dissenting opinions, the plurality wrote:

Neither the dissent nor the concurrence acknowledges that this court acts within its authority in reaffirming the well-settled and limited tort of retaliatory discharge, as an exception to the at-will employment doctrine, without being constrained to open broad new avenues of litigation

²² *Id.* at 44, 645 N.E.2d at 884, 206 Ill. Dec. at 632.

²³ *Id.* at 46, 645 N.E.2d at 885, 206 Ill. Dec. at 633 (Bilandic, C.J., concurring).

²⁴ *Id.* at 52, 645 N.E.2d at 888, 206 Ill. Dec. at 636 (Harrison, J., dissenting).

for other, less defined types of retaliatory conduct in the workplace.²⁵

Similarly, the Utah Supreme Court rejected a cause of action for retaliatory harassment or discrimination against an employee who disagreed with how an employer treated employees who filed workers' compensation claims. In *Touchard v. La-Z-Boy Inc.*,²⁶ the Utah court determined that the public policy exception behind retaliatory discharge did not apply "to the same extent when the employee . . . does not have the fear of losing his or her employment." The court also expressed concern that to recognize such a claim would expand the public policy exception beyond its intended narrow scope by implicating "a much broader range of behavior, including *demotions*, salary reductions, job transfers, or disciplinary actions."²⁷

In contrast, the Kansas Supreme Court has recognized a cause of action for retaliatory demotion. In *Brigham v. Dillon Companies, Inc.*,²⁸ the Kansas court analyzed the *Zimmerman* decision, focusing on the concurring and dissenting opinions. The Kansas court pointed out that four of seven justices on the *Zimmerman* court—both the concurring and dissenting justices—believed it was inconsistent to recognize a cause of action for retaliatory discharge, but not demotion.

The Kansas court, in recognizing a cause of action for retaliatory demotion, reasoned:

The employers' violation of public policy and the resulting coercive effect on the employee is the same in both [termination and demotion]. The loss or damage to the demoted employee differs in degree only. We do not share the employers' concern that a torrent of litigation of insubstantial employment matters would follow in the wake of our recognition of a cause of action for retaliatory demotion and, even if we did, it does not constitute a valid

²⁵ *Id.* at 45-46, 645 N.E.2d at 885, 206 Ill. Dec. at 633.

²⁶ *Touchard v. La-Z-Boy Inc.*, 148 P.3d 945, 955 (Utah 2006).

²⁷ *Id.* (emphasis supplied).

²⁸ *Brigham v. Dillon Companies, Inc.*, 262 Kan. 12, 935 P.2d 1054 (1997).

reason for denying recognition of an otherwise justified cause of action.

We conclude that the recognition of a cause of action for retaliatory demotion is a necessary and logical extension of the cause of action for retaliatory discharge. To conclude otherwise would be to repudiate this court's recognition of a cause of action for retaliatory discharge. The obvious message would be for employers to demote rather than discharge employees in retaliation for filing a workers compensation claim or whistleblowing. Thus, employers could negate this court's decisions recognizing wrongful or retaliatory discharge by taking actions falling short of actual discharge.²⁹

Bag 'N Save cites several cases refusing to expand the public policy exception to other retaliatory actions short of discharge.³⁰ But we do not find that authority persuasive. Here, we address only demotion. Moreover, most of the cases cited did not involve retaliatory actions for filing a workers' compensation claim and thus, did not address the same policy concerns now before us.³¹ Although one of the cases cited is a workers' compensation case, it is distinguishable because it involved the unique circumstance where the plaintiffs had filed for workers' compensation under a different state's statute.³² Finally,

²⁹ *Id.* at 20, 935 P.2d at 1059-60.

³⁰ See, *Sanchez v. Philip Morris Inc.*, 992 F.2d 244 (10th Cir. 1993) (failure to hire); *Warnek v. ABB Combustion Eng'g*, 137 Wash. 2d 450, 972 P.2d 453 (1999) (failure to rehire); *White v. State*, 131 Wash. 2d 1, 929 P.2d 396 (1997) (wrongful transfer); *Mintz v. Bell Atlantic Systems Leasing*, 183 Ariz. 550, 905 P.2d 559 (Ariz. App. 1995) (failure to promote).

³¹ See, *Sanchez v. Philip Morris Inc.*, *supra* note 30 (involving national origin discrimination); *White v. State*, *supra* note 30 (retaliation in violation of First Amendment right to freedom of speech); *Mintz v. Bell Atlantic Systems Leasing*, *supra* note 30 (retaliation for filing sex discrimination claim). See, also, *Ludwig v. C & A Wallcoverings, Inc.*, 960 F.2d 40 (7th Cir. 1992) (refusing to recognize cause of action for retaliatory demotion when employee reported supervisor's alleged misconduct).

³² See *Warnek v. ABB Combustion Eng'g*, *supra* note 30.

one other jurisdiction has taken the opposite view and allowed claims for lesser retaliatory actions.³³

NEBRASKA RECOGNIZES A CAUSE OF ACTION FOR
RETALIATORY DEMOTION FOR FILING A
WORKERS' COMPENSATION CLAIM

[7] Focusing on our rationale in *Jackson*, we conclude that a cause of action for retaliatory demotion exists when an employer demotes an employee for filing a workers' compensation claim. When we recognized a retaliatory discharge claim, we reasoned that "a rule which allows fear of retaliation for the filing of a claim undermines [the important public policy of the Nebraska Workers' Compensation Act]."³⁴ And we stated that "the employee must be able to exercise his right in an unfettered fashion without being subject to reprisal."³⁵

[8] An employee's right to be free from retaliatory demotion for filing a workers' compensation claim is married to the right to be free from discharge. Demotion, like termination, coercively affects an employee's exercise of his or her rights under the Nebraska Workers' Compensation Act. If we fail to recognize a claim for retaliatory demotion, it would create an incentive for employers to merely demote, rather than discharge, employees who exercise their rights. To promote such behavior would compromise the act and would render illusory the cause of action for retaliatory discharge. Thus, we believe that extending the tort created in *Jackson* to include retaliatory demotion is a logical step, and one which gives vitality to that decision.

³³ See, *Lawson v. AK Steel Corp.*, 121 Ohio App. 3d 251, 699 N.E.2d 951 (1997) (recognizing wrongful demotion cause of action when employer fired employee for whistleblowing); *Powers v. Springfield City Schools*, No. 98-CA-10, 1998 Ohio App. LEXIS 2827 (Ohio App. June 26, 1998) (unpublished opinion) (recognizing wrongful denial of promotion cause of action for whistleblowing). See, also, *Kulch v. Structural Fibers, Inc.*, 78 Ohio St. 3d 134, 162, 677 N.E.2d 308, 328 (1997) (recognizing common-law tort action for "wrongful discharge/discipline" in violation of public policy).

³⁴ *Jackson v. Morris Communications Corp.*, *supra* note 1, 265 Neb. at 432, 657 N.W.2d at 640-41.

³⁵ *Id.* at 429, 657 N.W.2d at 639, quoting *Hansen v. Harrah's*, *supra* note 14.

[9] We disagree with Bag 'N Save's contention that our case law advises against recognizing a tort for retaliatory demotion. Bag 'N Save cites our refusal in *White v. Ardan, Inc.*,³⁶ to adopt claims of "malicious termination" or "bad faith discharge" as indicating that we narrowly interpret the public policy exception. But in *White*, the plaintiffs' terminations did not implicate a clear public policy. The plaintiffs simply alleged that their employer fired them because an executive falsely accused them of dishonesty. In *White*, the plaintiffs failed to show that a constitutional, statutory, or regulatory provision or scheme warranted an exception to the "'terminable-at-will' rule."³⁷ Our refusal to recognize a cause of action in *White* is easily distinguishable from the present case because we have already determined that the Nebraska Workers' Compensation Act provides a clear public policy mandate.³⁸ And an employer's conduct in demoting an employee contravenes this policy, just as discharge does.

Bag 'N Save also refers us to *Collins v. Baker's Supermarkets*,³⁹ where we held that an employee's demotion did not violate Neb. Rev. Stat. § 81-1932 (Reissue 1999). Section 81-1932 prohibits an employer from terminating an employee based on the results of the employee's polygraph examination. Under the plain language of the statute, it only prohibited termination. Thus, the statute simply did not apply to demotion. *Collins* is not controlling.

We recognize that demotion may not be as severe as discharge in that it affects only the terms of employment, rather than the "essence" of the employment.⁴⁰ But this is not a compelling distinction. Although *Jackson* specifically addressed discharge, more broadly, the intent in *Jackson* was to protect the important public policy and beneficent purpose of the Nebraska Workers' Compensation Act. Although demotion is less harsh

³⁶ See *White v. Ardan, Inc.*, 230 Neb. 11, 16-17, 430 N.W.2d 27, 31 (1988).

³⁷ *Id.* at 15, 430 N.W.2d at 30.

³⁸ See *Jackson v. Morris Communications Corp.*, *supra* note 1.

³⁹ *Collins v. Baker's Supermarkets*, 223 Neb. 365, 389 N.W.2d 774 (1986).

⁴⁰ See Mark A. Rothstein, *Wrongful Refusal to Hire: Attacking the Other Half of the Employment-at-Will Rule*, 24 Conn. L. Rev. 97, 143 (1991).

than dismissal, nevertheless, it would shrink an employee's right to pursue workers' compensation. Allowing employers to demote an employee for filing a workers' compensation claim would circumvent the policy in *Jackson*.

We acknowledge that allowing a cause of action for retaliatory demotion could result in claims for other retaliatory conduct. As usual in common-law adjudication, we will deal with those concerns case-by-case. Today, we address demotion, and nothing more. Further, we do not believe that the courts will be flooded with suits over insubstantial employment matters resulting in excessive judicial entanglement. But even so, an increase in litigation would "not constitute a valid reason for denying recognition of an otherwise justified cause of action."⁴¹

CONCLUSION

Here, Trosper's petition alleged that Bag 'N Save demoted her in retaliation for reporting a work-related injury. Because we recognize that a cause of action exists, we reverse, and remand for further proceedings. We note that to the extent Trosper's petition lacks factual allegations, she should be given leave to amend.

REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.

⁴¹ *Brigham v. Dillon Companies, Inc.*, *supra* note 28, 262 Kan. at 20, 935 P.2d at 1059.

GERRARD, J., concurring.

I join fully in the majority opinion. I write separately to address two issues raised by the dissenting opinion. The dissent advances these primary contentions: that our holding unwisely expands our retaliatory discharge rule announced in *Jackson v. Morris Communications Corp.*¹ and that the issue of retaliatory demotion should be addressed only by the Legislature. I respectfully disagree. The Legislature certainly could, if it

¹ *Jackson v. Morris Communications Corp.*, 265 Neb. 423, 657 N.W.2d 634 (2003).

chose, follow the example of other states and address the issues presented in this case, but that does not preclude this court from acting upon the public policy already expressed in the Nebraska Workers' Compensation Act. And the statutes enacted in other states, relied upon by the dissent, actually demonstrate that a rule protecting employees from retaliatory demotion is practical and fair.

The dissenting opinion begins by asserting that we are expanding the "narrow exception" to the at-will employment doctrine that we adopted in *Jackson* into a new theory of liability for retaliatory demotion. I simply do not agree with the articulated basis for making a distinction in these circumstances. We explained in *Jackson* that the overriding purpose of the Nebraska Workers' Compensation Act² would be seriously frustrated if employers were able to prevent employees from filing claims through the threat of discharge. The same is true for retaliation short of discharge—the only difference is the nature and extent of the damage suffered by the employee.³ The Nebraska Workers' Compensation Act is equally subverted if an employer can threaten a potential claimant with retaliation that is short of discharge but substantial enough to deter the filing of a claim.

The dissenting opinion suggests that today's holding may prove unworkable. But the dissent's argument is contrary to decades of experience with similar rules, in Nebraska and other jurisdictions. As the dissent notes, many other jurisdictions have enacted statutes that protect workers' compensation claimants from retaliation.⁴ Those statutes generally bar an employer from

² Neb. Rev. Stat. § 48-101 et seq. (Reissue 2004 & Cum. Supp. 2006).

³ See, *Brigham v. Dillon Companies, Inc.*, 262 Kan. 12, 935 P.2d 1054 (1997); *White v. State*, 131 Wash. 2d 1, 929 P.2d 396 (1997) (Madsen, J., concurring); *Garcia v. Rockwell Intern. Corp.*, 187 Cal. App. 3d 1556, 232 Cal. Rptr. 490 (1986).

⁴ See, e.g., Conn. Gen. Stat. Ann. § 31-290a (West 2003); Mo. Ann. Stat. § 287.780 (West 2005); N.Y. Workers' Comp. Law § 120 (McKinney 2006); N.C. Gen. Stat. § 95-241 (2005); Ohio Rev. Code Ann. § 4123.90 (LexisNexis 2001); S.C. Code Ann. § 41-1-80 (West Cum. Supp. 2006); Tex. Lab. Code Ann. § 451-001 (Vernon 2006); Vt. Stat. Ann. tit. 21, § 710 (2003); Wash. Rev. Code Ann. § 51.48.025(1) (West 2002).

“discriminating” against a claimant, but have been understood to give rise to civil remedies for retaliation short of discharge.⁵ Yet those states answered the questions posed by the dissent and avoided the calamities that the dissent predicts.

They have done so because their laws, and our holding, are not, as the dissenting opinion suggests, radical departures from well-settled law. Rather, they apply a well-settled, developed, and extensive body of law regarding discrimination and retaliation. Our Legislature has enacted comparable antidiscrimination statutes in a variety of contexts.⁶ And this court has already been required to address circumstances involving employer action short of discharge.⁷

We have handled those situations, as have other jurisdictions, by incorporating the *McDonnell Douglas*⁸ burden-shifting analysis familiar from discrimination cases.⁹ Most recently, in *Riesen v. Irwin Indus. Tool Co.*,¹⁰ we applied that burden-shifting analysis to a case involving retaliatory discharge for filing a workers’ compensation claim. We explained that “[t]o 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

⁵ See, e.g., *Mele v. City of Hartford*, 270 Conn. 751, 855 A.2d 196 (2004); *Robel v. Roundup Corp.*, 148 Wash. 2d 35, 59 P.3d 611 (2002); *Murray v. St. Michael’s College*, 164 Vt. 205, 667 A.2d 294 (1995); *Garcia v. Levi Strauss & Co.*, 85 S.W.3d 362 (Tex. App. 2002); *Palermo v. Tension Envelope Corp.*, 959 S.W.2d 825 (Mo. App. 1997).

⁶ See, e.g., Neb. Rev. Stat. §§ 48-1004 and 48-1114 (Reissue 2004).

⁷ See, *Fraternal Order of Police v. County of Douglas*, 270 Neb. 118, 699 N.W.2d 820 (2005); *Humphrey v. Nebraska Public Power Dist.*, 243 Neb. 872, 503 N.W.2d 211 (1993).

⁸ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

⁹ See, *Fraternal Order of Police*, *supra* note 7; *Humphrey*, *supra* note 7; *Helvering v. Union Pacific RR. Co.*, 13 Neb. App. 818, 703 N.W.2d 134 (2005).

¹⁰ *Riesen v. Irwin Indus. Tool Co.*, 272 Neb. 41, 717 N.W.2d 907 (2006).

activity and the adverse employment action.”¹¹ If the employee succeeds in proving a prima facie case, the burden shifts to the employer to articulate some legitimate, lawful reason for the adverse employment action. If the employer articulates a nondiscriminatory reason for disparate treatment of the employee, the employee maintains the burden of proving that the stated reason was pretextual.¹²

As we noted in *Riesen*, most jurisdictions have applied this burden-shifting analysis to workers’ compensation retaliatory discharge cases.¹³ But as we implied in *Riesen*, this framework is also applicable to other “adverse employment action[s].”¹⁴ And other jurisdictions have applied that burden-shifting framework to claims of retaliation short of discharge against workers’ compensation claimants.¹⁵ This has allowed those courts to take advantage of the breadth of jurisprudence in which a burden-shifting analysis has been used to resolve similar claims of adverse employment actions.¹⁶

The dissenting opinion poses a number of questions about various issues of fact courts may be asked to decide. But in any given case, the issue will always be whether the employer has engaged in actions that violate public policy, and courts have routinely examined similar questions in a wide variety of cases. In particular, courts have routinely addressed issues of workplace discrimination and retaliation involving employer action other than discharge.¹⁷ I do not understand why those issues will be more difficult to address when the alleged retaliation is based on a workers’ compensation claim, as opposed to any other

¹¹ *Id.* at 48-49, 717 N.W.2d at 915.

¹² See *id.*

¹³ *Id.* (citing cases).

¹⁴ See *id.* at 49, 717 N.W.2d at 915.

¹⁵ See, e.g., *Mele*, *supra* note 5; *Murray*, *supra* note 5; *Garcia*, *supra* note 5.

¹⁶ See, e.g., *Galabya v. New York City Bd. of Educ.*, 202 F.3d 636 (2d Cir. 2000); *Sanchez v. Denver Public Schools*, 164 F.3d 527 (10th Cir. 1998); *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453 (11th Cir. 1998).

¹⁷ See *White*, *supra* note 3 (Madsen, J., concurring).

activity protected by public policy. While a work-related injury may bring about legitimate temporary or permanent changes in an employment relationship, I respectfully suggest that the law is well equipped to ferret out substantial claims of retaliatory demotion versus petty complaints by the employee or legitimate changes in employment by the employer.

The well-understood principles of antidiscrimination law provide more clarity than the dissent's proposed rule, which would present the difficult problem of separating "constructive discharge" from lesser forms of retaliation.¹⁸ And if an identified public policy is important enough that a wrongful discharge claim should be allowed, then it is important enough to support a claim based on lesser acts of an employer that may just as effectively contravene a clear mandate of public policy.¹⁹ The common-law principles of at-will employment have already adapted to functionally identical restrictions. Employers in Nebraska should already be familiar with the hazards of retaliatory "adverse employment actions" other than termination, due to similar rules against retaliation imposed by other state and federal laws.²⁰

Nor do I believe the dissent's fears of undue interference with the employment relationship are justified. It is well understood that some threshold level of substantiality must be met for a plaintiff to make a *prima facie* case of unlawful retaliation.²¹

¹⁸ See, e.g., *National Sec. Ins. Co. v. Donaldson*, 664 So. 2d 871 (Ala. 1995).

¹⁹ See *White*, *supra* note 3 (Madsen, J., concurring).

²⁰ See, e.g., *Meyers v. Starke*, 420 F.3d 738 (8th Cir. 2005); *Jacob-Mua v. Veneman*, 289 F.3d 517 (8th Cir. 2002) (retaliatory demotion); *Bradley v. Widnall*, 232 F.3d 626 (8th Cir. 2000); *Scusa v. Nestle U.S.A. Co., Inc.*, 181 F.3d 958 (8th Cir. 1999); *Williams v. KETV Television, Inc.*, 26 F.3d 1439 (8th Cir. 1994); *Carlton v. Union Pacific R.R.*, No. 8:05CV293, 2006 WL 3290323 (D. Neb. Nov. 13, 2006); *Weigand v. Spadt*, 317 F. Supp. 2d 1129 (D. Neb. 2004) (retaliatory demotion); *Letares v. Ashcroft*, 302 F. Supp. 2d 1092 (D. Neb. 2004); *Mustafa v. State of Nebraska Dept. of Correctional*, 196 F. Supp. 2d 945 (D. Neb. 2002); *Fraternal Order of Police*, *supra* note 7.

²¹ See, e.g., *Graham v. State Farm Mut. Ins. Co.*, 193 F.3d 1274 (11th Cir. 1999).

A plaintiff sustains an “adverse employment action,” as we used the phrase in *Riesen*,²² if he or she suffers a materially adverse change in the terms and conditions of employment.²³ To be materially adverse, a change in working conditions must be a significant change in employment status, more disruptive than a mere inconvenience or an alteration of job responsibilities.²⁴ As the U.S. Supreme Court recently explained, for the challenged action to be materially adverse, it must be such that “‘it well might have “dissuaded a reasonable worker”’” from engaging in the activity protected by public policy.²⁵ Although the significance of any given act of retaliation will often depend upon the particular circumstances, an employee’s decision to engage in protected activity cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience.²⁶ A plaintiff must suffer “*material adversity*” because “it is important to separate significant from trivial harms.”²⁷ That separation answers the questions posed by the dissenting opinion.

The dissent concludes that any further restrictions on at-will employment should be expressly imposed by the Legislature. I do not disagree that the Legislature could address the issue or that it is the function of the Legislature through the enactment of statutes to declare what is the law and public policy of this state.²⁸ The Legislature could resolve any lingering doubts about the scope of protection afforded to workers’ compensation

²² *Riesen*, *supra* note 10, 272 Neb. at 49, 717 N.W.2d at 915.

²³ *Galabya*, *supra* note 16.

²⁴ See *id.* See, generally, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998).

²⁵ *Burlington N. & S. F. R. Co. v. White*, 548 U.S. 53, 68, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006), quoting *Rochon v. Gonzales*, 438 F.3d 1211 (D.C. Cir. 2006).

²⁶ See *id.*

²⁷ *Id.*, 548 U.S. at 68 (emphasis in original).

²⁸ See *In re Claims Against Atlanta Elev., Inc.*, 268 Neb. 598, 685 N.W.2d 477 (2004).

claimants by enacting an antiretaliation statute similar to those of other jurisdictions.

But it was the very point of *Jackson v. Morris Communications Corp.*²⁹ that the Legislature *has declared* the public policy of this state, by enacting the Nebraska Workers' Compensation Act. We recognized that the Legislature enacted the Nebraska Workers' Compensation Act to relieve injured workers from the adverse economic effects caused by a work-related injury or occupational disease and that important public purpose would be undermined by a rule which allowed fear of retaliation for the filing of a claim. Our holdings in this case and *Jackson* are equally based on the "clear mandate of public policy" that the Nebraska Workers' Compensation Act presents.³⁰ Our decision in *Jackson* met with the Legislature's acquiescence,³¹ and there is no reason to believe that our application today of the same principle is any less a reflection of legislatively declared public policy.

If anything, the dissent would frustrate the Legislature's stated public policy by opening a loophole in *Jackson* that could quickly subsume its holding. The Nebraska Workers' Compensation Act would lose its meaning if the benefits it provides could be reclaimed by an employer's retaliatory action, even if that retaliation stops short of discharge. Because the majority's holding is a more workable rule, guided by ample precedent, and provides greater protection for clearly established public policy, I concur in the majority's decision.

McCORMACK and MILLER-LERMAN, JJ., join in this concurrence.

²⁹ *Jackson*, *supra* note 1.

³⁰ See *id.*, 265 Neb. at 432, 657 N.W.2d at 641.

³¹ 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).

STEPHAN, J., dissenting.

*Jackson v. Morris Communications Corp.*¹ was correctly decided within the structure of our long-established common law pertaining to at-will employment. Because today's decision significantly expands that structure, I respectfully dissent.

The general principle that an employer may discharge an at-will employee at any time with or without reason, so long as the discharge is not constitutionally, statutorily, or contractually prohibited, recognizes the right of the employer to determine the makeup of its workforce without judicial oversight. Just as an at-will employee is free to leave an employment relationship without recourse by the employer, so is the employer free to terminate the relationship, so long as it does not act unlawfully or in breach of a contract. This rule applies even where the result may seem harsh to an outside observer.² The public policy exception to this rule holds that an at-will employee "may claim damages for wrongful discharge when the motivation for the firing contravenes public policy."³ The exception has been narrowly applied in discharge cases, based upon our recognition that

courts must use care in creating new public policy and that "recognition of an otherwise undeclared public policy as a basis for a judicial decision involves the application of a very nebulous concept to the facts of a given case, and that declaration of public policy is normally the function of the legislative branch."⁴

¹ *Jackson v. Morris Communications Corp.*, 265 Neb. 423, 657 N.W.2d 634 (2003).

² See, *Goff-Hamel v. Obstetricians & Gyns., P.C.*, 256 Neb. 19, 588 N.W.2d 798 (1999) (Stephan, J., dissenting); *Hamersky v. Nicholson Supply Co.*, 246 Neb. 156, 517 N.W.2d 382 (1994).

³ *Ambroz v. Cornhusker Square Ltd.*, 226 Neb. 899, 902, 416 N.W.2d 510, 513 (1987), quoting *Mau v. Omaha Nat. Bank*, 207 Neb. 308, 299 N.W.2d 147 (1980).

⁴ *Schriner v. Meginnis Ford Co.*, 228 Neb. 85, 91, 421 N.W.2d 755, 759 (1988), quoting *Adler v. American Standard Corp.*, 830 F.2d 1303 (4th Cir. 1987).

In *Malone v. American Bus. Info.*,⁵ we declined to apply the public policy exception to a claim that an employee was discharged for exercising rights under the Nebraska Wage Payment and Collection Act, reasoning that the act did not declare “‘an important public policy with such clarity as to provide a basis for a civil action for wrongful discharge.’” But in *Jackson*, after conducting a detailed analysis of the policy considerations underlying the Nebraska Workers’ Compensation Act, we held that the public policy exception permitted “an action for retaliatory discharge when an employee has been discharged for filing a workers’ compensation claim.”⁶

If an employer’s decision to discharge an at-will employee is exempt from judicial oversight except in the limited circumstance where the public policy exception applies, it logically follows that decisions affecting the terms and conditions of an at-will employment relationship which do not terminate the relationship should be entitled to an even greater degree of deference. Until today, we have never imposed common-law restrictions upon an employer’s right to make such decisions. The majority has done so in this case by transforming a narrow exception to the rule of nonliability for discharge into a new theory of liability for retaliatory demotion. In my opinion, recognition of this new cause of action is unwise. While I would be willing to extend the holding in *Jackson* to circumstances constituting a constructive discharge, which is not alleged in this case, I would go no further.

I do not condone any form of retaliation against an employee who files a workers’ compensation claim. But the reality is that a job-related injury may bring about legitimate changes in an employment relationship. A workers’ compensation claimant may be temporarily or permanently prevented from performing job requirements by the physical effects of the injury. Will a transfer to a different position, perhaps at a reduced wage, in order to accommodate the worker’s diminished physical

⁵ *Malone v. American Bus. Info.*, 262 Neb. 733, 740, 634 N.W.2d 788, 793 (2001), quoting *Schriner v. Meginnis Ford Co.*, *supra* note 4.

⁶ *Jackson v. Morris Communications Corp.*, *supra* note 1, 265 Neb. at 432, 657 N.W.2d at 641.

abilities, now be deemed a retaliatory demotion? An employee who has filed a workers' compensation claim is subject to the employer's work rules to the same extent as other employees. Will routine disciplinary actions involving workers' compensation claimants now be the basis for a retaliation lawsuit? If there is a restructuring necessitated by changing business conditions, will the employer be required to exempt workers' compensation claimants from any changes in hours or job status in order to avoid a retaliation claim? Will an employer be prevented from taking measures to address the unsatisfactory job performance of an employee who has a pending workers' compensation claim?

The concurring opinion suggests that to resolve these concerns, we can simply apply the "*McDonnell Douglas*^[7] burden-shifting analysis familiar from discrimination cases." Even if application of this analysis would be a workable solution, the fact is that the analysis was developed and is used by courts to adjudicate express *statutory* prohibitions of various forms of workplace discrimination. We simply are not presented with such a prohibition here. Instead, the majority holds for the first time in Nebraska that an implicit declaration of public policy can serve as the basis of an employment discrimination claim in a nondischarge situation. All of the cases cited in the concurring opinion as utilizing *McDonnell Douglas* "to resolve similar claims of adverse employment actions" involved express *statutory* causes of action. Federal and state employment discrimination statutes include defined terms, jurisdictional requirements, specific statements of prohibited conduct and available defenses, and enforcement mechanisms.⁸ No such detailed guidance is provided with respect to the new common-law cause of action which the court recognizes today, and there is no assurance that it will be construed in the future in the manner predicted in the concurring opinion.

⁷ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

⁸ See, e.g., 42 U.S.C. §§ 2000e, 2000e-2, 2000e-3, and 2000e-5 (2000); Neb. Rev. Stat. §§ 48-1104, 48-1108, 48-1111, and 48-1118 (Reissue 2004).

It is true that in *Riesen v. Irwin Indus. Tool Co.*,⁹ we applied the *McDonnell Douglas* burden-shifting analysis to the established common-law cause of action for wrongful discharge under the public policy exception to the doctrine of employment at will. The analysis was appropriate in part because wrongful discharge is actionable both under employment discrimination statutes and, in more limited circumstances, at common law. But until today, there has been no common-law cause of action which would impose civil liability for an employer's action which does not result in termination of the employment relationship. Unlike the circumstance of wrongful discharge, an employer will have no means of knowing in advance what specific conduct is proscribed under the new common-law cause of action which today's majority opinion creates. To say that we will use *McDonnell Douglas* to figure it all out simply ignores the fundamental difference between recognizing a wrongful discharge claim based on an implicit legislative articulation of public policy and recognizing an entirely new cause of action arising from the same source.

As the majority notes, two other courts have specifically declined to recognize a new cause of action for retaliatory demotion within an at-will employment relationship. These cases generally reason that retaliatory demotion or discrimination does not implicate a clear and substantial public policy to the same extent as a discharge and that creating a new cause of action would "encourage myriad claims against employers."¹⁰ I agree with the reasoning of these courts, especially to the extent that they find that an implicit articulation of public policy is an insufficient basis on which to predicate the judicial recognition of a new, common-law cause of action.

Instead, if there are to be restrictions upon an employer's freedom to make decisions concerning the terms and conditions of on-going at-will employment, it is my view that they

⁹ *Riesen v. Irwin Indus. Tool Co.*, 272 Neb. 41, 717 N.W.2d 907 (2006).

¹⁰ See *Touchard v. La-Z-Boy Inc.*, 148 P.3d 945, 955 (Utah 2006). See, also, *Zimmerman v. Buchheit of Sparta, Inc.*, 164 Ill. 2d 29, 645 N.E.2d 877, 206 Ill. Dec. 625 (1994).

should be expressly imposed by the Nebraska Legislature.¹¹ The Legislature has enacted statutes prohibiting retaliation or discrimination based upon an employee's exercise of certain statutory rights.¹² In my opinion, it should be left to the Legislature to decide whether or to what extent the public policy considerations underlying the Nebraska Workers' Compensation Act require or warrant regulation of the terms and conditions of an existing at-will employment relationship.

For these reasons, I would affirm the judgment of the district court.

HEAVICAN, C.J., joins in this dissent.

¹¹ See, e.g., Conn. Gen. Stat. Ann. § 31-290a (West 2003) (prohibiting discharge or discrimination against employee who files workers' compensation claim and prescribing nature and scope of remedy); Mo. Ann. Stat. § 287.780 (West 2005) (prohibiting discharge or discrimination against employee for exercising rights under workers' compensation law, enforceable by civil action for damages); N.C. Gen. Stat. § 95-241 (2005) (prohibiting discrimination or any retaliatory action against employee who exercises statutory rights and establishing defense to such claims where employer can show it would have taken same action in absence of protected activity of employee).

¹² See Neb. Rev. Stat. §§ 48-1004 (Reissue 2004) (prohibiting discrimination based upon assertion of rights under statute prohibiting age discrimination in employment) and 48-1114 (Reissue 2004) (prohibiting discrimination based upon exercise of rights under Fair Employment Practice Act).

DANIEL DOMJAN, M.D., APPELLANT AND CROSS-APPELLEE,
V. FAITH REGIONAL HEALTH SERVICES, APPELLEE
AND CROSS-APPELLANT.

735 N.W.2d 355

Filed July 6, 2007. No. S-05-1463.

1. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
2. **Jury Instructions: Judgments: Appeal and Error.** Whether a jury instruction given by a trial court is correct is a question of law.
3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.

4. **Jury Instructions: Evidence: New Trial.** Submission of an issue on which the evidence is insufficient to sustain an affirmative finding is generally prejudicial and results in a new trial.
5. **Breach of Contract.** Whether or not a breach is material and important is a question of degree which must be answered by weighing the consequences of the breach in light of the actual custom of persons in the performance of contracts similar to the one involved in the specific case.
6. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
7. **Jury Instructions: Appeal and Error.** Jury instructions do not constitute prejudicial error if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence.
8. **Jury Instructions: Pleadings: Evidence.** A litigant is entitled to have the jury instructed upon only those theories of the case that are presented by the pleadings and which are supported by competent evidence.
9. **Jury Instructions: Trial.** A party's right to a fair trial may be substantially impaired by jury instructions that contain inconsistencies or confuse or mislead the jury.
10. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not needed to adjudicate the controversy before it.

Appeal from the District Court for Madison County: PATRICK G. ROGERS, Judge. Reversed and remanded for a new trial.

Gregory C. Scaglione and Heather S. Voegele, of Koley Jessen, P.C., L.L.O., for appellant.

Timothy E. Brogan, of Brogan & Gray, P.C., L.L.O., and Christopher R. Hedican, of Baird Holm, L.L.P., for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Daniel Domjan, M.D., appellant and cross-appellee, brought this breach of contract action against Faith Regional Health Services (Faith Regional), appellee and cross-appellant. In the fall of 2001, Domjan and Faith Regional entered into three contracts, a "Recruitment Agreement" (Recruitment Agreement), an "Agreement to Provide Medical Direction and Clinical Services for the Specialty of Cardiothoracic Surgery" (Director

Agreement), and a “Cardiovascular Services Promotional Agreement” (Promotional Agreement). These three contracts formed the basis of the present lawsuit. Each agreement related to Domjan’s providing cardiothoracic surgery services in the Norfolk, Nebraska, area. Faith Regional later terminated the agreements, claiming, in summary, that Domjan had failed to perform the terms of the agreements.

Domjan sued Faith Regional in the district court for Madison County, Nebraska, for breach of each of the three agreements. Faith Regional denied the alleged breaches of contract, and, as to the Recruitment Agreement, Faith Regional filed a counterclaim against Domjan, claiming that Domjan had breached the terms of the Recruitment Agreement. The matter came on for trial, and a jury found in favor of Domjan on his claim against Faith Regional for breach of the Recruitment Agreement and rejected Faith Regional’s counterclaim as to the Recruitment Agreement. The jury also found in favor of Domjan on his claim that Faith Regional had breached the Director Agreement. The jury rejected Domjan’s claim that Faith Regional had breached the Promotional Agreement. The district court entered judgment on the jury’s verdicts.

Following the jury’s verdicts, Domjan filed an application for attorney fees, and Faith Regional filed a motion for new trial. The district court overruled Domjan’s application for attorney fees. In a separate order, the district court sustained in part, and in part overruled Faith Regional’s motion for new trial. The district court overruled that portion of Faith Regional’s motion seeking a new trial on liability issues, but sustained the motion to the extent it sought a new trial limited to the issue of Domjan’s damages for Faith Regional’s breach of the Recruitment Agreement.

Domjan appeals from the district court’s orders denying his motion for attorney fees and sustaining Faith Regional’s motion for new trial as to damages for its breach of the Recruitment Agreement. Faith Regional cross-appeals from that part of the district court’s order that overruled its motion for new trial, in which it sought a new trial as to liability with respect to the Recruitment Agreement and the Director Agreement.

We take up Faith Regional's cross-appeal first because disposition of the cross-appeal determines the outcome of the appeal. We conclude that the district court committed prejudicial error in the giving of its jury instructions. We therefore reverse that portion of the district court's order denying Faith Regional's motion for new trial on Domjan's claims that Faith Regional breached the Recruitment Agreement and the Director Agreement and on Faith Regional's counterclaim that Domjan breached the Recruitment Agreement. We remand the cause for a new trial on Domjan's claim and Faith Regional's counterclaim with respect to the Recruitment Agreement and Domjan's claim that Faith Regional breached the Director Agreement. Because the jury verdict with respect to the Promotional Agreement is not challenged on appeal, the judgment entered with respect to the Promotional Agreement stands. Further, because our decision with regard to Faith Regional's cross-appeal is dispositive of the issues raised in this appeal, we do not reach the errors assigned by Domjan in his direct appeal.

STATEMENT OF FACTS

In the fall of 2001, Faith Regional successfully recruited Domjan to engage in the practice of cardiothoracic surgery in the Norfolk area. As part of the process, Domjan and Faith Regional entered into a series of separate agreements. The Recruitment Agreement was executed by the parties in September 2001 and provided, *inter alia*, that Domjan would relocate to Norfolk and use his "best efforts to establish a successful, stable medical practice." In return, Faith Regional agreed to pay Domjan certain amounts as a moving allowance and a signing bonus. Faith Regional also agreed to provide Domjan a "net operating income" for a certain period of time. This feature of the Recruitment Agreement was effectively an income support provision by which Faith Regional would periodically lend Domjan money if his income failed to reach a certain level. The Recruitment Agreement provided that Domjan worked as an independent contractor and further provided that Faith Regional was obligated each year to issue an Internal Revenue Service 1099 tax form for the moneys it paid Domjan under the agreement. The Recruitment Agreement provided that either Domjan or Faith Regional could terminate the agreement

“for cause,” which the agreement more specifically defined as a “material breach or default” by either party.

On September 10, 2001, Domjan and Faith Regional entered into the Director Agreement under which Domjan agreed, *inter alia*, to manage and develop the Faith Regional “Division of Cardiothoracic Surgery,” in exchange for which he would receive \$125 an hour not to exceed 1,000 hours annually. The Director Agreement stated that Domjan provided services under the contract as an independent contractor and not as an employee of Faith Regional and further provided that Domjan was to pay for “his own debts, obligations, acts, and omissions, including payment of all required withholding, social security and other taxes, malpractice insurance, and benefits.” Either Domjan or Faith Regional could terminate the Director Agreement “for cause,” which the agreement more specifically defined as a “material breach or default” by either party.

Finally, Domjan and Faith Regional entered into the Promotional Agreement, which, *inter alia*, provided that Faith Regional would pay Domjan certain sums for its use of Domjan’s name in promotional activities.

The record reflects that after Domjan began providing cardiothoracic services at Faith Regional, disputes arose between the parties concerning, *inter alia*, the nature and quality of the services provided by Domjan and Domjan’s relationship with other staff members. In 2003 and early 2004, Faith Regional terminated its various agreements with Domjan. In response to Faith Regional’s termination of the agreements, Domjan filed a breach of contract action against Faith Regional. In his amended complaint filed on January 5, 2004, the operative complaint for purposes of this appeal (the complaint), Domjan claimed that Faith Regional had breached its obligations to him under each of the three agreements. As relief, Domjan sought “general damages” and “lost income,” as well as prejudgment and post-judgment interest, attorney fees, and costs.

On February 5, 2004, Faith Regional filed its “Answer to Amended Complaint, Affirmative Defenses, and Counterclaim.” In addition to generally denying the material allegations contained in Domjan’s complaint, Faith Regional asserted a counterclaim against Domjan, in which it claimed that Domjan had

breached his obligations to Faith Regional under the Recruitment Agreement. For its damages, Faith Regional sought judgment in the amount of \$577,903.84.

The case came on for a jury trial in the fall of 2005. A total of 22 witnesses testified during the trial. Eighty-eight exhibits, consisting of several hundred pages, were offered into evidence. Included in the evidence were copies of Domjan's federal tax returns for the period of time during which Domjan's agreements with Faith Regional were in effect. In those returns, Domjan reported that he was self-employed.

The jury was instructed by the district court, and following deliberations, on September 30, 2005, the jury returned its verdicts. The jury found in favor of Domjan on his claim for breach of the Recruitment Agreement and rejected Faith Regional's counterclaim claiming that Domjan had breached the Recruitment Agreement. The jury awarded Domjan damages in the amount of \$1,233,588.16. The jury further found in favor of Domjan on his claim for breach of the Director Agreement and awarded Domjan damages in the amount of \$84,150. The jury rejected Domjan's claim that Faith Regional had breached the Promotional Agreement. On October 4, the district court entered judgment in accordance with the jury's verdicts.

The parties filed a series of posttrial motions. Prior to trial, Domjan had filed an application for attorney fees, which application he amended following trial. In his amended application filed October 11, 2005, Domjan asserted in summary that he was an employee of Faith Regional and that Faith Regional had violated the Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. §§ 48-1228 to 48-1232 (Reissue 2004), when it failed to pay him certain sums under the various agreements. Domjan also asserted that as a result of the jury verdicts in his favor, he was entitled to attorney fees, court costs, and damages to be awarded to the Nebraska School Fund.

On October 14, 2005, Faith Regional filed a motion for new trial, asserting that it was entitled to a new trial due to irregularities in the proceedings, excessive damages, errors in the assessment of damages, jury verdicts that were contrary to the evidence, and errors in the law. Faith Regional sought a new trial

on the jury's verdicts in favor of Domjan on the Recruitment Agreement, in favor of Domjan on the Director Agreement, and in favor of Domjan and against Faith Regional on its counterclaim concerning the Recruitment Agreement.

The posttrial motions came on for hearing on November 3, 2005. In an order filed November 23, the district court denied Domjan's amended application for attorney fees, concluding, in summary, that based upon the evidence adduced at trial, Domjan was an independent contractor and not an employee of Faith Regional. In a separate order also filed November 23, the district court denied Faith Regional's motion for new trial to the extent it sought a new trial as to liability on the jury's verdicts in favor of Domjan on the Recruitment Agreement and the Director Agreement and in favor of Domjan and against Faith Regional on its counterclaim on the Recruitment Agreement. With regard to the jury's verdict on Domjan's claim for breach of the Recruitment Agreement, the district court determined that there was sufficient evidence adduced at trial by which the jury could find that Faith Regional had breached its obligations under that agreement. The district court further determined, however, that the jury had failed to follow its jury instruction No. 6 with regard to the calculation of damages for Faith Regional's breach of the Recruitment Agreement. Accordingly, the district court ordered a new trial limited to the issue of Domjan's damages resulting from Faith Regional's breach of the Recruitment Agreement.

Domjan appeals from that portion of the district court's order that ordered a new trial on Domjan's damages sustained as a result of Faith Regional's purported breach of the Recruitment Agreement, as well as from the district court's order denying his amended application for attorney fees. Faith Regional cross-appeals from that portion of the district court's order that denied Faith Regional's motion seeking a new trial on Domjan's claims that Faith Regional breached the Recruitment Agreement and the Director Agreement, as well as that portion of the order that denied Faith Regional's motion for a new trial on its counterclaim claiming that Domjan breached the Recruitment Agreement.

ASSIGNMENTS OF ERROR

On appeal, Domjan assigns numerous errors that we restate. Domjan claims that the district court erred (1) in sustaining Faith Regional's motion for new trial and vacating the damages portion of the \$1,233,588.16 judgment on Domjan's claim that Faith Regional breached the Recruitment Agreement and (2) in denying Domjan's application for attorney fees. Domjan also claims that if this court determines on appeal that the district court did not err in sustaining part of Faith Regional's motion for new trial, then the district court erred in ordering a new trial on damages when it should have merely reduced the amount of the judgment to \$205,471.16.

For its cross-appeal, Faith Regional assigns three errors. Faith Regional claims that the district court erred (1) in denying Faith Regional's motion for new trial on the issue of Domjan's claim that Faith Regional breached the Recruitment Agreement; (2) in denying Faith Regional's motion for new trial on the issue of Domjan's claim that Faith Regional breached the Director Agreement; and (3) in denying Faith Regional's motion for new trial on its counterclaim.

STANDARDS OF REVIEW

[1] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Roth v. Wiese*, 271 Neb. 750, 716 N.W.2d 419 (2006).

[2,3] Whether a jury instruction given by a trial court is correct is a question of law. *Worth v. Kolbeck*, ante p. 163, 728 N.W.2d 282 (2007). 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

We first take up the assignments of error presented by Faith Regional's cross-appeal, because resolution of these issues is dispositive of this case. For its cross-appeal, Faith Regional asserts that the district court erred in denying its motion for new trial on Domjan's claims that Faith Regional breached the Recruitment Agreement and the Director Agreement, as well as

on Faith Regional's counterclaim against Domjan for breach of the Recruitment Agreement.

Faith Regional specifically claims that the district court erred as a matter of law in giving instruction No. 6, which read as follows:

If you find in favor of Dr. Domjan on any of his claims for breach of contract, then you must determine the amount of Dr. Domjan's damages.

Dr. Domjan is entitled to recover the amount of the salary agreed upon for the period agreed to, minus the amount of money Dr. Domjan earned or reasonably could have earned [sic] from other employment during that same time.

If you find in favor of Dr. Domjan but do not find any actual damages, then you may award Dr. Domjan no more than a nominal sum.

With regard to this instruction, Faith Regional notes that it objected to the instruction during the instruction conference and that although the district court had agreed to modify instruction No. 6 by changing "salary" to "compensation," it later failed to do so. Faith Regional claims that instruction No. 6 is incorrect and prejudicial. Faith Regional argues that, to its detriment, instruction No. 6 uses employment terms to describe Domjan's working relationship with Faith Regional and Domjan was not an employee. Faith Regional states that it was prejudiced by this instruction because an employment relationship has different responsibilities from those of an independent contractor relationship.

Faith Regional further asserts that the error surrounding instruction No. 6 was compounded by the remainder of the instructions and in particular, the giving of instruction No. 11. Instruction No. 11, read, in pertinent part, as follows: "[g]ood cause for dismissal is that which a reasonable employer, acting in good faith, would regard as good and sufficient reason for terminating the services of an employee as distinguished from arbitrary and capricious." Faith Regional claims that this instruction was incorrect because the actual agreements at issue permitted Faith Regional to terminate the agreements "for cause," which was defined as a "material breach or default" by Domjan. Faith Regional also argues that instruction No. 11 was incorrect

because it states that Domjan worked with Faith Regional as an “employee,” whereas Domjan was an independent contractor. Faith Regional claims that by giving this instruction, the district court improperly instructed the jury on the standard under which Faith Regional could terminate the Recruitment Agreement and Director Agreement and that it was prejudiced thereby.

We agree with Faith Regional that taken as a whole, the manner by which the district court instructed the jury resulted in instructions that were misleading, confused the jury, and constituted prejudicial error. As a result, the district court abused its discretion when it denied Faith Regional’s motion for new trial. We therefore reverse that portion of the district court’s order that denied Faith Regional’s motion for new trial and remand the cause for a new trial on Domjan’s claims that Faith Regional breached the Recruitment Agreement and Director Agreement, as well as on Faith Regional’s counterclaim against Domjan for breach of the Recruitment Agreement.

[4] In reaching our conclusion, we note that jury instruction No. 6 utilized terms such as “other employment” and “salary” when instructing the jury. These terms indicate that Faith Regional and Domjan had an employer-employee relationship. Such a relationship, however, was not supported by the evidence. The evidence at trial included the agreements, which defined Domjan’s relationship with Faith Regional as one of an independent contractor, and Domjan’s tax records, in which he reported that he was self-employed. Submission of an issue on which the evidence is insufficient to sustain an affirmative finding is generally prejudicial and results in a new trial. *Jay v. Moog Automotive*, 264 Neb. 875, 652 N.W.2d 872 (2002). Thus, the inclusion of employment terms in instruction No. 6 to describe the parties’ relationship, when the evidence adduced at trial was insufficient to establish an employment relationship, was incorrect, confused the jury as to the parties’ rights and responsibilities under the agreements, and constituted prejudicial error. See *Thompson v. Florida Drum Co.*, 651 So. 2d 180, 182 (Fla. App. 1995) (stating that when evidence adduced at trial indicated certain individuals were independent contractors, “it [was] error to instruct the jury” that they were “employees”).

[5] The error surrounding instruction No. 6 is compounded when we consider the jury instructions taken as a whole. Compare *Worth v. Kolbeck*, ante p. 163, 728 N.W.2d 282 (2007) (stating that jury instructions do not constitute prejudicial error if, taken as a whole, they correctly state law, are not misleading, and adequately cover issues supported by pleadings and evidence). In this regard, as previously noted, Faith Regional directs our attention to instruction No. 11 in which the jury was instructed that a reasonable employer could terminate the services of an employee for good cause. Both the Recruitment Agreement and the Director Agreement provide that Faith Regional could terminate the agreements “for cause,” which the controlling agreements defined as a “material breach or default” by Domjan. We have stated that “[w]hether or not a breach is material and important is a question of degree which must be answered by weighing the consequences of the breach in light of the actual custom of persons in the performance of contracts similar to the one involved in the specific case.” *Phipps v. Skyview Farms*, 259 Neb. 492, 499, 610 N.W.2d 723, 730-31 (2000). The district court did not instruct the jury on the standard for a material breach to which the parties had agreed. Instead, the district court instructed the jury as to a “good cause” standard for dismissal from employment. We conclude that this instruction was incorrect and had the effect of confusing the jury, by instructing the jury to evaluate the breach of contract claims under a standard for termination of the agreements that was not agreed to by the parties. Furthermore, instruction No. 11 erroneously perpetuated the characterization of the relationship of the parties as an employer-employee relationship.

[6-8] Whether a jury instruction given by a trial court is correct is a question of law. *Worth v. Kolbeck*, supra. 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.* Jury instructions do not constitute prejudicial error if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence. *Id.* A litigant is entitled to have the jury instructed upon only those theories of the case

that are presented by the pleadings and which are supported by competent evidence. *Id.*

[9] Here, the jury was given instructions that incorrectly described the relationship between the parties as an employer-employee relationship and, additionally, delivered incorrect instructions on the standard to apply when determining whether Faith Regional properly terminated the Recruitment Agreement and Director Agreement. The instructions taken as a whole did not comport with the evidence adduced at trial. A party's right to a fair trial may be substantially impaired by jury instructions that confuse or mislead the jury. See *Pribil v. Koinzan*, 266 Neb. 222, 665 N.W.2d 567 (2003). The instructions in this case were not correct and were prejudicial. We conclude as a matter of law that instruction No. 6 was prejudicial error, and because of the potential for confusion created by instructions Nos. 6 and 11, the district court abused its discretion in denying Faith Regional's motion for new trial. We therefore reverse the district court's order overruling Faith Regional's motion for new trial on Domjan's claims that Faith Regional breached the Recruitment Agreement and the Director Agreement, and on Faith Regional's counterclaim asserting that Domjan breached the Recruitment Agreement and remand the cause for a new trial.

[10] Because we are ordering a new trial on Domjan's claims that Faith Regional breached the Recruitment Agreement and the Director Agreement, as well as a new trial on Faith Regional's counterclaim that Domjan breached the Recruitment Agreement, a discussion of Domjan's assignments of error is not necessary. An appellate court is not obligated to engage in an analysis that is not needed to adjudicate the controversy before it. *Castillo v. Young*, 272 Neb. 240, 720 N.W.2d 40 (2006).

CONCLUSION

For the reasons discussed above, we conclude that the district court abused its discretion when it denied Faith Regional's motion for new trial. We reverse that portion of the district court's order that denied Faith Regional's motion and remand the cause for a new trial on Domjan's claims that Faith Regional breached the Recruitment Agreement and Director Agreement, as well as on Faith Regional's counterclaim against Domjan for

breach of the Recruitment Agreement. The judgment entered on the jury's verdict with respect to the Promotional Agreement stands and is not affected by the disposition of this appeal.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA EX REL. HARLAND H. JOHNSON ET AL.,
APPELLANTS, v. HONORABLE JOHN A. GALE, SECRETARY OF
STATE OF THE STATE OF NEBRASKA, ET AL., APPELLEES.

734 N.W.2d 290

Filed July 6, 2007. No. S-06-224.

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. **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.
3. **Constitutional Law.** Constitutional interpretation presents a question of law.
4. **Constitutional Law: Initiative and Referendum.** The people have the power to amend the Nebraska Constitution by the initiative process pursuant to Neb. Const. art. 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. **Constitutional Law.** A constitution represents the supreme written will of the people regarding the framework for their government.
6. **Constitutional Law: Initiative and Referendum.** The people of Nebraska may amend their Constitution in any way they see fit, provided the amendments do not violate the federal Constitution or conflict with federal statutes or treaties.
7. **Initiative and Referendum: Appeal and Error.** An appellate court makes no attempt to judge the wisdom or the desirability of enacting initiative amendments.
8. **Constitutional Law: Proof.** The party challenging the constitutionality of an amendment bears the burden of establishing its unconstitutionality.
9. **Constitutional Law: Statutes: States.** The 1st Amendment's protection of speech and association for the advancement of political objectives is extended to the states through the 14th Amendment and applies to both state statutes and state constitutional provisions.
10. **Constitutional Law.** The First Amendment protects the right of citizens to band together in promoting among the electorate candidates who espouse their political views.

11. **Constitutional Law: Voting.** Although there is no fundamental right to seek elective office, the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters.
12. **Voting.** Election laws will invariably impose some burden upon individual voters.
13. **Constitutional Law: Voting.** The right to vote in any manner and the right to associate for political purposes are not absolute; the U.S. Supreme Court has recognized that states retain the power to regulate their own elections under the federal Constitution.
14. ____: _____. Although the rights of voters are fundamental, not all restrictions imposed by the states on candidates' eligibility for the ballot impose constitutionally suspect burdens on voters' rights to associate or to choose among candidates.
15. **Constitutional Law: Courts: Statutes.** To resolve a challenge to a state's election laws, a court must weigh the character and magnitude of the asserted injury to the rights protected by the 1st and 14th Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the state as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights.
16. **Constitutional Law: Statutes.** Election laws imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. When the burden is slight, the state need not establish a compelling interest to tip the constitutional scales in its direction.
17. **Constitutional Law: Presumptions.** If minimal scrutiny applies, a presumption of constitutionality can be overcome only if the party challenging an amendment's constitutionality negates every conceivable basis that might support the amendment.
18. **Equal Protection.** The Equal Protection Clause keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike.
19. **Constitutional Law: Equal Protection: Appeal and Error.** When the classifications involved in a constitutional amendment do not create any suspect class or address any fundamental right, an appellate court applies only minimal scrutiny under the equal protection analysis.
20. **Constitutional Law: Appeal and Error.** Under a minimal scrutiny standard of review, an appellate court will uphold a classification created by a constitutional amendment where it is a rational means of promoting a legitimate government interest or purpose.
21. **Constitutional Law: Intent: Appeal and Error.** In ascertaining the intent of a constitutional provision from its language, an appellate court may not supply any supposed omission, or add words to or take words from the provision as framed.
22. **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.
23. ____: _____. 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.
24. ____: _____. If the meaning of a constitutional provision is clear, the court will give to it the meaning that obviously would be accepted and understood by laypersons.

25. **Constitutional Law: Statutes.** Constitutional provisions are not subject to strict construction and receive a broader and more liberal construction than do statutes.
26. **Constitutional Law: Courts: Intent.** It is the duty of courts to ascertain and to carry into effect the intent and purpose of the framers of the Constitution or of an amendment thereto.
27. **Constitutional Law.** The Nebraska Constitution, as amended, must be read as a whole.
28. _____. A constitutional amendment becomes an integral part of the instrument and must be construed and harmonized, if possible, with all other provisions so as to give effect to every section and clause as well as to the whole instrument.
29. **Constitutional Law: Legislature.** Subsection (3) of Neb. Const. art. III, § 12, operates only to determine whether an expired legislative term will count as a full term toward disqualification to seek a third consecutive term.
30. **Constitutional Law: Appeal and Error.** A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.

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

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

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

L. Steven Grasz, of Blackwell, Sanders, Peper & Martin, L.L.P., and Donald B. Stenberg, of Erickson & Sederstrom, P.C., for amici curiae U.S. Term Limits, Inc., and Don't Touch Term Limits-Nebraska.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ., and CARLSON, Judge.

PER CURIAM.

I. NATURE OF CASE

This is a mandamus and declaratory judgment action filed by voters wishing to reelect three state legislators whose 2005 candidate filings for placement on the ballot were rejected by the Secretary of State, John A. Gale. Gale rejected the filings because he determined the legislators were ineligible to serve a third consecutive term under Neb. Const. art. III, § 12. This term limits section was added to the state Constitution when voters approved Initiative 415 at the general election on November 7, 2000.

Appellants claim that § 12 must be read to disqualify only incumbent legislators halfway through their second term. They contend that § 12 therefore unnecessarily burdens the right of voters to choose among political candidates because challengers to second-term legislators do not face this risk. Appellants also contend that § 12 denies them equal protection under the law because first-term legislators are not disqualified halfway through their term. The State claims that § 12 does not prevent an incumbent legislator from serving a full second term.

The district court agreed with the State's interpretation of § 12 and accordingly denied appellants' requests for (1) a declaration that § 12 infringes upon their federal constitutional rights and (2) a peremptory writ of mandamus requiring Gale to revoke his decision that the legislators were disqualified from seeking another term of office. We affirm.

II. CONSTITUTIONAL PROVISION

Neb. Const. art. III, § 12, provides:

(1) No person shall be eligible to serve as a member of the Legislature for four years next after the expiration of two consecutive terms regardless of the district represented.

(2) Service prior to January 1, 2001, as a member of the Legislature shall not be counted for the purpose of calculating consecutive terms in subsection (1) of this section.

(3) For the purpose of this section, service in office for more than one-half of a term shall be deemed service for a term.

III. BACKGROUND

In November 2005, Senators Dennis Byars, Marian L. Price, and Ernie Chambers submitted to Gale candidate filings for reelection. Byars and Price asked to be placed on the primary ballot in 2006; Chambers asked to be placed on the primary ballot in 2008. Byars and Price were first elected to the Legislature in 1998 and reelected in 2002. Chambers was first sworn in on January 5, 1971, and was reelected to consecutive terms thereafter, including reelections in 2000 and 2004. Also in November, Gale rejected all three filings because he determined the legislators were ineligible to serve another consecutive term.

In December 2005, appellants, who are registered voters in the districts represented by Byars, Price, and Chambers, filed this action. They asked for an alternative writ of mandamus requiring Gale to revoke his decision or to show cause for his failure to do so. In addition, they asked for (1) a peremptory writ of mandamus after the court had considered the evidence¹ and (2) a declaration that article III, § 12, violated their constitutional rights under the 1st and 14th Amendments to the U.S. Constitution. Appellants named Byars, Price, and Chambers as necessary parties, and the legislators later asked to be aligned with appellants.

1. APPELLANTS' ALLEGATIONS

Appellants alleged that Gale had exceeded his authority and violated their First Amendment rights of free speech and free association under the U.S. Constitution—to vote for the representative of their choice—by enforcing article III, § 12. They further alleged that their senators had been unconstitutionally denied their right to run for office and unconstitutionally placed at risk of being found ineligible to serve before the end of their 4-year terms.

Appellants' allegations centered on subsections (1) and (3) of § 12. They alleged that when read together, these subsections disqualify any representative after he or she has served more than half of a second 4-year term. Because Byars and Price had served more than half of their 2002 terms when the complaint was filed in December 2005, appellants alleged that these senators were presently subject to disqualification. Appellants claimed the plain language of the statute would require political appointees to complete the second term of any incumbent representative. Although Gale had accepted Byars' and Price's filings to seek 4-year terms in 2002, appellants alleged that this fact showed Gale had inconsistently and discriminatorily applied § 12.

Appellants also alleged that Gale had denied them equal protection of the law. They claimed the district court could not save

¹ See Neb. Rev. Stat. §§ 25-2158 (Reissue 1995) and 25-2159 (Cum. Supp. 2006).

§ 12 by construing it in a “nonliteral” manner because to do so would deny Byars and Price equal protection of the law. That is, Gale had already determined that Byars and Price had served more than half of a term between January 2001 and January 2003, so applying the law any differently for other senators would present an equal protection problem. Appellants further alleged that voters in Chambers’ district would be particularly injured by losing an effective representative for the only non-Caucasian majority district in the state.

2. SECRETARY OF STATE’S RESPONSE

The court issued an alternative writ of mandamus. In Gale’s answer and response, he alleged that because article III, § 12, did not define the word “term,” it must be read in conjunction with article III, § 7. Section 7 provides that “all members shall be elected for a term of four years.” When so read, Gale alleged that subsection (1) of § 12 provides that no person may serve more than two consecutive *4-year* terms and that subsection (3) only clarifies whether a legislator’s service at the expiration of a 4-year term counts as a “full term” in determining whether the legislator is disqualified from serving a third term.

3. APPELLANTS’ POSITION AT SHOW CAUSE HEARING

At the show cause hearing, appellants specified they were not claiming that § 12 was racially discriminatory. They also conceded that challenges to term limits had failed in other jurisdictions. But they argued they were not claiming term limits were inherently unconstitutional—only that Nebraska’s term limits were unconstitutional because of the way § 12 was drafted. Appellants agreed with the district court’s statement that if it decided § 12 did not make legislators ineligible to continue after they had been in office for more than half of their second term, then their argument failed.

4. DISTRICT COURT’S ORDER

In a written order, the district court concluded that § 12 could be interpreted as disqualifying a senator after 6 years only if subsection (3) altered the meaning of a “term” for purposes of term limits. The court declined to interpret subsection (3) to be inconsistent with the 4-year definition of a term provided

in article III, § 7. It reasoned that subsection (3) addressed, in part, circumstances requiring a political appointment to fill a vacancy in the Nebraska Unicameral. The court concluded that subsection (3) was intended to resolve whether “a term counts in computing consecutive terms, and not to determine how long a term lasts. . . . It is only by torturing the plain language of the amendment that it could mean anything else.”

IV. ASSIGNMENTS OF ERROR

Appellants assign, restated, that the district court erred in (1) concluding that subsection (3) of article III, § 12, does not modify and qualify the meaning of “term” in subsection (1); (2) failing to find that article III, § 12, is unconstitutional on its face and as applied; (3) failing to find that Gale is construing and enforcing § 12 in a manner inconsistent with its plain language; (4) failing to reach the issue of whether voters in Chambers’ district, in particular, were denied their First Amendment and equal protection rights, and to decide this issue in favor of appellants; and (5) failing to grant appellants’ requested order for a peremptory writ of mandamus and declaratory judgment.

V. STANDARD OF REVIEW

[1] 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

[2] 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.³

² *State ex rel. Upper Republican NRD v. District Judges*, ante p. 148, 728 N.W.2d 275 (2007).

³ *Peterson v. Ohio Casualty Group*, 272 Neb. 700, 724 N.W.2d 765 (2006).

[3] Here, whether the district court properly denied a peremptory writ of mandamus and declaratory relief turns upon the meaning of article III, § 12, of the Nebraska Constitution. Constitutional interpretation presents a question of law.⁴

VI. ANALYSIS

[4] The people have the power to amend the Nebraska Constitution by the initiative process pursuant to Neb. Const. art. 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

[5-8] A constitution represents the supreme written will of the people regarding the framework for their government.⁶ The people of Nebraska may amend their Constitution in any way they see fit, provided the amendments do not violate the federal Constitution or conflict with federal statutes or treaties.⁷ This court makes no attempt to judge the wisdom or the desirability of enacting initiative amendments.⁸ The party challenging the constitutionality of an amendment bears the burden of establishing its unconstitutionality.⁹

1. PARTIES’ CONTENTIONS ON APPEAL

Appellants contend that article III, § 12, operates to keep “only certain senators” from filing for candidacy, which prohibits their supporters from voting for the candidate of their choice.¹⁰ They argue that this result is a substantial burden on First Amendment rights that requires this court to apply strict scrutiny review. In addition, appellants argue that their votes have been diluted under the Equal Protection Clause because

⁴ See *Keef v. State*, 271 Neb. 738, 716 N.W.2d 58 (2006).

⁵ See *State ex rel. Lemon v. Gale*, 272 Neb. 295, 721 N.W.2d 347 (2006).

⁶ *Id.*

⁷ *Hall v. Progress Pig, Inc.*, 254 Neb. 150, 575 N.W.2d 369 (1998).

⁸ See *Duggan v. Beermann*, 249 Neb. 411, 544 N.W.2d 68 (1996).

⁹ See *Hall v. Progress Pig, Inc.*, 259 Neb. 407, 610 N.W.2d 420 (2000).

¹⁰ Brief for appellants at 15.

only incumbent legislators can be disqualified midway through their second term. The State contends that appellants' interpretation of § 12 is incorrect and that even if correct, § 12 is neutral and does not severely burden voting rights.

Appellants' First Amendment and equal protection claims are both based on the alleged unequal treatment that § 12 imposes on incumbent legislators. To explain why their First Amendment argument depends upon their equal protection argument, we first set out the analytical framework of a voter's First Amendment challenge to election laws.

2. FREE SPEECH AND ASSOCIATION

[9] The First Amendment provides that Congress "shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The 1st Amendment's protection of speech and association for the advancement of political objectives is extended to the states through the 14th Amendment¹¹ and applies to both state statutes and state constitutional provisions.¹²

[10,11] Among other things, the First Amendment "protects the right of citizens 'to band together in promoting among the electorate candidates who espouse their political views.'"¹³ Although there is no fundamental right to seek elective office,¹⁴ "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters."¹⁵

¹¹ See, *Meyer v. Grant*, 486 U.S. 414, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 107 S. Ct. 544, 93 L. Ed. 2d 514 (1986).

¹² See *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999).

¹³ *Clingman v. Beaver*, 544 U.S. 581, 586, 125 S. Ct. 2029, 161 L. Ed. 2d 920 (2005).

¹⁴ See *Pick v. Nelson*, 247 Neb. 487, 528 N.W.2d 309 (1995), citing *Bullock v. Carter*, 405 U.S. 134, 92 S. Ct. 849, 31 L. Ed. 2d 92 (1972).

¹⁵ *Anderson v. Celebrezze*, 460 U.S. 780, 786, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983).

[12-14] “Election laws will invariably impose some burden upon individual voters.”¹⁶ But the right to vote in any manner and the right to associate for political purposes are not absolute; the U.S. Supreme Court has recognized that states retain the power to regulate their own elections under the federal Constitution.¹⁷ “Although [the] rights of voters are fundamental, not all restrictions imposed by the states on candidates’ eligibility for the ballot impose constitutionally suspect burdens on voters’ rights to associate or to choose among candidates.”¹⁸

Strict scrutiny of an election law is appropriate only if the burden on voters’ associational rights is severe.¹⁹ Reasonable and nondiscriminatory restrictions are usually supported by a state’s important regulatory interests.²⁰ “[T]he mere fact that a State’s system ‘creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny.’”²¹

[15] To resolve a challenge to a state’s election laws, a court must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against “the precise interests put forward by the State as justifications for the burden imposed by its rule,” taking into consideration “the extent to which those interests make it necessary to burden the plaintiff’s rights.”²²

This scheme has become known as the *Anderson-Burdick* balancing test.²³

¹⁶ *Burdick v. Takushi*, 504 U.S. 428, 433, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992).

¹⁷ *Id.*

¹⁸ *Anderson v. Celebrezze*, *supra* note 15, 460 U.S. at 788.

¹⁹ *Clingman v. Beaver*, *supra* note 13.

²⁰ *Id.*

²¹ *Burdick v. Takushi*, *supra* note 16, 504 U.S. at 433.

²² *Id.*, 504 U.S. at 434, quoting *Anderson v. Celebrezze*, *supra* note 15.

²³ See, e.g., *Citizens for Legislative Choice v. Miller*, 144 F.3d 916 (6th Cir. 1998).

[16,17] Election laws imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest.²⁴ But when the burden is slight, "the State need not establish a compelling interest to tip the constitutional scales in its direction."²⁵ If minimal scrutiny applies, "a presumption of constitutionality can be overcome only if the party challenging [an amendment's] constitutionality negates every conceivable basis that might support the amendment."²⁶

This court adopted the *Anderson-Burdick* balancing test in *Pick v. Nelson*.²⁷ Under this test, courts in other jurisdictions have generally held that burdens imposed by voter initiatives to establish term limits for state officers do not warrant strict scrutiny review. Courts have concluded that term limit provisions are content-neutral and do not impose an undue burden on voters when weighed against the state's interests in enforcing the term limits.²⁸ Courts have compared term limits to other neutral eligibility restrictions on candidacy, like age and residency requirements,²⁹ and have concluded that even lifetime term limit bans do not severely restrict incumbents' access to the ballot when they are not prohibited from seeking a different elected office.³⁰

²⁴ *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997).

²⁵ *Burdick v. Takushi*, *supra* note 16, 504 U.S. at 439.

²⁶ *Hall v. Progress Pig, Inc.*, *supra* note 9, 259 Neb. at 418, 610 N.W.2d at 430.

²⁷ *Pick v. Nelson*, *supra* note 14.

²⁸ See, *Citizens for Legislative Choice v. Miller*, *supra* note 23; *Bates v. Jones*, 131 F.3d 843 (9th Cir. 1997) (en banc); *League of Women Voters v. Diamond*, 923 F. Supp. 266 (D. Me. 1996); *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 872 S.W.2d 349 (1994); *Legislature of State of Cal. v. Eu*, 54 Cal. 3d 492, 816 P.2d 1309, 286 Cal. Rptr. 283 (1991).

²⁹ See, e.g., *Citizens for Legislative Choice v. Miller*, *supra* note 23; *Bates v. Jones*, *supra* note 28.

³⁰ *Citizens for Legislative Choice v. Miller*, *supra* note 23; *Bates v. Jones*, *supra* note 28; *Legislature of State of Cal. v. Eu*, *supra* note 28.

Appellants' First Amendment argument focuses on the last part of the *Anderson-Burdick* test: the requirement that a court take into consideration the extent to which a state's interests make it necessary to burden a plaintiff's rights. Appellants specifically state that they are not challenging term limits in general. Their challenge is limited to their contention that § 12 imposes an unnecessary burden on voters by disqualifying only incumbent legislators midway through their second term, whereas their challengers can serve 4 years. This claim of unequal treatment between incumbents and their challengers mirrors their equal protection claim of unequal treatment between incumbents and first-term legislators. As appellants conceded to the district court, both arguments depend upon their contention that only second-term incumbents face the risk of disqualification before their 4-year term has expired. We therefore do not address the arguments separately.

3. EQUAL PROTECTION CHALLENGE

Appellants contend that § 12 violates the Equal Protection Clause by diluting the votes of persons wishing to reelect incumbent legislators because it operates to disqualify an incumbent legislator after the midway point of his or her second term, thus depriving voters of their elected representative. Appellants contend that nonincumbent legislators do not face this risk: "They [incumbent legislators] are not given an equal chance, even to serve a second term, with non-incumbent candidates."³¹ Appellants also argue that Gale is "apparently applying the subsection (3) language only to the persons who were elected in 1998 and therefore served just over half their term between January 1, 2001, and early January, 2003."³²

Appellants' second argument regarding Gale's application of the amendment only to legislators elected in 1998 is refuted by their own allegations and evidence. That is, Gale rejected Chambers' candidate filing for reelection in 2008, after Chambers was reelected in 2004. Thus, Gale did not apply the law only to legislators reelected in 1998.

³¹ Brief for appellants at 18.

³² *Id.*

(a) Level of Scrutiny

Regarding appellants' unequal treatment claim between incumbent and first-term legislators, the State argues that appellants' interpretation of § 12 is incorrect. Alternatively, the State argues that even if appellants' interpretation were correct, strict scrutiny does not apply and that "[t]he amendment does not limit anyone's access to candidacy or the ballot based on a prohibited factor such as race, religion or gender. . . . Access will be the same as it always has been for all voters."³³ Based on this equal access argument, the State apparently assumes there is no fundamental right at stake because every voter's representative would be disqualified to serve the last 2 years of a second term, which would be only an incidental burden on voting rights.

[18-20] The Equal Protection Clause keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike.³⁴ But when the classifications involved in a constitutional amendment do not create any suspect class or address any fundamental right, we apply only minimal scrutiny under the equal protection analysis.³⁵ Under this standard of review, this court will uphold a classification created by a constitutional amendment where it is a rational means of promoting a legitimate government interest or purpose.³⁶

Appellants do not contend that § 12 creates a suspect classification. As noted, there is no fundamental right to seek elective office.³⁷ Similarly, the U.S. Supreme Court has held that voters do not have a fundamental right to vote for a particular candidate.³⁸ It does not follow from this, however, that voters do not have a right to be served by their chosen representative for a full term once elected. Article III, § 7, of the Nebraska

³³ Brief for appellees at 34-35.

³⁴ *In re Interest of Phoenix L.*, 270 Neb. 870, 708 N.W.2d 786 (2006).

³⁵ *Hall v. Progress Pig, Inc.*, *supra* note 9.

³⁶ See *id.*

³⁷ See *Pick v. Nelson*, *supra* note 14.

³⁸ See, *Timmons v. Twin Cities Area New Party*, *supra* note 24; *Burdick v. Takushi*, *supra* note 16.

Constitution provides that members of the Legislature “shall be elected for a term of four years.”

Further, even applying minimal scrutiny, disqualifying only second-term legislators midway through their term is not rationally related to the main purpose of term limits: to eliminate incumbent election advantage.³⁹ If incumbent legislators are disqualified from running again for a 4-year period following the expiration of their second term, a political appointment for the last 2 years of their second term is unnecessary to eliminate incumbent election advantage. Thus, we reject the State’s argument that appellants’ interpretation of § 12 would not create a constitutional infirmity. Regardless of what level of review this court applies, the resolution of appellants’ First Amendment and equal protection challenges hinges on the correct interpretation of § 12.

(b) Meaning of Article III, § 12

Appellants argue that for legislators like Chambers, who were elected in 1996 and 2000, both these terms expired after the January 1, 2001, effective date in subsection (2): their first term expired on January 3, 2001, and their second term expired on January 5, 2005.⁴⁰ Appellants argue that under subsection (1), these legislators should have been disqualified from seeking reelection in 2004 because subsection (1) disqualifies legislators from a third consecutive term after the expiration of two consecutive terms. But under subsection (3), which provides that “service in office for more than one-half of a term shall be deemed service for a term,” they were nonetheless allowed to run for office again because their 1996 terms did not count as service for a term after the effective date. According to appellants, this shows that the full-term calculation under subsection (3) must be incorporated into subsection (1) to determine whether a term has expired.

Appellants further argue that this incorporation is demonstrated by Gale’s determination that Byars and Price had served more than half of their 1999 terms after the amendment’s

³⁹ See, e.g., *Bates v. Jones*, *supra* note 28.

⁴⁰ See Neb. Const. art. III, § 10.

effective date of January 1, 2001. They then contend that this incorporation shows the subsection (3) calculation has altered the meaning of a “term” in subsection (1) so that “service of more than one-half a term [is] the same as expiration of a term.”⁴¹ Thus, they argue § 12 disqualifies all incumbent legislators “from the moment they have passed the midpoint of their second term” and that subsection (1) must be read to incorporate the following underscored language: “No person shall be eligible to serve as a member of the Legislature for four years next after the expiration of service for more than one-half of each of two consecutive terms regardless of the district represented.”⁴²

[22] In ascertaining the intent of a constitutional provision from its language, however, this court may not supply any supposed omission, or add words to or take words from the provision as framed.⁴³ The additional language that appellants contend must be read into subsection (1) illustrates that their interpretation is not consistent with its plain language. Without this italicized language, the meaning of subsection (1) is clear and appellants’ sophistic argument cannot mask the structural simplicity of § 12.

[22] 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.⁴⁴

[23-26] 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.⁴⁵ If the meaning is clear, the court will give to it the meaning that obviously would be accepted

⁴¹ Brief for appellants at 28.

⁴² *Id.* at 27-28.

⁴³ *State ex rel. Lemon v. Gale*, *supra* note 5; *Pony Lake Sch. Dist. v. State Committee for Reorg.*, 271 Neb. 173, 710 N.W.2d 609 (2006).

⁴⁴ *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007).

⁴⁵ *Id.*

and understood by laypersons.⁴⁶ Constitutional provisions are not subject to strict construction and receive a broader and more liberal construction than do statutes.⁴⁷ It is the duty of courts to ascertain and to carry into effect the intent and purpose of the framers of the Constitution or of an amendment thereto.⁴⁸

A layperson would understand from the plain language of subsection (1) that a legislator is disqualified to serve for another consecutive term “*after the expiration of two consecutive terms.*” (Emphasis supplied.) Under appellants’ interpretation, however, a legislator is disqualified from serving a third consecutive term *before the expiration of two consecutive terms.* Thus, appellants’ interpretation is contrary to the plain language and natural sense of subsection (1).

Nor is there any reason to incorporate the full-term calculation from subsection (3) into subsection (1) because all the subsections have distinct functions. Subsection (1) prohibits a third term for a 4-year period after two consecutive terms have expired. Subsection (2) specifies that term limits apply only prospectively to a legislator’s time served on or after January 1, 2001. At the time the initiative was passed, however, prospective application raised the problem of how to count a legislator’s current term as of the effective date. This is the problem that subsection (3) was most obviously intended to address, although the State and district courts have noted possible future applications of subsection (3). That is, subsection (3) was primarily intended to determine whether a legislator’s current term on January 1, 2001, would count toward disqualifying the legislator from a third consecutive term. If more than one-half of the then-current term was served after the effective date, the term would count toward disqualification for a third term, but not otherwise.

This is exactly the manner in which Gale has applied it. Significantly, appellants did not allege that Gale determined any second-term legislator is disqualified halfway through his or her term, and we take judicial notice of Chambers’ current represen-

⁴⁶ *Hall v. Progress Pig, Inc.*, *supra* note 9.

⁴⁷ See, *id.*; *Carpenter v. State*, 179 Neb. 628, 139 N.W.2d 541 (1966).

⁴⁸ *Pony Lake Sch. Dist. v. State Committee for Reorg.*, *supra* note 43.

tation of his district despite having served more than half of his second consecutive term according to appellants' evidence.⁴⁹

Byars and Price were elected in 1998. That term began on January 6, 1999, and expired January 8, 2003, so they served more than half of their 1998 term on or after January 1, 2001. Under subsection (3), therefore, their 1998 term counted as their first consecutive term after January 1, 2001, and their reelection in 2002 counted as their second consecutive term. Thus, Gale properly determined they were disqualified from seeking a third consecutive term in 2006. Chambers' 1996 term began on January 8, 1997, and expired January 3, 2001, so he served only 2 days of that term on or after January 1, 2001, meaning that under subsection (3), his 1996 term did not count as one of his consecutive terms. Chambers' 2000 term therefore counted as his first consecutive term, and his 2004 term counted as his second consecutive term. Applying § 12 in a straightforward manner disqualifies Chambers from seeking a third consecutive term in 2008. Subsection (3) did not, and does not, operate to disqualify any incumbent legislator at the midway point of a second term.

The district court also correctly noted that appellants' interpretation of § 12 would cause a conflict with article III, § 7, which defines a legislator's "term" as 4 years. If subsection (3) were interpreted to mean that "service in office for more than one-half a term" is the same as expiration of a term, then subsection (3) would amend article III, § 7, by implication.⁵⁰

[27,28] The Nebraska Constitution, as amended, must be read as a whole.⁵¹ A constitutional amendment becomes an integral part of the instrument and must be construed and harmonized, if possible, with all other provisions so as to give effect to every section and clause as well as to the whole instrument.⁵²

⁴⁹ See *State v. Kolosseus*, 198 Neb. 404, 253 N.W.2d 157 (1977).

⁵⁰ Compare *Duggan v. Beermann*, *supra* note 8.

⁵¹ *Father Flanagan's Boys Home v. Dept. of Soc. Servs.*, 255 Neb. 303, 583 N.W.2d 774 (1998).

⁵² See *id.*

[29] Reading the constitution as a whole and giving § 12 the meaning that would obviously be accepted and understood by laypersons, we agree with the district court that subsection (3) of § 12 operates only to determine whether an expired legislative term will count as a full term toward disqualification to seek a third consecutive term.

4. FIRST AMENDMENT AND EQUAL PROTECTION CONCLUSION

As noted, the Equal Protection Clause keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike.⁵³ But appellants have failed to show that the full-term calculation in subsection (3) requires a different application for incumbent and nonincumbent legislators. Different outcomes do not necessarily demonstrate different treatment under the law. Equally important, appellants have failed to show that § 12 disqualifies incumbent legislators after they have been in office for more than half of their second term. Thus, § 12 does not infringe upon any fundamental right. Accordingly, this court applies minimal scrutiny, and the burden is on appellants to show that the amendment is not rationally related to achieving any legitimate state purpose.⁵⁴ In other words, a presumption of constitutionality can be overcome only if the party challenging its constitutionality negates every conceivable basis that might support the amendment.⁵⁵

Regardless of whether this court agrees with the wisdom or desirability of term limits, the State has cited rational bases for its enforcement of § 12, including restoring voter participation, competitive elections, and citizen representation by eliminating incumbent election advantages.⁵⁶ Appellants do not attempt to negate these rationales because their entire argument depends upon an interpretation of § 12 that we reject. We conclude that

⁵³ *In re Interest of Phoenix L.*, *supra* note 34.

⁵⁴ See *Hall v. Progress Pig, Inc.*, *supra* note 9.

⁵⁵ *Id.*

⁵⁶ See, *U.S. Term Limits, Inc. v. Hill*, *supra* note 28; *Legislature of State of Cal. v. Eu*, *supra* note 28. See, also, *U. S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (1995).

appellants' equal protection argument must fail. Because appellants' First Amendment claim also depends solely upon their claim of unequal treatment, that claim must fail as well.

5. MINORITY VOTERS

Finally, appellants assign that the district court erred in failing to reach the issue of whether voters in Chambers' district, in particular, were denied their First Amendment and equal protection rights because they lost an effective representative for the only district in the state with a majority of voters who are of a minority race. At the show cause hearing, however, they specifically conceded this was not a racial discrimination claim. These statements effectively informed the district court that it need not address this claim on the basis of racial discrimination or suspect classifications.

[30] A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.⁵⁷ In addition, as the State has pointed out, there is no merit to this argument. Section 12 applies to a legislator from any district, and the Sixth Circuit has concluded that because term limit provisions burden all voters the same, a claim that a minority district is disproportionately affected by losing an effective legislator will not support a claim that the term limit provision imposes a severe burden on those voters' rights.⁵⁸

VII. CONCLUSION

Appellants have failed to show that Nebraska's term limit amendment imposes a severe burden on their First Amendment rights or that it violates the Equal Protection Clause. Both claims depended upon their contention that article III, § 12, disqualifies any incumbent legislator after serving more than half of his or her second term. We conclude that appellants' interpretation of § 12 is contrary to its plain and obvious meaning. We agree with the district court's conclusion that subsection (3) determines whether an expired term counts as one of the two consecutive terms a legislator is permitted to serve before being disqualified

⁵⁷ *Mason v. City of Lincoln*, 266 Neb. 399, 665 N.W.2d 600 (2003).

⁵⁸ See *Citizens for Legislative Choice v. Miller*, *supra* note 23.

to seek a third consecutive term. We further agree that subsection (3) has no application to determining the length of term under subsection (1). We therefore affirm the district court's denial of a peremptory writ of mandamus and declaratory judgment.

AFFIRMED.

WRIGHT, J., not participating.

RHONDA GRIFFIN WASHINGTON, PERSONAL REPRESENTATIVE OF THE
ESTATE OF ROBERT LEE GRIFFIN, APPELLANT, v. TARIE CONLEY,
ALSO KNOWN AS TARIA CONLEY, PERSONAL REPRESENTATIVE
OF THE ESTATE OF ROSE L. GRIFFIN, ET AL., APPELLEES.

734 N.W.2d 306

Filed July 6, 2007. No. S-06-428.

1. **Motions to Dismiss: Jurisdiction: Rules of the Supreme Court: Pleadings: Appeal and Error.** 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) which is limited to a facial attack on the pleadings is subject to the same de novo standard of review as a motion brought under rule 12(b)(6).
2. **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.
3. **Rules of the Supreme Court: Pleadings: Jurisdiction.** There are two ways a party may challenge the court's subject matter jurisdiction under Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(1) (rev. 2003). The first way is a facial attack which challenges the allegations raised in the complaint as being insufficient to establish that the court has jurisdiction over the subject matter of the case. In a facial attack, a court will look only to the complaint in order to determine whether the plaintiff has sufficiently alleged a basis of subject matter jurisdiction. The second way is a factual challenge where the moving party alleges that there is in fact no subject matter jurisdiction, notwithstanding the allegations presented in the complaint. In a factual challenge, the court may consider and weigh evidence outside of the pleadings to answer the jurisdictional question.
4. **Motions to Dismiss: Jurisdiction: Affidavits: Proof.** A motion to dismiss becomes a factual challenge to the court's subject matter jurisdiction when the moving party supports its motion by presenting affidavits or other evidence properly brought before the court. The party opposing the motion must then offer affidavits or other relevant evidence to support its burden of establishing subject matter jurisdiction.

5. **Decedents' Estates: Courts: Jurisdiction: Equity.** County courts, in exercising exclusive original jurisdiction over estates, may apply equitable principles to matters within probate jurisdiction.
6. **Decedents' Estates: Actions: Equity: Courts: Jurisdiction.** In common-law and equity actions relating to decedents' estates, the county courts have concurrent original jurisdiction with the district courts.
7. **Actions: Trusts: Equity.** Actions to declare a resulting or constructive trust are in equity.
8. **Courts: Jurisdiction.** When the jurisdiction of the county court and district court is concurrent, the basic principles of judicial administration require that the court which first acquires jurisdiction should retain it to the exclusion of the other court.
9. **Decedents' Estates: Courts: Jurisdiction.** The county court acquires jurisdiction of all matters relating to the administration and settlement of the estate when formal or informal estate proceedings are filed or instituted in the county court.
10. **Trusts: Statutes.** Resulting and constructive trusts are not governed by the Nebraska Uniform Trust Code.

Appeal from the District Court for Douglas County:
MARLON A. POLK, Judge. Reversed and remanded for further proceedings.

Thomas K. Harmon, of Law Offices of Thomas K. Harmon,
for appellant.

Rebecca Abell Brown, of Law Office of Rebecca Abell Brown,
for appellees.

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

GERRARD, J.

NATURE OF CASE

Robert Lee Griffin purchased a parcel of real estate and placed title to the property in Rose L. Griffin's name. Rose died, and shortly thereafter, Robert also died. The personal representative of Robert's estate, Rhonda Griffin Washington, brought an action in district court against the personal representative of Rose's estate and several other individuals, seeking to establish a resulting or constructive trust over the parcel of real estate at issue. The defendants filed a motion to dismiss for, among other things, lack of subject matter jurisdiction. The district court granted the defendants' motion to dismiss, determining that the county court had exclusive jurisdiction over this matter. The

question presented in this appeal is whether the district court, given the record before it, erred in concluding that it did not have subject matter jurisdiction.

STATEMENT OF FACTS

Washington's operative complaint alleges as follows: In late 2002, Robert Lee Griffin purchased a parcel of real estate located on Fort Street in Omaha, Nebraska. For Robert's "convenience," title to the property was placed in the name of Rose L. Griffin and a deed was delivered to Rose, which was then recorded in the office of the register of deeds for Douglas County. Robert occupied part of the premises with his family, improved and cared for the property, collected the rents from the property, and never recognized Rose as the owner of the property.

Rose died, and Tarie Conley was appointed as the personal representative of her estate. Washington alleges that after Rose's death, Robert requested that the defendants execute and deliver to him a deed for the property at issue in this case, but the defendants refused to do so. On March 4, 2005, Robert died, and Washington was subsequently appointed as the personal representative of his estate.

On December 30, 2005, Washington filed the operative complaint in district court against Melanie Conley, Christopher Conley, Morgan Conley, and Tarie Conley, as an individual and in her capacity as the personal representative of Rose's estate. Washington's complaint alleged that because Robert purchased the real property, Robert's estate has equitable title to the property, and that the defendants are obligated, in equity, to hold title to the property for his benefit. In essence, Washington requested that the district court impose a constructive or resulting trust on the real estate to which Rose held the record title. The defendants filed a motion to dismiss, claiming that Washington's complaint failed to state a claim upon which relief could be granted and for lack of jurisdiction.

At the hearing on the defendants' motion to dismiss, the following colloquy occurred:

THE COURT: Okay. And we're here on the Motion to Dismiss filed on behalf of the Defendants. And the Court's first question in that regard, having reviewed the Complaint, the Motion to Dismiss, the Objection, and the

Brief in Opposition of the Motion for Dismissal, what is going on in the county court?

[Counsel for the defendants]: There has been a probate filed for the estate of Rose L. Griffin. It's just in the beginning stages. [Tarie] Conley has been appointed personal representative. It is an informal proceeding at this point in time and was just appointed not that long ago. I think November would be —

[Counsel for Washington]: Judge, my understanding it was like November 10th or November 17th of 2005, if I may interject. Thank you. Excuse me.

THE COURT: Okay. In fact, I see those letters of appointment that were attached to the Complaint. Is the property [on] Fort Street that is at issue in the Rose L. Griffin estate matter?

[Counsel for the defendants]: That is basically along with the vehicle is the only property in the estate that needs to be probated.

However, no evidence was adduced at the hearing, and no pleadings have been filed other than the complaint. None of the parties requested that the district court take judicial notice of any probate proceedings. Apparently relying on the statements of counsel that the real estate was subject to a probate proceeding in county court, the district court granted the defendants' motion to dismiss for lack of jurisdiction. In support of this conclusion, the court cited *Ptak v. Swanson*¹ for the proposition that when a personal representative's recovery of estate assets is inextricably tied to the probate of the estate, the right of recovery arises within the exclusive original jurisdiction over probate matters in the county court. The court noted that in the present case, Washington is seeking to recover title to real property that the court believed was involved in an ongoing probate proceeding. Accordingly, the court concluded that Washington's recovery in this case is inextricably tied to the probate of Rose's estate and that Washington's right of recovery arises within the exclusive original jurisdiction of the county court. The court dismissed the complaint, and Washington appealed.

¹ *Ptak v. Swanson*, 271 Neb. 57, 709 N.W.2d 337 (2006).

ASSIGNMENT OF ERROR

Washington assigns, summarized, restated, and renumbered, that the district court erred in concluding that it was without jurisdiction to hear her complaint.

STANDARD OF REVIEW

[1,2] 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) which is limited to a facial attack on the pleadings is subject to the same de novo standard of review as a motion brought under rule 12(b)(6).² 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.³

ANALYSIS

The sole question presented to this court on appeal is whether the district court erred in granting the defendants' motion to dismiss for lack of subject matter jurisdiction. Washington's action was filed on December 30, 2005, and thus, we apply the new rules for notice pleading.⁴ Because Nebraska's notice pleading rules are modeled after the Federal Rules of Civil Procedure, we look to the federal decisions for guidance.⁵

[3] It is well established in federal courts that there are two ways a party may challenge the court's subject matter jurisdiction under rule 12(b)(1). The first way is a facial attack which challenges the allegations raised in the complaint as being insufficient to establish that the court has jurisdiction over the subject matter of the case.⁶ In a facial attack, a court will look only to the complaint in order to determine whether the plaintiff

² *VanHorn v. Nebraska State Racing Comm.*, ante p. 737, 732 N.W.2d 651 (2007).

³ See *id.*

⁴ See Neb. Ct. R. of Pldg. in Civ. Actions 1 (rev. 2004).

⁵ See *Bohaboj v. Rausch*, 272 Neb. 394, 721 N.W.2d 655 (2006).

⁶ See, *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000); *Courtney v. Choplin*, 195 F. Supp. 2d 649 (D.N.J. 2002); *Zelaya v. J.M. Macias, Inc.*, 999 F. Supp. 778 (E.D.N.C. 1998).

has sufficiently alleged a basis of subject matter jurisdiction.⁷ The second type of challenge is a factual challenge where the moving party alleges that there is in fact no subject matter jurisdiction, notwithstanding the allegations presented in the complaint.⁸ In a factual challenge, the court may consider and weigh evidence outside of the pleadings to answer the jurisdictional question.⁹

[4] A motion to dismiss becomes a factual challenge to the court's subject matter jurisdiction when the moving party supports its motion by presenting affidavits or other evidence properly brought before the court.¹⁰ The party opposing the motion must then offer affidavits or other relevant evidence to support its burden of establishing subject matter jurisdiction.¹¹

In this case, the defendants filed a motion to dismiss but did not offer any evidence in support of their motion. Accordingly, we consider the defendants' motion to be a facial challenge to the district court's jurisdiction, as opposed to a factual one.¹² Because it is a facial challenge, we must accept all of the allegations made in Washington's complaint as true and draw all reasonable inferences in favor of Washington.¹³

Given this standard of review, we conclude that the district court erred in finding that it did not have subject matter jurisdiction over this claim. We begin by reviewing the general principles relating to the respective jurisdiction of the district and county courts.

⁷ See *VanHorn v. Nebraska State Racing Comm.*, *supra* note 2. See, also, *Beatty v. U.S. Food and Drug Admin.*, 12 F. Supp. 2d 1339 (S.D. Ga. 1997); *Cohen v. Temple Physicians, Inc.*, 11 F. Supp. 2d 733 (E.D. Pa. 1998).

⁸ See, *St. Clair v. City of Chico*, 880 F.2d 199 (9th Cir. 1989); *Beatty v. U.S. Food and Drug Admin.*, *supra* note 7.

⁹ See, *Krohn v. Forsting*, 11 F. Supp. 2d 1082 (E.D. Mo. 1998); *Rodriguez v. Texas Com'n on Arts*, 992 F. Supp. 876 (N.D. Tex. 1998), *affirmed* 199 F.3d 279 (5th Cir. 2000).

¹⁰ See *Savage v. Glendale Union High School*, 343 F.3d 1036 (9th Cir. 2003).

¹¹ See, *id.*; *Paterson v. Weinberger*, 644 F.2d 521 (5th Cir. 1981).

¹² See, *Paterson v. Weinberger*, *supra* note 11; *Yuksel v. Northern American Power Technology*, 805 F. Supp. 310 (E.D. Pa. 1992).

¹³ See *VanHorn v. Nebraska State Racing Comm.*, *supra* note 2.

Neb. Const. art. V, § 9, states: “The district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the Legislature may provide” Because a district court’s general jurisdiction emanates from the Nebraska Constitution, it cannot be legislatively limited or controlled.¹⁴

Exclusive original jurisdiction over probate matters has been given to the county court by the Nebraska Legislature. Neb. Rev. Stat. § 24-517 (Cum. Supp. 2006) provides in relevant part that “[e]ach county court shall have the following jurisdiction: (1) Exclusive original jurisdiction of all matters relating to decedents’ estates, including the probate of wills and the construction thereof” Neb. Rev. Stat. § 30-2211(a) (Cum. Supp. 2006) provides in part: “To the full extent permitted by the Constitution of Nebraska, the [county] court has jurisdiction over all subject matter relating to (1) estates of decedents, including construction of wills and determination of heirs and successors of decedents, and estates of protected persons”

[5,6] County courts, in exercising exclusive original jurisdiction over estates, may apply equitable principles to matters within probate jurisdiction.¹⁵ We have noted, however, that the Legislature’s grant of exclusive jurisdiction to the county court in matters relating to decedents’ estates “‘is of suspect constitutionality insofar as it relates to matters that would involve either the chancery or common-law jurisdiction of the district courts.’”¹⁶ In reconciling this apparent tension, we have concluded that in common-law and equity actions relating to decedents’ estates, the county courts have concurrent original jurisdiction with the district courts.¹⁷ We have further explained:

The grant of jurisdiction to the district court, however, while original, is not exclusive. That each of two courts

¹⁴ *Ptak v. Swanson*, *supra* note 1; *Schweitzer v. American Nat. Red Cross*, 256 Neb. 350, 591 N.W.2d 524 (1999).

¹⁵ *In re Estate of Steppuhn*, 221 Neb. 329, 377 N.W.2d 83 (1985); *In re Estate of Layton*, 207 Neb. 646, 300 N.W.2d 802 (1981).

¹⁶ *Ptak v. Swanson*, *supra* note 1, 271 Neb. at 63, 709 N.W.2d at 341.

¹⁷ *Ptak v. Swanson*, *supra* note 1; *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999); *Iodence v. Potmesil*, 239 Neb. 387, 476 N.W.2d 554 (1991).

may possess the same original jurisdiction is clear, but that two separate courts may not exercise exclusive jurisdiction is also clear. Our previous opinions have not always addressed this point. In considering the difference between exclusive and original, the apparent conflict between the jurisdiction of the county court and the district court vanishes.¹⁸

[7] In this case, Washington is seeking to impose a constructive or resulting trust on a parcel of real estate. Actions to declare a resulting or constructive trust are in equity.¹⁹ In the absence of a probate issue the district court would have original jurisdiction over such an action. However, in an equitable action relating to a decedent's estate, the county court may under some circumstances have concurrent original jurisdiction with the district court.

[8,9] When the jurisdiction of the county court and district court is concurrent, the basic principles of judicial administration require that the court which first acquires jurisdiction should retain it to the exclusion of the other court.²⁰ We have explained that the "county court acquires jurisdiction of all matters relating to the administration and settlement of the estate when formal or informal estate proceedings are filed or instituted in the county court."²¹

The resolution of the present case depends on the answers to the following questions: First, whether there is a pending probate proceeding in county court involving the real property at issue in this case; and second, if there is an ongoing probate proceeding, whether the county court first acquired jurisdiction. Based solely on the allegations presented in Washington's complaint, which answer neither of these questions, we conclude

¹⁸ *In re Estate of Steppuhn*, *supra* note 15, 221 Neb. at 332, 377 N.W.2d at 85.

¹⁹ *Brtek v. Cihal*, 245 Neb. 756, 515 N.W.2d 628 (1994); *Kuhlman v. Cargile*, 200 Neb. 150, 262 N.W.2d 454 (1978).

²⁰ See *In re Estate of Kentopp*, 206 Neb. 776, 295 N.W.2d 275 (1980).

²¹ *Id.* at 785, 295 N.W.2d at 280.

that the district court erred in finding that it did not have jurisdiction over this matter.

We note that under Nebraska law, title to real property passes immediately upon death to devisees or heirs, subject to administration.²² Of course, pursuant to Neb. Rev. Stat. § 30-2470 (Reissue 1995), a personal representative may request possession of the property for purposes of estate administration, and may also maintain an action to determine title to the property.²³ However, in the present case, there is no allegation in the complaint that the real property is necessary for purposes of estate administration or for a determination of title in the probate court. Thus, on the face of the complaint, there is no impediment to the district court's properly exercising jurisdiction over this action.

Moreover, in finding that it lacked jurisdiction, the district court erroneously relied upon information not found in Washington's complaint, specifically, the assertions of counsel that the property at issue in this case is subject to a separate and contemporaneous probate proceeding in county court. In relying solely on the allegations made by Washington in her complaint, as we must, and without an allegation in the complaint that the property at issue is somehow necessary for purposes of estate administration in a pending probate proceeding, we cannot say that the county court has acquired jurisdiction over this matter to the exclusion of the district court. The district court erred in granting the motion to dismiss based on the record before it.

As an alternative basis for dismissing the complaint, the defendants argue that the county court has jurisdiction over this case pursuant to Neb. Rev. Stat. §§ 30-3814(a) and (f) (Cum. Supp. 2006) of the Nebraska Uniform Trust Code. Section 30-3814(a) provides that "[t]o the full extent permitted by the Constitution of Nebraska, the county court has jurisdiction over all subject matter relating to trusts." Section 30-3814(f) states

²² Neb. Rev. Stat. § 30-2401 (Reissue 1995). See, also, *Ruzicka v. Ruzicka*, 262 Neb. 824, 635 N.W.2d 528 (2001); *Mischke v. Mischke*, 253 Neb. 439, 571 N.W.2d 248 (1997).

²³ See *Ruzicka v. Ruzicka*, *supra* note 22.

that “[f]or purposes of this section, ‘proceeding’ includes action at law and suit in equity.” The defendants claim that given these provisions, the county court has jurisdiction because a resulting or constructive trust, although an action in equity, is a “matter relating to trusts.”

The defendants’ reliance on § 30-3814(a) and (f) is misplaced. Neb. Rev. Stat. § 30-3802 (Cum. Supp 2006) provides that “[t]he Nebraska Uniform Trust Code applies to express trusts, charitable or noncharitable, and trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust.” The official comment to § 102 of the Uniform Trust Code, which is identical to § 30-3802, states that the code, “while comprehensive, applies only to express trusts.”²⁴ Excluded from the code’s coverage are resulting and constructive trusts, which are not express trusts but remedial devices imposed by law.²⁵

[10] It is clear from the plain language of § 30-3802 that resulting and constructive trusts are not governed by the Nebraska Uniform Trust Code. The defendants’ argument that the county court had jurisdiction under the code is without merit.

CONCLUSION

We conclude that the district court erred in considering evidence outside of Washington’s complaint and finding that it did not have subject matter jurisdiction over Washington’s claim. Absent other evidence, the allegations presented in Washington’s complaint are sufficient to vest jurisdiction in the district court. We reverse the judgment of the district court and remand the cause for further proceedings.

REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.

²⁴ Unif. Trust Code § 102, 7C U.L.A. 411 (2006).

²⁵ *Id.*

IN RE ESTATE OF EDWARD F. NEMETZ, JR., DECEASED.
 JILL A. NEMETZ AND CHRISTOPHER NEMETZ, APPELLANTS,
 v. KATHLEEN A. NEMETZ, APPELLEE.
 735 N.W.2d 363

Filed July 6, 2007. No. S-06-487.

1. **Decedents' Estates: Appeal and Error.** In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Decedents' Estates.** A proceeding under Neb. Rev. Stat. § 30-2454 (Reissue 1995) to remove a personal representative for cause is a special proceeding within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995).
4. **Statutes.** The meaning of a statute is a question of law.
5. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
6. **Courts: Jurisdiction: Decedents' Estates.** A county court has exclusive jurisdiction over all proceedings regarding a decedent's estate.
7. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not passed upon by the trial court.

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

Bradley E. Barrows, of Hoppe & Harner, L.L.P., for appellants.

Sally J. Hytrek for appellee.

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

WRIGHT, J.

NATURE OF CASE

Eighteen years after Edward F. Nemetz, Jr., died, his surviving spouse, Kathleen A. Nemetz, filed an application for informal appointment of personal representative in intestacy, and she was appointed. Edward's children from a previous marriage filed a petition to remove Kathleen as personal representative. Following an evidentiary hearing, the county court denied the petition, and the children appeal.

SCOPE OF REVIEW

[1,2] In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. *In re Trust of Rosenberg*, 269 Neb. 310, 693 N.W.2d 500 (2005). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

FACTS

Edward died August 9, 1987. He was survived by his spouse, Kathleen, and two children from a previous marriage: Jill A. Nemetz, born August 22, 1972, and Christopher Nemetz, born November 20, 1975. At the time of his death, Edward owned residential property in Omaha, Nebraska. From the time of Edward's death through the time of the proceedings below, Kathleen continued to live in the house, paid the mortgage and taxes, and made necessary repairs to the premises.

No probate proceeding was commenced until September 14, 2005, at which time, Kathleen filed in the county court an application for informal appointment of personal representative in intestacy. She was appointed as personal representative of Edward's estate in an unsupervised administration, and a letter of personal representative was issued to her. On October 4, Kathleen, as personal representative, signed a deed of distribution transferring the residential property to herself.

On January 27, 2006, Jill and Christopher petitioned the court for formal adjudication of intestacy, removal of the personal representative, appointment of a successor personal representative, determination of heirs, and surcharge of the former personal representative. The court separated the issues raised in the children's petition and held an evidentiary hearing on their request to remove Kathleen as personal representative. At the end of the hearing, the court found no reason to remove Kathleen and entered an order denying the children's request. From that order, the children appeal.

ASSIGNMENTS OF ERROR

The children assert, restated, that the county court erred (1) in finding that its jurisdiction was not limited by Neb. Rev. Stat.

§ 30-2408 (Reissue 1995) to determining only how Edward's property devolved at his death and (2) in denying their request to remove Kathleen as the personal representative for the estate.

ANALYSIS

In their brief on appeal, the children make a number of arguments about issues that have not yet been adjudicated in the county court. The only ruling from which the children have appealed is the order denying their request to remove Kathleen as personal representative. Just two issues are presented in this appeal: Did the county court have jurisdiction to appoint Kathleen as personal representative? Did the county court err in denying the children's request to remove Kathleen as personal representative?

[3] We note that a proceeding under Neb. Rev. Stat. § 30-2454 (Reissue 1995) to remove a personal representative for cause is a special proceeding within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 1995). *In re Estate of Seidler*, 241 Neb. 402, 490 N.W.2d 453 (1992). Therefore, the county court's order denying the children's request to remove Kathleen is a final order and is appealable, even though it neither terminated the action nor constituted a final disposition of the case. See *id.*

JURISDICTION OF COUNTY COURT

The children argue that if probate proceedings are commenced more than 3 years after the decedent's death, § 30-2408 limits the court's jurisdiction to determining how the property of an intestate decedent devolved at the time of the decedent's death and determining claims for administration expenses. The record shows that the county court appointed Kathleen as personal representative and denied the children's request to remove her. No determination has yet been made by the county court as to how Edward's estate passed (or should pass) to his heirs. Thus, we address the children's jurisdiction argument only as it pertains to the appointment of Kathleen.

We first consider the children's argument that the county court did not have jurisdiction to appoint Kathleen as personal representative more than 3 years after Edward's death. The proceedings were initiated when Kathleen filed an application for

informal appointment of personal representative in intestacy. Section 30-2408 provides, in relevant part, as follows:

No informal probate or appointment proceeding or formal testacy or appointment proceeding, other than a proceeding to probate a will previously probated at the testator's domicile and appointment proceedings relating to an estate in which there has been a prior appointment, may be commenced more than three years after the decedent's death, *except . . . (4) an informal probate or appointment or a formal testacy or appointment proceeding may be commenced thereafter if no formal or informal proceeding for probate or proceeding concerning the succession or administration has occurred within the three-year period*, but claims other than expenses of administration may not be presented against the estate.

(Emphasis supplied.)

[4,5] The meaning of a statute is a question of law. *State ex rel. Columbus Metal v. Aaron Ferer & Sons*, 272 Neb. 758, 725 N.W.2d 158 (2006). Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Turco v. Schuning*, 271 Neb. 770, 716 N.W.2d 415 (2006).

[6] A county court has exclusive jurisdiction over all proceedings regarding a decedent's estate. *Mischke v. Mischke*, 253 Neb. 439, 571 N.W.2d 248 (1997). See, also, Neb. Rev. Stat. § 30-2211 (Cum. Supp. 2006). Section 30-2408 clearly permits an informal appointment proceeding to be commenced more than 3 years after the decedent's death "if no formal or informal proceeding for probate or proceeding concerning the succession or administration has occurred within the three-year period."

The record shows that Edward died intestate on August 9, 1987. No formal or informal proceeding for probate or proceeding concerning the succession or administration of Edward's estate occurred within 3 years after his death. Kathleen filed her application for informal appointment of personal representative on September 14, 2005. Although this filing was made more than 3 years after Edward's death, we conclude that under

the plain language of § 30-2408, the county court had jurisdiction to appoint Kathleen as personal representative of Edward's estate.

DENIAL OF REQUEST TO REMOVE PERSONAL REPRESENTATIVE

The children also claim that the county court erred in refusing to remove Kathleen as personal representative. A personal representative of an estate may be removed by a court upon the petition of an interested person in the estate if

removal would be in the best interests of the estate, or if it is shown that a personal representative . . . intentionally misrepresented material facts in the proceedings leading to his [or her] appointment, or that the personal representative has disregarded an order of the court, has become incapable of discharging the duties of his [or her] office, or has mismanaged the estate or failed to perform any duty pertaining to the office.

See § 30-2454(b).

[7] The children first assert an argument similar to their jurisdictional claim. They argue that Kathleen should have been removed because she made claims for homestead allowance, family allowance, and exempt property more than 3 years after Edward's death. Whether improper claims were made against the estate has not been adjudicated by the county court. An appellate court will not consider an issue on appeal that was not passed upon by the trial court. *In re Estate of Eriksen*, 271 Neb. 806, 716 N.W.2d 105 (2006). Thus, we do not address the children's argument concerning alleged claims made against the estate by Kathleen.

Second, the children argue that Kathleen has a conflict of interest that precludes her from acting as personal representative of Edward's estate. In October 2005, after Kathleen was appointed personal representative to administer the estate without supervision, she signed a deed of distribution transferring the residential property to herself. The children claim that in so doing, Kathleen failed to act impartially and did not consider the children's inheritance rights. The children assert that once they petitioned for Kathleen's removal in January 2006, she should have returned the property to the estate. Because she did

not do so, the children claim Kathleen has a conflict of interest and should be removed from serving as personal representative.

The record does not show that Kathleen has intentionally misrepresented any facts, disregarded any court orders, become incapable of discharging the duties of her office, or mismanaged the estate. Nor does the record show that Kathleen has exhibited bad faith in performing her duties as personal representative, as the children have alleged. The children's petition for formal adjudication of the intestate estate has not yet been heard by the county court; in other words, proper distribution of the estate has not been determined. During the hearing on the children's removal request, Kathleen stated that if the court were to determine that the residence should have been distributed differently, she would distribute it in accordance with the court's ruling.

To the extent that the children's argument stands for the notion that Kathleen cannot serve as personal representative because of her interest in the estate, this court has previously rejected such notion. Those who are directly interested in estates are regularly selected and appointed as personal representatives. See *In re Estate of Rosso*, 270 Neb. 323, 701 N.W.2d 355 (2005). "That the named personal representative is interested in the estate and that his or her interest may become hostile to those of the other interested beneficiaries does not necessarily render the personal representative legally incompetent." *Id.* at 332, 701 N.W.2d at 363-64.

The county court applied the language of § 30-2454(b) and found that no cause existed to remove Kathleen as personal representative. Based on an examination for error appearing on the record, we conclude that the county court's ruling conformed to the law, was supported by competent evidence, and was neither arbitrary, capricious, nor unreasonable.

CONCLUSION

The children's assignments of error are without merit. The county court had jurisdiction to appoint Kathleen as personal representative and did not err in denying the children's request to remove her. The county court's order is affirmed.

AFFIRMED.

HAUPTMAN, O'BRIEN, WOLF & LATHROP, P.C., APPELLEE, v.
LOUIS J. TURCO, JR., AND LUCIA TURCO, APPELLANTS.
735 N.W.2d 368

Filed July 13, 2007. No. S-05-928.

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. **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.
4. **Attorney Fees.** An attorney may not recover for services rendered if those services are rendered in contradiction to the requirements of professional responsibility and are inconsistent with the character of the profession.
5. _____. An attorney fee computed pursuant to a contingent fee agreement is subject to the same standard of reasonableness as any other attorney fee.
6. **Attorney Fees: Contracts: Proof.** In a suit to recover an unpaid fee, the lawyer has the burden of persuading the trier of fact, when relevant, of the existence and terms of any fee contract, the making of any disclosures to the client required to render a contract enforceable, and the extent and value of the lawyer's services.
7. **Attorney and Client.** The value of an attorney's services is ordinarily a question of fact.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Reversed and remanded for further proceedings.

Jeff T. Courtney for appellants.

Terry M. Anderson and Melany S. Chesterman, of Hauptman, O'Brien, Wolf & Lathrop, P.C., for appellee.

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

STEPHAN, J.

Louis J. Turco, Jr., engaged the law firm of Hauptman, O'Brien, Wolf & Lathrop, P.C., to represent his minor daughter, Lucia Turco, with respect to her personal injuries and the death of her unborn child resulting from a motor vehicle accident. Louis executed a contingent fee agreement with the firm.

After receiving a settlement offer, but before accepting it, Louis advised the firm that he was terminating its services. The firm then brought this action to enforce an attorney lien against Louis and Lucia (collectively the Turcos) in an amount computed in accordance with the contingent fee agreement. The Turcos asserted various defenses, including a claim that the amount of the fee was unreasonable. The district court for Douglas County granted the firm's motion for summary judgment, and the Turcos appealed. Because the record does not afford a sufficient basis for determining the reasonableness of the claimed fee, we conclude that there are genuine issues of material fact which preclude summary judgment and therefore reverse, and remand for further proceedings.

BACKGROUND

On June 20, 2004, Lucia was a passenger in an automobile involved in an accident with another vehicle. Lucia was a minor at the time of the accident and was 31 weeks pregnant. She suffered a broken femur and the loss of her unborn child. She was hospitalized for 6 days.

Several days after the accident, Louis contacted the law firm on Lucia's behalf and met with an attorney from the firm. During the meeting, he explained that Lucia had been a passenger in an automobile which was struck by a drunk driver and that her unborn child had died as a result. Louis did not employ the law firm at this initial meeting, but he did leave the office with a brochure and a copy of the firm's contingent fee agreement.

On July 8, 2004, Louis, his wife, and Lucia again met with attorneys from the law firm. During this meeting, the parties discussed Lucia's injuries, responsibility for medical bills, issues relating to the possible wrongful death claim, and the length of time it would take to resolve the matters. The details and particulars of the accident and Lucia's injuries were related to the law firm. From the attorneys' comments, Louis understood that "it would be a lot of work to get the insurance companies to pay the claim" and that the firm would not consider settling for 6 to 8 months because of uncertainty as to the extent of Lucia's injuries and the resulting medical bills. The contingent

fee agreement was explained during this meeting, and Louis signed it.

The agreement provided that the firm's fee would be "thirty-three and one-third percent (33 1/3%) of the gross amount recovered either by judgment or by settlement . . . calculated independently of any costs or bills owed by client." It included an acknowledgment that the fee was "dependent upon the outcome of client's claim" and that the firm had explained that the case "could be handled at an attorney's regular hourly rate, plus expenses, payable monthly as billed, but client prefers that this matter be handled on a contingent fee basis." The agreement also included the following provision:

In the event of termination of attorney's representation, attorney shall have a lien for fees and expenses, which lien will be imposed upon any sums recovered by, for, or on behalf of client. For purposes of computing the contingency fee to which attorney is entitled, the 33 1/3 percentage shall be computed based upon the last settlement offer received by attorney from defendant's representatives. If no such settlement offer has been tendered, attorney shall be allowed fees in an amount equal to his/her standard hourly rate for the hours expended, as well as the hourly rate of paralegal and other support staff utilized on client's behalf.

Members of the firm explained to the Turcos that this provision was necessary to protect it from clients who would terminate its services in order to avoid payment of a fee.

On August 9, 2004, an attorney from the firm telephoned Louis' wife and informed her that the liability insurance carrier for the driver of the other vehicle involved in the accident had offered to settle for its policy limits. The attorney told her that the next step would be to pursue underinsured coverage. Neither Louis nor his wife told the attorney that they would accept the settlement offer, which was in the amount of \$194,000.

Following a court hearing in September 2004, Louis became dissatisfied with the firm. On September 14, he delivered a letter to the law firm terminating its services. Although he was aware of the provision of the contingent fee agreement specifying the fee payable upon termination, he felt that the law firm

had expended little time and effort and that the fee of 33½ percent of the settlement offer was excessive for the amount of work done.

After the firm tried unsuccessfully to resolve the dispute regarding the fee, it served notice of an attorney lien on the attorney representing the party which had made the settlement offer. The notice stated that the lien was in the amount of \$64,600 and represented fees owed pursuant to the contingent fee agreement signed by Louis. New counsel retained by Louis subsequently advised the firm that while Louis agreed that it was entitled to be compensated for the "reasonable value of services provided up to the time of [the firm's] termination" and reimbursed for expenses incurred, the amount of the claimed lien was excessive.

The law firm subsequently brought this action against the Turcos, generally alleging breach of contract. In their answer, the Turcos alleged that terms of the contingent fee agreement were unconscionable, that the execution of the agreement was fraudulently induced, and that the amount of the fee claimed by the firm was "unreasonable and excessive." The firm filed a motion for summary judgment, as did the Turcos. The district court granted the law firm's motion and denied that filed by the Turcos. The Turcos perfected this 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.¹

ASSIGNMENTS OF ERROR

The Turcos assign, restated, that the district court erred in granting the law firm's motion for summary judgment because (1) there are genuine issues of material fact as to whether the fee is excessive for the amount of work actually performed, (2) the law firm failed to present evidence that the terms of the fee agreement were reasonable, and (3) there are genuine issues of material fact as to whether the law firm made fraudulent representations that the Turcos relied upon to their detriment.

¹ See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

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.² In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.³

ANALYSIS

[3] The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that it is entitled to judgment as a matter of law.⁴ The evidence offered by the law firm in support of its motion for summary judgment included the contingent fee agreement and notice of attorney lien, the deposition of Louis, and the termination letter Louis delivered to the firm. These latter documents reflect Louis' dissatisfaction with the firm's services and his reasons for claiming that the amount of the fee was unreasonable. The law firm also offered the affidavit of an attorney who opined that the contingent fee agreement utilized in this case "is a reasonable fee agreement and is not excessive" and that the firm was experienced and enjoyed an "outstanding reputation" in the legal, insurance, and medical communities. However, this affidavit does not address the reasonableness of the fee itself.

The firm contends that the reasonableness of its claimed fee is not at issue. In its brief, the firm argues that it has not

² *Ferer v. Aaron Ferer & Sons*, 272 Neb. 770, 725 N.W.2d 168 (2006); *Brodine v. Blue Cross Blue Shield*, 272 Neb. 713, 724 N.W.2d 321 (2006).

³ *In re Adoption of Jaden M.*, 272 Neb. 789, 725 N.W.2d 410 (2006); *Ferer v. Aaron Ferer & Sons*, *supra* note 2.

⁴ *Crouse v. Pioneer Irr. Dist.*, 272 Neb. 276, 719 N.W.2d 722 (2006); *Lovette v. Stonebridge Life Ins. Co.*, 272 Neb. 1, 716 N.W.2d 743 (2006).

claimed that the fee is owed “only because [it] is reasonable.”⁵ Instead, it argues that the fee computed in accordance with the contingent fee agreement “is owed because [the Turcos] agreed to pay that specific amount.”⁶ It further argues that whether that amount “has been shown to be ‘reasonable’ is not relevant” to its claim for breach of contract.⁷ In support of this argument, the firm relies in part upon *Mecham v. Colby*,⁸ which it cites for the proposition that written, unambiguous fee agreements between attorney and client are enforceable where the agreement contains a set or identifiable amount of the fee owed to the attorney.

In *Mecham*, we affirmed a summary judgment in favor of an attorney who had negotiated a settlement on behalf of a client involved in a complex dispute relating to an estate’s inherited shares of corporate stock. After the settlement was consummated, the attorney billed the client in the amount of \$2,000 and the client approved the statement in writing. The client later refused to pay the fee. We held that the client’s written approval of the billing statement constituted a contract enforceable by the attorney, notwithstanding the client’s subsequent claim that the settlement was not in her best interests. The record in *Mecham* included affidavits establishing that the attorney had achieved “the best possible settlement that was obtainable” for the client and that the “reasonable value” of his services was “between \$7,500 and \$10,000,” far in excess of the \$2,000 fee established in the contract.⁹ The opinion does not recite any evidence placing the value of the attorney’s services at less than the amount claimed. Thus, *Mecham* does not support an argument that an attorney fee contract is enforceable in the absence of some showing that the amount of the claimed fee is reasonable.

⁵ Brief for appellee at 9.

⁶ *Id.* at 9-10.

⁷ *Id.* at 10.

⁸ *Mecham v. Colby*, 156 Neb. 386, 56 N.W.2d 299 (1953).

⁹ *Id.* at 393, 56 N.W.2d at 302-03.

[4] Our jurisprudence recognizes that an attorney fee agreement is different from conventional commercial contracts.¹⁰ The difference arises from the fact that an attorney may not recover for services rendered if those services are rendered in contradiction to the requirements of professional responsibility and are inconsistent with the character of the profession.¹¹

The Code of Professional Responsibility, which was in effect when the legal services at issue in this case were performed, provided: “A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.”¹² Under the code, a fee was deemed “clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.”¹³ The code enumerated eight factors to be considered as guides in determining the reasonableness of the fee, one of which was “[w]hether the fee is fixed or contingent.”¹⁴ The Nebraska Rules of Professional Conduct, which are currently in effect, similarly provide that a lawyer “shall not make an agreement for, charge, or collect an unreasonable fee,” and list the same eight factors to be considered in determining the reasonableness of a fee.¹⁵ The official comment 3 to rule 1.5 specifically states: “Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule.”

Citing authority from other jurisdictions, we have held that “[a] contingent fee which is not fair and reasonable can not be recovered in an action for attorney fees.”¹⁶ In *Kirby*, we held

¹⁰ See, *Baker v. Zikas*, 176 Neb. 290, 125 N.W.2d 715 (1964); *Byrne v. Hauptman, O'Brien*, 9 Neb. App. 77, 608 N.W.2d 208 (2000).

¹¹ *Sherrets, Smith v. MJ Optical, Inc.*, 259 Neb. 424, 610 N.W.2d 413 (2000); *Zimmerman v. FirsTier Bank*, 255 Neb. 410, 585 N.W.2d 445 (1998); *State ex rel. FirsTier Bank v. Mullen*, 248 Neb. 384, 534 N.W.2d 575 (1995).

¹² Code of Professional Responsibility, Canon 2, DR 2-106(A).

¹³ *Id.*, DR 2-106(B).

¹⁴ *Id.*, DR 2-106 (B)(8).

¹⁵ Neb. Ct. R. of Prof. Cond. 1.5(a) (rev. 2005).

¹⁶ *Kirby v. Liska*, 214 Neb. 356, 362, 334 N.W.2d 179, 183 (1983).

that the evidence was insufficient to establish an oral contingent fee agreement. Noting that the record showed that the attorney “examined the record, filed some pleadings, wrote some correspondence, conferred with his client, obtained continuances, drafted a settlement offer, and was present when the settlement agreement was signed,” we concluded that it did “not sustain an allowance of \$65,340 for attorney fees upon the basis of an express agreement or upon a quantum meruit basis. Such an amount is excessive.”¹⁷

[5] We conclude that an attorney fee computed pursuant to a contingent fee agreement is subject to the same standard of reasonableness as any other attorney fee. To hold otherwise would require us to ignore the ethical principle which prohibits a lawyer from making an agreement for, charging, or collecting an unreasonable fee. We agree with the observation of the Court of Special Appeals of Maryland that “[e]ither a fixed or contingent fee, proper when contracted for, may later turn out to be excessive.”¹⁸ Under the Code of Professional Responsibility applicable to this case and the Nebraska Rules of Professional Conduct currently in effect, whether a fee is fixed or contingent is only one factor to be considered in determining whether the fee is reasonable.

[6,7] In a suit to recover an unpaid fee, “the lawyer has the burden of persuading the trier of fact, when relevant, of the existence and terms of any fee contract, the making of any disclosures to the client required to render a contract enforceable, and the extent and value of the lawyer’s services.”¹⁹ The value of an attorney’s services is ordinarily a question of fact.²⁰ Here, the evidence offered by the law firm in support of its motion for summary judgment established that Louis signed a contingent fee agreement which was reasonable on its face and

¹⁷ *Id.* at 363, 334 N.W.2d at 183.

¹⁸ *Brown & Sturm v. Frederick Rd.*, 137 Md. App. 150, 181, 768 A.2d 62, 79 (2001).

¹⁹ Restatement (Third) of the Law Governing Lawyers § 42(2) at 301 (2000).

²⁰ *Sherrets, Smith v. MJ Optical, Inc.*, *supra* note 11; *Grimminger v. Cummings*, 176 Neb. 142, 125 N.W.2d 613 (1963).

included an acknowledgment that the law firm had offered Louis the alternative of an hourly fee billed monthly, which he declined. There is also evidence that the law firm is experienced and respected in handling personal injury suits. However, the law firm presented no evidence of the extent and value of the professional services which it performed during the period from July 8, 2004, when the contingent fee agreement was executed until September 14, 2004, when Louis terminated the representation. Without such evidence, there is no factual basis upon which to determine whether or not the claimed fee computed pursuant to the contingent fee agreement is reasonable. The district court erred in sustaining the law firm's motion for summary judgment because the firm did not meet its initial burden, as the moving party, of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Because this conclusion requires reversal, we do not reach the Turcos' other assignments of error.

CONCLUSION

For the reasons discussed, we reverse the judgment of the district court and remand the cause for further proceedings.

REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.

GERRARD, J., concurring.

I agree with the majority opinion, which clearly explains the basic principles involved in this kind of fee dispute. It is well established that a contingent fee which is not fair and reasonable cannot be recovered in an action for attorney fees.¹ I write separately, in light of further proceedings in this case, because the parties have a fundamental disagreement on the evidence necessary for a lawyer to establish a prima facie case that the fees sought are reasonable. Further, the parties disagree on the evidence the client would then need to produce in order to show the existence of a material issue of fact precluding judgment as a matter of law on the issue of reasonableness in a contingency fee case.

¹ See, *Kirby v. Liska*, 214 Neb. 356, 334 N.W.2d 179 (1983); *Byrne v. Hauptman, O'Brien*, 9 Neb. App. 77, 608 N.W.2d 208 (2000).

As our opinion explains, in a suit to recover an unpaid fee, the lawyer has the burden of proving the existence and terms of any fee contract, the making of any disclosures to the client required to render a contract enforceable, and the extent and value of the lawyer's services.² A lawyer can establish the extent and value of his or her services in a contingency fee case by producing evidence showing, for example, the results obtained, the quality of the work, and whether the lawyer's efforts substantially contributed to the result.³ We have also identified other factors relevant to the reasonableness of a contingency fee, such as the time and labor required, the novelty and difficulty of the legal issues involved, the skill required to do the work properly, and the experience, reputation, and ability of the lawyer performing the services.⁴ While the pertinent factors will differ from case to case, generally, the inquiry should focus on the circumstances of the agreement and the work performed.⁵

At that point, the burden of going forward with evidence shifts to the client, and the client must object with specificity to demonstrate why the documented fees are not reasonable.⁶ The client must, for instance, produce competent evidence disputing specific facts respecting the reasonableness of the fees or set forth the basis for a qualified opinion that the fees are unreasonable.⁷ In particular, it will generally be insufficient to simply conclude that the size of a contingent fee, compared to the length of the litigation, makes the fee unreasonable. There

² See Restatement (Third) of the Law Governing Lawyers § 42(2) (2000). See, also, *Byrne v. Hauptman, O'Brien*, *supra* note 1.

³ See *McKenzie Const., Inc. v. Maynard*, 758 F.2d 97 (3d Cir. 1985). See, also, *King v. Fox*, 418 F.3d 121 (2d Cir. 2005).

⁴ See *Kirby v. Liska*, *supra* note 1.

⁵ See *King v. Fox*, *supra* note 3.

⁶ *In re Ralph Lauren Womenswear, Inc.*, 204 B.R. 363 (S.D.N.Y. 1997). See, also, e.g., *Cloutier, Barrett, et al. v. Wax*, 604 A.2d 42 (Me. 1992); *Basin Credit Consultants, Inc. v. Obregon*, 2 S.W.3d 372 (Tex. App. 1999).

⁷ See *id.* Compare, e.g., *Hinkle, Cox, et al. v. Cadle Co.*, 115 N.M. 152, 848 P.2d 1079 (1993).

are a number of reasons why, in any particular case, a contingency fee agreement may be more advantageous to a client than an hourly fee paid on a monthly basis. A contingency fee will generally be reasonable if the lawyer offered the client a free and informed choice between an hourly fee and a contingency fee, the contract provides for a fee within the range commonly charged by other lawyers in similar representations, and there was no subsequent change in circumstances that made the fee contract unreasonable.⁸

And while events may occur after a fee agreement was made so that a contingent fee arrangement that was fair in the first instance becomes unfair in its enforcement, courts should be reluctant to disturb contingent fee arrangements freely entered into by knowledgeable and competent parties.⁹ A prompt and efficient attorney who achieves a fair settlement without litigation serves both the client and the interests of justice.¹⁰ It should therefore be the unusual circumstance that a court refuses to enforce a fully informed contingent fee arrangement because of events arising after the contract's negotiation.¹¹

A contingent-fee contract . . . allocates to the lawyer the risk that the case will require much time and produce no recovery and to the client the risk that the case will require little time and produce a substantial fee. Events within that range of risks, such as a high recovery, do not make unreasonable a contract that was reasonable when made.¹²

In short, once a lawyer has established a *prima facie* case that a demanded fee is reasonable, judgment as a matter of law is precluded only if the client produces specific evidence on factors relevant to the reasonableness of the fee. Only at that point does the client show a genuine issue of material fact, so as to place the burden on the lawyer to persuade the trier of fact

⁸ See Restatement, *supra* note 2, § 34, comment *c*.

⁹ *McKenzie Const., Inc. v. Maynard*, *supra* note 3.

¹⁰ See *id.*

¹¹ See *id.*

¹² Restatement, *supra* note 2, § 34, comment *c*. at 250.

that the fee demanded is reasonable under the circumstances.¹³ But because, as the majority opinion explains, the law firm in this case did not meet its initial burden, I agree that the summary judgment in this case should be reversed. I concur in the judgment.

CONNOLLY and McCORMACK, JJ., join in this concurrence.

¹³ See Restatement, *supra* note 2, §§ 34 and 42.

GEORGETTE TADROS, APPELLEE, v. CITY OF OMAHA,
A MUNICIPAL CORPORATION, APPELLANT.
735 N.W.2d 377

Filed July 13, 2007. No. S-05-1538.

1. **Statutes: Judgments: Appeal and Error.** The meaning of a statute is a question of law, and when reviewing a question of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court.
2. **Actions: Parties.** Neb. Rev. Stat. § 25-21,185.10 (Reissue 1995) is limited to actions involving more than one defendant.
3. **Statutes: Intent.** Statutes which effect a change in common law or take away a common-law right should be strictly construed.
4. **Actions: Tort-feasors: Liability.** Under Neb. Rev. Stat. § 25-21,185.11(1) (Reissue 1995), when the claimant settles with a joint tort-feasor and that tort-feasor is no longer a defendant in the action, the proportionate share of the settling tort-feasor's liability, as determined by the trier of fact, is deducted from the claimant's claim against any nonsettling party joint tort-feasor.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Reversed and remanded with directions.

Robert J. Hamer, Deputy Omaha City Attorney, for appellant.

Matthew G. Miller for appellee.

Jeffrey D. Patterson, of Bartle & Geier Law Firm, for amicus curiae Nebraska Association of Trial Attorneys.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, McCORMACK, and MILLER-LERMAN, JJ., and CARLSON, Judge.

McCORMACK, J.

NATURE OF CASE

We are asked to determine whether, under our contributory negligence statutes,¹ a joint tort-feasor defendant's liability for economic damages is reduced by the amount of a nonparty joint tort-feasor's settlement with the plaintiff or, instead, by the nonparty's proportionate share of liability regardless of the settlement amount. Section 25-21,185.11(1) states that in the event of settlement by the claimant with one joint tort-feasor, "[t]he claim of the claimant against other persons shall be reduced by the amount of the released person's share of the obligation as determined by the trier of fact." The defendant in this case relies on § 25-21,185.11 to argue that its liability should be reduced by the nonparty tort-feasor's proportionate share of negligence, even though the plaintiff/claimant received less than that proportionate share in her settlement. The plaintiff argues that § 25-21,185.11 does not clearly abrogate the common-law rule that joint tort-feasors were jointly and severally liable and that any settlement with one reduces the liability of remaining tort-feasors only by the amount of the settlement.

BACKGROUND

The City of Omaha (City) appeals from a determination upon remand of apportionment of liability.² The underlying facts of the case are not in dispute. To summarize, Georgette Tadros was crossing West Center Road in Omaha, Nebraska, when she was seriously injured after being struck by a vehicle driven by James Bowley, Jr. Tadros had begun to cross West Center Road when the "walk" light on the crosswalk signal was illuminated, but the signal changed to red as she stepped from a median in the middle of the street. In setting the pedestrian clearance interval for the signal, the City had failed to provide sufficient time for pedestrians traveling at a normal speed to cross the intersection.

¹ See Neb. Rev. Stat. §§ 25-21,185.07 to 25-21,185.12 (Reissue 1995).

² See *Tadros v. City of Omaha*, 269 Neb. 528, 694 N.W.2d 180 (2005).

Tadros originally brought suit against both the City and Bowley, but later settled with Bowley for the amount of \$35,000. In accordance with a joint stipulation of Tadros and Bowley, the court dismissed Bowley as a defendant in the case. The propriety of the court's dismissal of Bowley as a party defendant is not contested, and only Tadros and the City were parties to the proceedings upon remand. There is no suggestion that the City and Bowley acted in concert as part of a common enterprise or plan.

The trial court found that Tadros was 20-percent negligent in stepping off the median and into traffic, that Bowley was 30-percent negligent in failing to keep a proper lookout and exercise due care to avoid colliding with Tadros, and that the City was 50-percent negligent in its timing of the "walk" signal. The court found that Tadros suffered total economic damages in the amount of \$1,258,999.81 and total noneconomic damages in the amount of \$300,000.

Relying on § 25-21,185.10, the court concluded that the City and Bowley were jointly and severally liable to Tadros for the amount of economic damages not attributable to her contributory negligence, a total amount of \$1,007,199.81. It determined that the City's liability for noneconomic damages was several only, and not joint. The court calculated that the City was responsible for 50 percent of Tadros' noneconomic damages, which would be \$150,000. The court then added the \$1,007,199.81 and \$150,000 amounts and deducted the \$35,000 settlement amount which Bowley paid to Tadros, for a total judgment against the City in the amount of \$1,122,199.81. Pursuant to the limitations on recovery under Neb. Rev. Stat. § 13-926(1) (Reissue 1997), the judgment against the City was reduced to \$1 million. The City appeals the district court's order.

ASSIGNMENT OF ERROR

The City asserts that in considering the effect of the pre-trial settlement and release of Bowley, the trial court erred in reducing its liability for economic damages by the amount of the settlement and release, \$35,000, rather than by \$377,699.94, the amount representing Bowley's 30-percent proportionate share of responsibility for Tadros' injuries.

STANDARD OF REVIEW

[1] The meaning of a statute is a question of law, and when reviewing a question of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court.³

ANALYSIS

Under Nebraska common law, an act wrongfully done by the joint agency or cooperation of several persons, or done contemporaneously by them without concert, renders them liable for all damages, both economic and noneconomic, jointly and severally.⁴ Under such joint and several liability, either tort-feasor may be held liable for the entire damage, and a plaintiff need not join all tort-feasors as defendants in an action for damages.⁵ Also, in accordance with the underpinnings of joint and several liability, our common law follows the traditional rule⁶ that if the plaintiff settles with one of the jointly and severally liable tort-feasors, then the plaintiff's recovery against the remaining tort-feasors is reduced by the actual settlement amount. This is often referred to as pro tanto reduction.⁷

However, for cases involving multiple defendants where contributory negligence is a defense, the Legislature has altered the common law.⁸ We have explained that in cases falling under § 25-21,185.10, the Legislature has abrogated common law regarding noneconomic damages against joint tort-feasors not acting in concert by limiting a plaintiff's recovery of noneconomic damages from any one tort-feasor to that tort-feasor's

³ See *Zach v. Nebraska State Patrol*, ante p. 1, 727 N.W.2d 206 (2007).

⁴ *Lackman v. Rousselle*, 257 Neb. 87, 596 N.W.2d 15 (1999).

⁵ *Id.*

⁶ See 22 Am. Jur. 2d *Damages* § 390 (2003).

⁷ See, *Jameson v. Liquid Controls Corp.*, 260 Neb. 489, 618 N.W.2d 637 (2000). See, also, *Vowers & Sons, Inc. v. Strasheim*, 254 Neb. 506, 576 N.W.2d 817 (1998); *Fitzgerald v. Union Stock Yards Co.*, 89 Neb. 393, 131 N.W. 612 (1911).

⁸ See §§ 25-21,185.07 to 25-21,185.12.

proportionate liability.⁹ This proportionate share is often referred to as the pro rata share. Section 25-21,185.10 retains common law joint and several liability for economic damages. Thus, Tadros relies on § 25-21,185.10 in arguing that the trial court's decision to reduce the City's liability for economic damages by the pro tanto amount of her settlement with Bowley was correct.

[2] Because Bowley was no longer a defendant in Tadros' action, we conclude that § 25-21,185.10 is inapplicable to the question of apportionment of liability as between Bowley and the City. Section 25-21,185.10, by its terms, is limited to "action[s] involving more than one defendant." In addition, the joint and several liability for economic damages described in § 25-21,185.10 is "of each defendant." In *Maxwell v. Montey*,¹⁰ we explained that if the action does not involve multiple party defendants, then § 25-21,185.10 is simply not applicable. The proper timeframe to consider whether there are multiple defendants is when the case is submitted to the finder of fact.

The joint tort-feasor in *Maxwell* was not dismissed pursuant to a settlement with the plaintiff, and we have never had occasion to consider the provisions of § 25-21,185.11 which specifically address the rights of the parties when a settlement is entered into between the claimant and a person liable to the claimant. The City argues that § 25-21,185.11 abrogates the common-law pro tanto reduction rule in favor of a pro rata reduction. Tadros, in contrast, argues that whether or not § 25-21,185.10 governs this case, § 25-21,185.11 does not abrogate the common-law pro tanto rule.

[3] It is true that statutes which effect a change in common law or take away a common-law right should be strictly construed.¹¹ Also, a construction which restricts or removes a common-law right should not be adopted unless the plain

⁹ See *Lackman v. Rousselle*, *supra* note 4.

¹⁰ *Maxwell v. Montey*, 262 Neb. 160, 631 N.W.2d 455 (2001).

¹¹ *Lackman v. Rousselle*, *supra* note 4.

words of the statute compel it.¹² But we agree with the City that § 25-21,185.11 has clearly abrogated common law with regard to the apportionment of liability between a party defendant joint tort-feasor and a nonparty settling tort-feasor.

Section 25-21,185.11 states in full:

(1) A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable shall discharge that person from all liability to the claimant but shall not discharge any other persons liable upon the same claim unless it so provides. *The claim of the claimant against other persons shall be reduced by the amount of the released person's share of the obligation as determined by the trier of fact.*

(2) A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable shall preclude that person from being made a party or, if an action is pending, shall be a basis for that person's dismissal, but the person's negligence, if any, shall be considered in accordance with section 25-21,185.09.

(Emphasis supplied.)

Section 25-21,185.09 states:

Any contributory negligence chargeable to the claimant shall diminish proportionately the amount awarded as damages for an injury attributable to the claimant's contributory negligence but shall not bar recovery, except that if the contributory negligence of the claimant is equal to or greater than the total negligence of all persons against whom recovery is sought, the claimant shall be totally barred from recovery. The jury shall be instructed on the effects of the allocation of negligence.

[4] As reflected above, § 25-21,185.11(1) plainly states that after the claimant settles with a joint tort-feasor, the claimant's claim against other persons "shall be reduced by the amount of the released person's share of the obligation as determined by the trier of fact." That the obligation is to be a "share" "determined by the trier of fact" precludes the idea that the "obligation" referred to in § 25-21,185.11(1) is the pro tanto amount

¹² *Id.*

of the settlement with the injured party. Had the Legislature wished for a nonsettling party's share to be reduced simply by the settlement amount, an obligation which would neither represent a "share" nor necessitate a "determin[ation]" by the trier of fact, it could have easily done so. Instead, the language of § 25-21,185.11(1) is similar to the language of § 25-21,185.10, relating to the allocation of noneconomic damages amongst multiple defendants, "in direct proportion to that defendant's percentage of negligence."

Tadros argues that our decisions in *Jameson v. Liquid Controls Corp.*¹³ and *Vowers & Sons, Inc. v. Strasheim*¹⁴ hold otherwise. *Jameson* involved the settlement of a products liability claim, while *Vowers & Sons, Inc.* was a breach of contract action. Neither of those cases fell under the contributory negligence statutes or addressed § 25-21,185.11, and those cases are simply inapposite to this case.

Under the contributory negligence statutory scheme in Nebraska, joint tort-feasors who are "defendants" in an action "involving more than one defendant" share joint and several liability to the claimant for economic damages.¹⁵ They are liable for the entire amount of the claimant's economic damages which are not chargeable to the claimant, so long as the claimant's contributory negligence is not equal to or greater than the total negligence of all persons against whom recovery is sought.¹⁶ But, when the claimant settles with a joint tort-feasor, the claimant forfeits that joint and several liability. The claimant cannot recover from the nonsettling joint tort-feasor more than that tort-feasor's proportionate share in order to compensate for the fact that the claimant made settlement with another that may prove to be inadequate.

By deducting the pro rata settlement amount from the claimant's claim against any nonsettling party joint tort-feasor, finality of liability for the settling tort-feasor is accomplished as to

¹³ *Jameson v. Liquid Controls Corp.*, *supra* note 7.

¹⁴ *Vowers & Sons, Inc. v. Strasheim*, *supra* note 7.

¹⁵ § 25-21,185.10.

¹⁶ See § 25-21,185.09.

both the claimant and party defendant joint tort-feasors. This encourages settlement, and it is the policy of the law to encourage rather than discourage the settlement of controversies by the parties out of court.¹⁷ This is the case because while a joint tort-feasor has a right to contribution against other joint tort-feasors when he or she discharges more than his or her proportionate share of the judgment,¹⁸ the joint tort-feasor will not discharge more than his or her proportionate share as to the settling tort-feasor. In addition, fairness is achieved to the extent that the nonsettling tort-feasor will not be prejudiced by a settlement amount over which he or she had no control.

This scheme is in accordance with the Uniform Comparative Fault Act and the Restatement (Third) of Torts.¹⁹ While it is true that the injured party, by choosing to settle with one or more of several joint tort-feasors, takes the risk of settling for too small an amount,²⁰ the claimant could also benefit in the event the settlement exceeds the settling tort-feasor's proportionate liability.²¹ Reducing the claimant's claim against nonsettling joint tort-feasors by the pro rata, rather than the pro tanto, share of the settling tort-feasor's obligation, strikes a balance in the interests of encouraging settlement and fairness to all affected parties.

Because § 25-21,185.11 mandates reduction by the settling tort-feasor's proportionate share of liability as determined by the trier of fact, the trial court erred in failing to deduct that share of responsibility attributable to Bowley from Tadros' judgment for economic damages against the City. The trial court already determined the relative share of negligence for Tadros, the City, and Bowley, and there is no dispute before us as to

¹⁷ See *Snoke v. Beach*, 105 Neb. 127, 179 N.W. 389 (1920).

¹⁸ *Royal Ind. Co. v. Aetna Cas. & Sur. Co.*, 193 Neb. 752, 229 N.W.2d 183 (1975).

¹⁹ See, Unif. Comparative Fault Act § 6, 12 U.L.A. 147 (1996); Restatement (Third) of Torts: Apportionment of Liability § 16 (2000).

²⁰ See 3 Jacob A. Stein, *Stein on Personal Injury Damages* § 14:33 (Gerald W. Boston ed., 3d ed. 1997).

²¹ See *id.*

that determination or as to the determination of total economic damages. Accordingly, we reverse the judgment and remand the cause with directions to enter a judgment against the City for \$629,499.91 in economic damages, for a total award of economic and noneconomic damages of \$779,499.91, as follows:

ECONOMIC:	\$1,258,999.81	
	<u>- 251,799.96</u>	(Tadros' 20 percent)
	\$1,007,199.85	
	<u>- 377,699.94</u>	(Bowley's 30 percent)
	\$ 629,499.91	
NONECONOMIC:	\$ 300,000.00	
	<u>- 60,000.00</u>	(Tadros' 20 percent)
	\$ 240,000.00	
	<u>- 90,000.00</u>	(Bowley's 30 percent)
	\$ 150,000.00	
TOTAL:	\$ 629,499.91	
	<u>+ 150,000.00</u>	
	\$ 779,499.91	

REVERSED AND REMANDED WITH DIRECTIONS.
STEPHAN, J., not participating.

THE TRAVELERS INDEMNITY COMPANY, APPELLEE, V.
INTERNATIONAL NUTRITION, INC., APPELLANT.

734 N.W.2d 719

Filed July 13, 2007. No. S-06-063.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Insurance: Contracts: Intent: Appeal and Error.** An insurance policy is a contract. In an appellate review of an insurance policy, the court construes the policy

as any other contract to give effect to the parties' intentions at the time the writing was made.

4. **Insurance: Contracts.** In construing an insurance contract, a court must give effect to the instrument as a whole and, if possible, to every part thereof.
5. ____: _____. While an ambiguous insurance policy will be construed in favor of the insured, ambiguity will not be read into policy language which is plain and unambiguous in order to construe it against the preparer of the contract.
6. **Contracts: Statutes.** Statutes in existence at the time of the execution of a contract become part of the contract as if set forth therein.
7. **Prejudgment Interest.** Prejudgment interest may be awarded only as provided in Neb. Rev. Stat. § 45-103.02(2) (Reissue 2004).
8. **Prejudgment Interest: Appeal and Error.** Whether prejudgment interest should be awarded is reviewed de novo on appeal.
9. **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 the plaintiff's right to recover or the amount of such recovery.

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

James L. Quinlan, David J. Stubstad, and Russell A. Westerhold, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellant.

CeCelia Ibson Wagner, of Smith, Schneider, Stiles & Serangeli, P.C., for appellee.

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

GERRARD, J.

International Nutrition, Inc., acquired workers' compensation insurance from The Travelers Indemnity Company (Travelers) through the State of Nebraska's assigned risk program. Soon after the policy term began, Travelers changed International Nutrition's classification code and retroactively applied the change, which resulted in an increase in International Nutrition's premium payments. Travelers sued International Nutrition for failure to pay the premiums. The primary issue presented in this appeal is whether Travelers had the authority to change International Nutrition's classification code and retroactively apply the change.

BACKGROUND

ASSIGNED RISK PROGRAM

The Nebraska Workers' Compensation Act¹ requires, with few exceptions, that every employer carry workers' compensation insurance.² For employers who cannot acquire such insurance on the open market, the State of Nebraska has established a workers' compensation insurance program that allows employers to obtain insurance coverage under the state's assigned risk program.³ At all times relevant to this case, Travelers was under contract with the state to serve as the sole provider of workers' compensation coverage to employers required to use the assigned risk program.

Under the assigned risk program, an employer's premium payment is determined by, among other things, the employer's annual payroll and classification code. Classification codes are assigned based on the general nature of the employer's business. Different types of businesses involve different levels of risk, and as a result, different levels of premiums apply. The classification codes are promulgated by the National Council on Compensation Insurance, Inc. (NCCI), a rating organization licensed in Nebraska to make and file rules, rating values, classifications, and rating plans for workers' compensation insurance. Pursuant to Travelers' contract with the State of Nebraska, Travelers is required to use the classification codes, rates, filing data, and forms filed by the NCCI and approved by the Nebraska Department of Insurance.

Two manuals published by the NCCI are relevant to this case, the "Basic Manual," which, among other things, promulgates rules for insurers, and the "Scopes of Basic Manual Classifications" or "Scopes Manual," which lists and describes the classification codes. The NCCI Basic Manual provides that when a correction in a classification results in an increased premium, the correction is retroactively applied to the start of

¹ Neb. Rev. Stat. § 48-101 et seq. (Reissue 2004 & Cum. Supp. 2006).

² § 48-106.

³ § 48-146.01.

the policy if the correction is made during the first 120 days of the policy.

INTERNATIONAL NUTRITION

International Nutrition is a company involved in the production and sale of nutritional and medicated supplements to the livestock and poultry industries. International Nutrition receives bulk raw materials, such as rice hulls and limestone, which are stored in large holding storage areas. Supplemental products such as medications and vitamins are then mixed into the bulk raw material. After the mixing is complete, the finished product is packaged into both 25- and 50-pound bags. International Nutrition describes its manufacturing operation as “primarily one of mixing and packaging.” The finished product is then sold to International Nutrition’s customers, including feed manufacturers, animal food manufacturers, feedlots, egg operations, and poultry farms. International Nutrition’s administrative procedures and manufacturing practices are regulated by the U.S. Food and Drug Administration.

International Nutrition was unable to obtain workers’ compensation insurance on the open market and, as a result, submitted an application for coverage under the assigned risk program. In its application, International Nutrition provided its estimated annual payroll and indicated that the work performed by a portion of its employees fell under the NCCI’s job classification code 4611. Classification code 4611 applies to employers “engaged in the compounding, blending or packing of drugs, medicines or pharmaceutical preparations.”

Given this information, Travelers extended coverage to International Nutrition on March 16, 2001, by issuing a binder letter and manual. The binder letter explained that it was only a temporary insurance contract and that International Nutrition would be receiving its new policy in approximately 20 days, at which point the binder letter would be canceled.

Included with the binder letter was a 6-page manual prepared by Travelers. Section V of this manual, entitled “Premium Audits,” stated:

In accordance with policy provisions, and so that you pay only what you owe, audits are required for all workers’ compensation policies to determine accurate premiums.

To confirm that your policy is priced accurately from the start, we may need to conduct a preliminary audit that involves a review of recent payroll and other business records within the first 90 days of coverage on new policies. If this is needed, an auditor will contact you to schedule a convenient time.

On March 22, 2001, Travelers sent a letter to International Nutrition's insurance agent, requesting a detailed description of International Nutrition's business. Travelers requested this information in order to verify that the classification codes listed on International Nutrition's application were correct. International Nutrition provided Travelers with a description of its business on April 4.

Travelers had issued the actual insurance policy to International Nutrition on March 30, 2001. Based on the information provided in International Nutrition's application, the policy included an estimated annual premium of \$27,806 and classified a portion of International Nutrition's employees under classification code 4611.

The precise language of the policy will be set forth in greater detail below. Summarized, the policy provided that its terms could not be changed or waived except by endorsement. The policy further provided that the premiums would be determined by the relevant manuals. The policy explained that the work classifications in the policy were an estimate and that if they were inaccurate, then proper classifications would be assigned. The premium shown on the policy was also an estimate, and the final premium was to be determined later using the actual premium basis and proper classifications. The policy required International Nutrition to permit Travelers to audit its records and inspect its workplaces.

CLASSIFICATION CODE CHANGE

On May 22, 2001, a loss control consultant from Travelers performed a "Loss Prevention and Engineering Survey" on International Nutrition. The purposes of this survey were "to gain a better understanding of [International Nutrition's] operations and to discuss [International Nutrition's] loss prevention activities." Following the survey, the loss control consultant prepared a written survey report which provided, among other

things, a description of International Nutrition's operations. Although similar to the description provided by International Nutrition on April 4, this description contained additional details relating to International Nutrition's operations. The description in the survey report did not contain any information contradicting the information provided by International Nutrition in its April 4 business description.

In light of International Nutrition's description of its business operations and the results of the loss prevention and engineering survey, Travelers decided to change International Nutrition's classification code from 4611 to 2014. Classification code 2014 applies to "insureds engaged in the operation of grist mills where grains such as wheat, oats, barley, rye, rice and corn are milled." Code 2014 also applies to "[t]he manufacture of feed or feed additives for livestock and poultry"

On June 18, 2001, Travelers informed International Nutrition's insurance agent that it was changing International Nutrition's classification code. Travelers explained that a preliminary audit would be ordered to verify that the classification code change was correct and that it would suspend billing for the endorsement until the audit was complete. Also on June 18, Travelers issued an endorsement to the policy that added classification code 2014 and resulted in an additional estimated premium of \$65,285.

Travelers conducted the preliminary audit and on August 17, 2001, informed International Nutrition's insurance agent that the change from classification code 4611 to 2014 was correct. The preliminary audit also revealed that International Nutrition had significantly underestimated the payroll for employees initially classified under code 4611 in its original application. International Nutrition had estimated in its application that the annual payroll for employees classified under code 4611 was \$549,000. However, the preliminary audit revealed that for these same employees now classified under code 2014, the payroll was actually \$807,797. Travelers issued an endorsement reflecting these changes on August 17, the result of which was an additional estimated premium of \$49,847.

International Nutrition disagreed with the change in classification code and on October 9, 2001, informed Travelers

that it had requested an NCCI inspection to verify the validity of the classification code change. Travelers agreed to suspend billing for the endorsement pending the outcome of the NCCI inspection. NCCI performed an onsite survey on October 31 and issued an "Inspection & Classification Report." The inspection report confirmed that classification code 2014 was the appropriate classification.

International Nutrition continued to dispute the change in classification code by sending various letters of protest to NCCI and Travelers. In spite of International Nutrition's letters, both NCCI and Travelers maintained that the change in classification code was correct. On March 9, 2002, Travelers canceled the policy for nonpayment of premiums. Travelers conducted a final audit and sent International Nutrition a demand for payment of a final premium of \$113,571. International Nutrition paid Travelers \$33,367 and also tendered a final premium payment of \$26,110.38 that Travelers refused.

DISTRICT COURT'S DECISION

Travelers sued International Nutrition for breach of contract and sought payment of \$83,472, representing the unpaid premium balance. International Nutrition filed a counterclaim, seeking a declaratory judgment that it had no legal or equitable obligation to pay any additional amounts to Travelers, that Travelers breached the policy by retroactively changing the classification codes and increasing the premiums, and that Travelers engaged in unfair and deceptive acts in violation of the Consumer Protection Act.⁴ The parties filed cross-motions for summary judgment.

The district court granted Travelers' motion for summary judgment and denied International Nutrition's motion. The court awarded Travelers \$83,472, along with prejudgment interest. In granting Travelers' motion, the court concluded that Travelers' conduct did not constitute a breach of the policy because the plain and unambiguous policy language allowed Travelers to audit International Nutrition, change the classification code, and retroactively charge a higher premium. The

⁴ Neb. Rev. Stat. § 59-1601 et seq. (Reissue 2004).

court further determined that the change in classification code was correct. In rejecting International Nutrition's counterclaim under the Consumer Protection Act, the court explained that there was no evidence showing that Travelers had engaged in unfair or deceptive acts or conduct. International Nutrition appealed.

ASSIGNMENTS OF ERROR

International Nutrition assigns, consolidated, restated, and renumbered, that the district court erred in (1) overruling its motion for summary judgment and granting Travelers' motion for summary judgment; (2) determining that it breached the policy of insurance between it and Travelers; (3) determining that Travelers did not breach the insurance policy by retroactively applying the change in classification code and failing to conduct a preliminary audit, as set forth in the terms of the policy; (4) concluding that the clear and unambiguous language of the insurance policy allowed Travelers to rely on the NCCI Basic Manual; (5) finding that classification code 2014 is the correct classification code; (6) awarding Travelers a premium calculated pursuant to the assigned risk rate, as opposed to the open market rate, after changing the classification code; (7) finding that Travelers' conduct did not constitute a breach of its duty of good faith and fair dealing; (8) concluding that the Consumer Protection Act did not apply; and (9) awarding Travelers pre-judgment interest.

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.⁵ 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.⁶

⁵ *City of Lincoln v. Hershberger*, 272 Neb. 839, 725 N.W.2d 787 (2007).

⁶ *Id.*

ANALYSIS

TRAVELERS' AUTHORITY TO RETROACTIVELY
APPLY CLASSIFICATION CODE CHANGE

We begin with International Nutrition's argument that the district court erred in determining that the insurance policy granted Travelers the authority to retroactively apply the change in classification code and increase the premiums. International Nutrition argues that there are no provisions in the policy that expressly grant Travelers this authority and that the language in the policy on which the district court relied to support its conclusion is ambiguous and should have been construed against Travelers.

[3-5] An insurance policy is a contract. In an appellate review of an insurance policy, the court construes the policy as any other contract to give effect to the parties' intentions at the time the writing was made.⁷ In construing an insurance contract, a court must give effect to the instrument as a whole and, if possible, to every part thereof.⁸ While an ambiguous insurance policy will be construed in favor of the insured, ambiguity will not be read into policy language which is plain and unambiguous in order to construe it against the preparer of the contract.⁹ Guided by these principles, we agree with the district court and conclude that the provisions of the insurance policy issued to International Nutrition, when considered together, gave Travelers the authority to retroactively change International Nutrition's classification code and charge the resulting increased premium when the initial premium was based on an incorrect classification code.

The insurance policy expressly states that the initial premium is only an estimated premium. The policy, in part five, paragraph B, under the title "Classifications," provides that the rate and premium basis stated on the information page of

⁷ *Olson v. Le Mars Mut. Ins. Co.*, 269 Neb. 800, 696 N.W.2d 453 (2005).

⁸ *Callahan v. Washington Nat. Ins. Co.*, 259 Neb. 145, 608 N.W.2d 592 (2000).

⁹ *Boutillier v. Lincoln Benefit Life Ins. Co.*, 268 Neb. 233, 681 N.W.2d 746 (2004).

the policy is “assigned based on an estimate of the exposures [International Nutrition] would have during the policy period.” That same paragraph further states that “[i]f your actual exposures are not properly described by those classifications, we will assign proper classifications, rates and premium basis by endorsement to this policy.” Part five, paragraph E, under the title “Final Premium,” provides that “[t]he premium shown on the Information Page, schedules, and endorsements is an estimate.” This provision further explains that “[t]he final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classifications and rates that lawfully apply to the business and work covered by this policy.”

Furthermore, the policy contains provisions under which Travelers is given the authority to perform inspections and audits to determine the correct premium to be charged. Part five, paragraph G, under the title “Audit,” states that “[y]ou [International Nutrition] will let us examine and audit all your records that relate to this policy” and “[w]e [Travelers] may conduct the audits during regular business hours during the policy period and within three years after the policy period ends.” This paragraph further explains that the “[i]nformation developed by audit will be used to determine final premium.” Part six, paragraph A, entitled “Inspection,” states that Travelers has “the right, but [is] not obliged to inspect [International Nutrition’s] workplaces at any time.” The paragraph further notes that these inspections are not safety inspections, but “relate only to the insurability of the workplaces and the premiums to be charged.”

Travelers’ insurance policy plainly stated that International Nutrition’s initial premium was only an estimate and subject to change as a result of an audit or inspection performed by Travelers. The policy further stated that if International Nutrition’s initial classifications were incorrect, Travelers would assign the proper classifications, rates, and premium basis through an endorsement to the policy. These provisions clearly and unambiguously gave Travelers the authority to retroactively change International Nutrition’s classification codes and increase the premium payments when the initial premium

was based on what was later determined to be an incorrect classification code.¹⁰

[6] We further conclude that the “Our Manuals” provision in Travelers’ policy incorporated the NCCI Basic Manual into the policy. The law generally is that statutes in existence at the time of the execution of a contract become part of the contract as if set forth therein.¹¹ Accordingly, the policy at issue in this case must be read in light of § 48-146.01, pursuant to which Travelers entered into a binding agreement with the state to become the state’s assigned risk insurer. Under this agreement, Travelers is obligated to use the classification codes, rates, filing data, and forms filed by the NCCI and approved by the Nebraska Department of Insurance. One of the documents, created by the NCCI and relevant to Travelers’ insurance policy, is the NCCI Basic Manual. The NCCI Basic Manual clearly states that if a correction in a classification is effective “[d]uring the first 120 days of the policy term,” then the correction is applied “[r]etroactively to the inception of the policy.”

The insurance policy issued by Travelers provided that all premiums for the policy will be determined by “our manuals of rules, rates, rating plans and classifications.” International Nutrition argues that this phrase is ambiguous and cannot be read to include the NCCI Basic Manual. International Nutrition contends that because the NCCI Basic Manual was not actually produced by Travelers, it cannot be considered one of “our manuals” under the plain language of the policy. We disagree.

International Nutrition’s argument ignores the context in which the term is used in the policy and the legal framework in which the assigned risk program operates. Travelers does not have the authority to create and apply its own classification codes, rates, filing date, or forms. Rather, Travelers is obligated to use those filed by the NCCI and approved by the state. Because of this requirement, the “our manuals” provision in

¹⁰ Compare, e.g., *Savant Ins. Ser. v. Central Oil and Supply*, 821 So. 2d 623 (La. App. 2002); *Great American Ins. Co. v. Nova-Frost, Inc.*, 362 N.W.2d 358 (Minn. App. 1985). See, also, *Nationwide Mut. Ins. v. Ed Soules Const. Co.*, 397 So. 2d 775 (Fla. App. 1981).

¹¹ *In re Estate of Peterson*, 221 Neb. 792, 381 N.W.2d 109 (1986).

the policy cannot be understood without reference to the NCCI publications. And in any event, the 120-day provision from the NCCI Basic Manual simply supplements the clear language of the policy with respect to estimated and final premiums.

In sum, the insurance policy states that the initial premium was only an estimate and that a final, actual premium would be determined by an audit. The policy explained that the actual premium would be based on the proper classification codes and rates that lawfully apply. The policy explained that if the final premium was lower than the estimated premium, Travelers would refund the difference, but if the final premium was higher, International Nutrition would be billed for the difference. And finally, the policy incorporated the NCCI Basic Manual that explicitly provides Travelers the authority to correct classification codes and, if the correction is made within the first 120 days of the policy term, apply the correction retroactively. We conclude that the provisions of the insurance policy, when considered together, clearly and unambiguously grant Travelers the authority to make classification code corrections and retroactively apply the increased premiums.

The undisputed evidence in the record shows that Travelers notified International Nutrition of the change in classification code on June 18, 2001, which is 95 days after the policy took effect on March 15, 2001. Because Travelers made the classification code change within the first 120 days of the policy term, Travelers was entitled to apply the classification code change retroactively.

TRAVELERS' FAILURE TO PERFORM PRELIMINARY
AUDIT WITHIN 90 DAYS OF COVERAGE

International Nutrition contends that Travelers' failure to conduct a preliminary audit within the timeframe set forth in the binder manual resulted in a waiver of Travelers' right to change the classification code and retroactively increase the premiums. The binder manual, issued by Travelers on March 16, 2001, served as a temporary insurance contract until the actual policy was delivered. The binder manual provided, as previously stated, that to confirm that the policy was priced accurately, Travelers "may need to conduct a preliminary audit

that involves a review of recent payroll and other business records within the first 90 days of coverage on new policies.” The binder manual further explained that “[i]f this is needed, an auditor will contact you to schedule a convenient time.”

It is undisputed that Travelers did not conduct a preliminary audit within the first 90 days of coverage. However, contrary to International Nutrition’s argument, Travelers’ decision to not perform a preliminary audit did not result in a waiver of Travelers’ right to conduct a later audit and change the classification code. The plain language of the binder manual clearly provides that the preliminary audit was discretionary.

Both the audit and the inspection clauses in the insurance policy grant Travelers the right to perform audits and inspections throughout the policy period. The audit clause states that International Nutrition “will let [Travelers] examine and audit all [its] records that relate to this policy” and that Travelers “may conduct the audits . . . during the policy period and within three years after the policy period ends.” The inspection clause in the policy states that Travelers has “the right . . . to inspect [International Nutrition’s] workplaces at any time” and that these inspections relate to “the insurability of the workplaces and the premiums to be charged.”

We conclude that Travelers was not obligated to conduct a preliminary audit, and its decision not to do so did not waive Travelers’ right under the policy to correct International Nutrition’s classification code and retroactively apply the premium increase.

NCCI CLASSIFICATION CODE 4611 VERSUS CODE 2014

We next address International Nutrition’s contention that the district court erred in determining that code 2014, as opposed to code 4611, was the correct classification code. The relevant facts regarding International Nutrition’s business description, as summarized above, are not in dispute.

The description for classification code 2014, as set forth in the NCCI Scopes Manual, provides in relevant part:

Code 2014 is applied to insureds engaged in the operation of grist mills where grains such as wheat, oats, barley, rye, rice and corn are milled.

The classification contemplates the receiving and storage of the grain in grain elevators, storage bins and hoppers or warehouses. The processing operations involve the use of mechanical equipment to clean, mill, mix and package the finished grain. Equipment such as screens, separators, scrubbers and brushes, mechanical grinders or rolling mills, mixing hoppers and mechanical bagging or packaging machines are utilized.

The manufacture of feed or feed additives for livestock and poultry is also covered under Code 2014. While the process generally involves grinding operations, there can be extensive mixing, blending and packaging operations.

Classification code 4611 provides in relevant part:

Code 4611 is applied to insureds engaged in the compounding, blending or packing of drugs, medicines or pharmaceutical preparations. The Code 4611 risk does not manufacture any of the ingredients that comprise the foregoing but receives the ingredients from others along with other miscellaneous ingredients such as sugars, starches, oils, extracts, flavorings and colorings.

.....

Code 4611 operations may involve simple hand or machine mixing or blending where no chemical reaction processes are involved.

Although Travelers' auditor, in the final audit report, noted that International Nutrition's operations had characteristics of both classification codes, the auditor ultimately applied classification code 2014 to International Nutrition's payroll. International Nutrition contends that given its business operations and the foregoing classification code descriptions, the application of code 2014 was incorrect. International Nutrition argues that code 2014 is intended to apply to businesses "'engaged in the operation of grist mills'" and to businesses involved in "'the receiving and storage of the grain in grain elevators, storage bins and hoppers or warehouses.'"¹² International Nutrition emphasizes that it does not operate a grist mill, nor

¹² Brief for appellant at 33.

does it receive and store grain in elevators, bins, or warehouses. International Nutrition argues that code 4611 is the correct classification.

While International Nutrition's business operations do not fit perfectly into either classification code, we agree with Travelers, the NCCI, and the district court that the most accurate classification code for International Nutrition's business is code 2014. International Nutrition's argument for why code 2014 is not correct is primarily based on the fact that International Nutrition does not operate a grist mill or engage in the milling or grinding of grain.

However, as correctly noted by Travelers and the NCCI, code 2014 expressly applies to the "manufacture of feed or feed additives for livestock and poultry," which is an accurate description of International Nutrition's business. The undisputed evidence establishes that International Nutrition is involved in the production and sale of supplements to the livestock and poultry industries. Moreover, code 2014 states that "[w]hile the process generally involves grinding operations, there can be extensive mixing, blending and packaging operations." Although International Nutrition's process does not involve grinding, its manufacturing operation is "primarily one of mixing and packaging" which, as noted above, fits within the description of code 2014.

A classification analyst with the NCCI, in a letter to International Nutrition, gave an accurate explanation of why code 2014 is the correct classification. In his letter, he stated:

Please note that while not every classification will fit every insured perfectly, classification seeks to find the one classification that best describes the business. We understand that your business does not engage in the grinding typically found in insureds assigned to Code 2014. However, your business does engage in extensive mixing and packaging that is typically found in insureds assigned to Code 2014. While both Codes 2014 and 4611 contemplate packaging, the packaging typically found in risks classified to 4611 is in small pharmaceutical quantities (like a bottle of pills) not in the bulk bags contemplated by Code 2014. We also understand that [your]

business manufactures feed additives and medicated feed for livestock.

Classification codes are intended to provide insurers with a categorical way of assessing the risks associated with providing workers' compensation coverage to employers. In this case, code 2014 is a more accurate description of International Nutrition's business as it relates to the duties and hazards faced by its employees. We conclude that the district court, as a matter of law, correctly determined that classification code 2014 is the proper classification code to be applied to International Nutrition.

OPEN MARKET RATE VERSUS ASSIGNED RISK RATE

International Nutrition argues that in retroactively applying the increased premium, Travelers incorrectly applied the assigned risk rate instead of the lower open-market-based rate when calculating the premium payment. International Nutrition reasons that had Travelers originally assigned classification code 2014, International Nutrition could have obtained workers' compensation insurance on the open market and, as a result, paid a lower premium. Accordingly, International Nutrition claims that the lower, open-market-based rate should have been the rate used by Travelers. International Nutrition cites no authority for this contention, and we are not persuaded by its argument.

To suggest that Travelers should have applied the open-market-based rate as opposed to the assigned risk rate, as urged by International Nutrition, ignores the fact that once an insured has applied for coverage through the assigned risk program, the insurance provider is required to apply the assigned risk rates. As previously noted, pursuant to Travelers' contract with the state, Travelers was required to use the classification codes, rates, filing data, and forms filed by the NCCI and approved by the Nebraska Department of Insurance. Travelers did not have the option of applying any rate other than the assigned risk rates. International Nutrition applied for coverage through the assigned risk program, and that is what it received. International Nutrition's argument is without merit.

PREJUDGMENT INTEREST

[7-9] International Nutrition argues that the district court erred in awarding prejudgment interest. Prejudgment interest may be awarded only as provided in Neb. Rev. Stat. § 45-103.02(2) (Reissue 2004),¹³ and whether prejudgment interest should be awarded is reviewed de novo on appeal.¹⁴ Prejudgment interest under § 45-103.02 is recoverable only when the claim is liquidated, that is, when there is no reasonable controversy as to either the plaintiff's right to recover or the amount of such recovery.¹⁵ 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.¹⁶

International Nutrition argues that there was a reasonable controversy regarding Travelers' right to recover the retroactively assessed premiums. We disagree. Based on our analysis above, we conclude that Travelers' right to recover its unpaid premiums was established beyond reasonable controversy. The district court did not err in concluding that prejudgment interest should be awarded.

Our conclusion that Travelers had the authority, under the terms of the insurance policy, to retroactively apply the change in classification code is otherwise dispositive of this appeal. Therefore, we do not address International Nutrition's remaining assignments of error.

CONCLUSION

We conclude that given the plain and unambiguous language of the insurance policy and the application of the NCCI Basic Manual, Travelers had the authority to correct International Nutrition's classification code and retroactively apply the corresponding change in premium. Travelers did not breach the insurance contract, nor did it waive its right to change the classification code as a result of its decision not to

¹³ *IBP, inc. v. Sands*, 252 Neb. 573, 563 N.W.2d 353 (1997).

¹⁴ *Ferer v. Aaron Ferer & Sons*, 272 Neb. 770, 725 N.W.2d 168 (2006).

¹⁵ *Id.*

¹⁶ *Id.*

perform a preliminary audit within the first 90 days of coverage. Travelers did not use an incorrect premium rate when it applied the assigned risk rate to calculate International Nutrition's premium. And the district court did not err in awarding Travelers prejudgment interest. We, therefore, affirm the judgment of the district court.

AFFIRMED.

GLAD TIDINGS ASSEMBLY OF GOD, A NEBRASKA NOT-FOR-PROFIT CORPORATION, APPELLANT AND CROSS-APPELLEE, V. NEBRASKA DISTRICT COUNCIL OF THE ASSEMBLIES OF GOD, INC., A NEBRASKA NOT-FOR-PROFIT CORPORATION, ET AL., APPELLEES AND CROSS-APPELLANTS.
734 N.W.2d 731

Filed July 13, 2007. No. S-06-145.

1. **Declaratory Judgments: Appeal and Error.** In a declaratory judgment action treated as an action at law, an appellate court does not disturb factual determinations unless they are clearly wrong.
2. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Trial: Witnesses: Appeal and Error.** In a bench trial, the judge sitting as the trier of fact is the sole judge of the credibility of the witnesses, and we do not reweigh the evidence on appeal.
5. **Corporations: Contracts.** To constitute a director's conflicting interest transaction, there must first be a transaction by the corporation, its subsidiary, or controlled entity.
6. **Corporations: Contracts: Words and Phrases.** The term "transaction" under Neb. Rev. Stat. § 21-1987 (Reissue 1997) generally connotes negotiations or a consensual bilateral arrangement between the corporation and another party or parties that concern their respective and differing economic rights or interests—not simply a unilateral action by the corporation, but, rather, a "deal."
7. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate it is entitled to judgment as a matter of law.

8. ____: ____: A movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were uncontroverted at trial. Then, the burden of producing evidence shifts to the party opposing the motion.

Appeal from the District Court for Buffalo County, PAUL W. KORSLUND, Judge, on appeal thereto from the County Court for Buffalo County, GRATEN D. BEAVERS, Judge. Judgment of District Court affirmed.

Jack W. Besse, of Knapp, Fangmeyer, Ashwege, Besse & Marsh, P.C., for appellant.

Jerald L. Rauterkus and Jason R. Yungtum, of Erickson, Sederstrom, P.C., for appellees.

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

CONNOLLY, J.

Glad Tidings Assembly of God (Glad Tidings) brought this action against the Nebraska District Council of the Assemblies of God, Inc. (District Council), and members of Glad Tidings' board of directors (Board). Glad Tidings alleged that the Board acted outside its authority when it closed Glad Tidings and transferred its property to the District Council.

This appeal presents two issues: (1) whether church members voted to close the church and (2) whether a conflict of interest existed involving directors who were also District Council officials. The county court found that by standing in unison, the church members voted to close the church, and that the directors did not have a conflict of interest. The district court affirmed.

We conclude that (1) when the church members stood in unison, they voted to close the church, and the church property reverted to the District Council under Glad Tidings' bylaws, and (2) no transaction occurred which would subject the directors to liability. We affirm.

BACKGROUND

CHURCH ORGANIZATION

Glad Tidings is a church in Gibbon, Buffalo County, Nebraska. It is a district-affiliated church of the District Council, meaning

it has fewer than 20 members. Glad Tidings, a Nebraska non-profit corporation, owns property in its name, including real estate. Under Glad Tidings' constitution and bylaws, however, all of its property reverts to the District Council if it ceases to function as a church.

In Nebraska, the District Council is the governing body for all Assemblies of God churches. It consists of 10 presbyters, nominated from 10 geographic sections throughout the state, and 3 elected officers: a superintendent, assistant superintendent, and a secretary-treasurer. The next level of governance for a district-affiliated church is the church's board of directors. Glad Tidings' Board consisted of the District Council superintendent, the geographic presbyter from Glad Tidings' section, and Glad Tidings' pastor. At all relevant times, Robert Nazareus, the superintendent; Robert Wine, the presbyter; and Alex Brodine, the local pastor, made up Glad Tidings' Board. Wine also served as the pastor of New Life Assembly in Kearney, Nebraska (New Life), and Brodine served in a mentorship position at New Life.

District-affiliated churches may also have an advisory board, which serves under the District Council and the church's board of directors. Glad Tidings previously had an advisory board consisting of three church members; however, two of the advisory board members resigned in July 2003. The church did not appoint anyone to replace them, and the board has since ceased to function.

GLAD TIDINGS' OPERATIONAL DIFFICULTIES

For several years, Glad Tidings had operational problems. Dorothy Miller, a member of Glad Tidings for about 10 years, began serving on the advisory board in January 2003. She testified that the congregation had problems with a new pastor who came to Glad Tidings in June 2001. Miller stated the pastor's spending concerned the church members. She also stated tensions arose between the church and the District Council because the District Council failed to give sufficient help. The record reflects that for several years, Glad Tidings lacked leadership and direction. The District Council believed that the church had failed in evangelization, discipleship, and growth.

In August or September 2003, the District Council appointed Brodine as an interim pastor. The District Council and the Board decided that Glad Tidings was dysfunctional and needed significant change. The Board presented three options to the congregation: (1) appoint a new pastor and continue the status quo, (2) close the church and “replant” it (i.e., reopen it with a fresh start), or (3) affiliate with New Life in Kearney. The Board members, however, expressed that continuing the status quo was not a good option, and they would not appoint a new pastor.

GLAD TIDINGS CLOSES

On January 18, 2004, Wine and Brodine held a meeting with the Glad Tidings congregation to decide the church’s future. They discussed whether to join with New Life. During the meeting, the record shows the members clearly did not want to join with New Life; Miller stood up and stated that she did not want to become a part of New Life and that if Glad Tidings were going to close, she wanted it to do so immediately. Then, the other church members stood as well. Wine testified that he asked if by standing, the members were showing that they wanted to close the church and have the property revert to the District Council. Wine and Brodine testified that the members confirmed that was their intent. But Glad Tidings contends the members were only standing to show that they would not join New Life—not that they wanted to close the church.

After the January 18, 2004, meeting, the District Council required that Glad Tidings members turn over all church property to it. The property included a safe-deposit box containing church documents and a certificate of deposit worth about \$2,500. Brodine closed Glad Tidings’ checking and savings accounts containing about \$1,400. Wine testified that the District Council combined Glad Tidings’ funds with New Life’s general fund and used it to pay Glad Tidings’ utilities and maintenance expenses.

Glad Tidings has not held church services since January 18, 2004, and church members have not had access to the building because the District Council changed the locks on January 21. New Life has used the church building for ministry activities in the Gibbon community. Glad Tidings still exists as a non-profit corporation.

GLAD TIDINGS' LAWSUIT

Glad Tidings brought this action against the District Council and the Board members. It sought a declaration that the Board exceeded its authority by transferring the church assets to the District Council. Glad Tidings alleged that the members did not vote to close the church or dispose of the property. The county court, however, determined that the members signified their vote to close the church by standing with Miller at the January 18, 2004, meeting. Further, the court found they were aware that by voting to close the church, they were also voting to dispose of the property because the property would revert to the District Council.

Glad Tidings had also argued that board members Wine and Nazarenus had conflicts of interest because they held positions on the District Council and benefited from receiving Glad Tidings' property. Nevertheless, the county court found no genuine issue of material fact regarding a conflict of interest and entered summary judgment for the District Council.

Glad Tidings appealed to the district court. The district court affirmed the county court's decision.

ASSIGNMENTS OF ERROR

Glad Tidings assigns, renumbered and restated, that the trial court erred in (1) finding that church members voted to close the church and dispose of its assets and (2) granting summary judgment to the District Council and the Board regarding whether the Board had conflicts of interest.

On cross-appeal, the District Council and the Board assign, restated, that the trial court erred in failing to grant it summary judgment because the First Amendment precluded the adjudication of the case.

STANDARD OF REVIEW

[1] In a declaratory judgment action treated as an action at law, we do not disturb factual determinations unless they are clearly wrong.¹

[2,3] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue

¹ See *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003).

regarding any material fact or 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 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.³

ANALYSIS

THE CHURCH MEMBERS VOTED TO CLOSE THE CHURCH

Glad Tidings contends that its members did not authorize the Board to close the church and dispose of its property. Glad Tidings relies on Neb. Rev. Stat. § 21-19,126 (Reissue 1997). This statute permits a nonprofit corporation to “dispose of all or substantially all of its property” when the transaction is approved “[b]y the members by two-thirds of the votes cast or a majority of the voting power,” unless the corporation’s bylaws require a greater vote. Glad Tidings’ bylaws require a two-thirds vote by the membership present at a regular or special meeting for any assembly property to be “sold, leased, mortgaged, or otherwise alienated.” The bylaws also provide that if the assembly “ceases to function as a church body,” its property shall revert to the District Council.

Glad Tidings argues that the action the members took at the January 18, 2004, meeting was not a vote either to close the church or to dispose of its property. Church members testified that they did not vote to close the church by standing in unison. Instead, they were only opposed to joining New Life. Yet according to Wine and Brodine, Wine asked the members whether by standing, they were voting to close the church and transfer the church property to the District Council. Wine and Brodine further testified that the members confirmed this was their intent, verbally and nonverbally, and that no one objected.

[4] The record shows conflicting evidence before the county court. In a bench trial, the judge sitting as the trier of fact is

² *Willet v. County of Lancaster*, 271 Neb. 570, 713 N.W.2d 483 (2006).

³ *Brodine v. Blue Cross Blue Shield*, 272 Neb. 713, 724 N.W.2d 321 (2006).

the sole judge of the credibility of the witnesses, and we do not reweigh the evidence on appeal.⁴ Here, the county court determined that—by standing in unison—the members voted to close the church. It also found the members knew such a vote would cause the church property to revert to the District Council.

Glad Tidings argues, however, that no vote occurred because the church did not follow the proper procedure to take a vote, i.e., by using motions and seconds. Neither Glad Tidings' by-laws nor Nebraska statutes require a particular procedure.⁵ A "vote" can be expressed "by ballot, show of hands, or other type of communication."⁶ For example, a "standing vote" occurs when each voter "stand[s] up when his or her side of the question is counted," and a "voice vote" can occur when "the voters collectively [answer] aloud."⁷ Wine testified he did not use formal parliamentary procedure so the meeting would not feel "harsh or cold" and to avoid intimidating the small group. Despite the lack of formality, the congregation expressed its decision regarding the church's future through standing, nodding, and verbally responding when Wine questioned the members about their intent.

We conclude that the congregation voted to close the church. The church members were aware that by closing the church, the church property would revert to the District Council by operation of the bylaws. The district court did not clearly err in determining that the members voted to close the church and dispose of the property.

NO CONFLICT OF INTEREST TRANSACTION
OCCURRED UNDER § 21-1987

Glad Tidings contends that Wine and Nazareus had conflicts of interest because they were on Glad Tidings' Board and held positions with the District Council, which received Glad Tidings' property when it closed. Neb. Rev. Stat. § 21-1987

⁴ *Waite v. A.S. Battiato Co.*, 238 Neb. 151, 469 N.W.2d 766 (1991).

⁵ See Neb. Rev. Stat. § 21-1914(32) (Reissue 1997).

⁶ Black's Law Dictionary 1606 (8th ed. 2004).

⁷ *Id.* at 1607.

(Reissue 1997) defines a conflict of interest transaction as “a transaction with the corporation in which a director of the corporation has a direct or indirect interest.” Glad Tidings alleges that the transfer of property to the District Council was a transaction under this section. The District Council counters that § 21-1987 does not apply because no transaction occurred.

The Nebraska Nonprofit Corporation Act does not define the term “transaction.” The Model Nonprofit Corporation Act, upon which Nebraska’s act is based, is also silent on what comprises a transaction. However, the Model Business Corporation Act (MBCA) contains a similar provision in § 8.60. And the comments provide guidance regarding what is a transaction.

[5,6] The official comment to § 8.60 states that “[t]o constitute a director’s conflicting interest transaction, there must first be a transaction by the corporation, its subsidiary, or controlled entity”⁸ The introductory comment to subchapter F, in which § 8.60 is contained, elaborates further:

[T]he subchapter is applicable only when there is a “transaction” by or with the corporation. For purposes of subchapter F, “transaction” generally connotes negotiations or a consensual bilateral arrangement between the corporation and another party or parties that concern their respective and differing economic rights or interests—not simply a unilateral action by the corporation but rather a “deal.”

In *Mueller v. Zimmer*,⁹ the Wyoming Supreme Court consulted the MBCA’s comments in addressing a conflict of interest argument under a statute identical to § 21-1987. The corporation managed a recreational residential subdivision, and it had a policy of reimbursing directors for expenses incurred while performing their duties. One director was also a partner in a law firm, and he used his law firm’s resources in performing his duties as a director. He then sought reimbursement for the expenses incurred by the law firm. The corporation’s members alleged that the reimbursement was a conflict-of-interest transaction, which required specific board approval. The Wyoming

⁸ 2 Model Business Corporation Act Ann. § 8.60, official comment at 8-382 to 8-383 (3d ed. 2002).

⁹ *Mueller v. Zimmer*, 124 P.3d 340 (Wyo. 2005).

court, however, determined that under the MBCA's definition, a transaction had not occurred. The court observed that the MBCA's definition is also consistent with the plain meaning of the word:

1. The act or an instance of conducting business or other dealings; esp., the formation, performance, or discharge of a contract. 2. Something performed or carried out; a business agreement or exchange. 3. Any activity involving two or more persons. 4. *Civil law*. An agreement that is intended by the parties to prevent or end a dispute and in which they make reciprocal concessions.¹⁰

The court in *Mueller* held that the reimbursement of a director's expenses was not the type of corporate action the Legislature designed the statute to cover. No negotiations, no bilateral arrangement, and no "deal" occurred between the corporation and another party.¹¹ Instead, the reimbursement was a policy choice.

We conclude that the MBCA's description of the term "transaction" is the appropriate definition of that term under § 21-1987. As in *Mueller*, no negotiations or mutual agreement occurred between the parties that would constitute a transaction as that term is used in the Nebraska Nonprofit Corporation Act. Instead, the church members voted to close the church. As stated in Glad Tidings' bylaws, church policy mandated that the assets reverted to the District Council when the church ceased to function. Summing up, the record does not show a "deal" between Glad Tidings and the District Council.

[7,8] In reviewing the county court's granting summary judgment, we look to these familiar principles: Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.¹² The party moving for summary judgment has the burden

¹⁰ Black's Law Dictionary, *supra* note 6 at 1535. See, also, *Mueller v. Zimmer*, *supra* note 9.

¹¹ *Mueller v. Zimmer*, *supra* note 9, 124 P.3d at 358.

¹² *Willet v. County of Lancaster*, *supra* note 2.

to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate it is entitled to judgment as a matter of law.¹³ A movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to a judgment if the evidence were uncontroverted at trial. Then, the burden of producing evidence shifts to the party opposing the motion.¹⁴ The undisputed facts show that no transaction occurred because no agreement or negotiations took place between the District Council and Glad Tidings for the transfer of the property. Instead, the property reverted to the District Council by operation of Glad Tidings' bylaws.

CONCLUSION

The Board did not violate § 21-19,126 by transferring Glad Tidings' property. The church members voted to close the church, and as a result, the property reverted to the District Council through the bylaws. Also, the transfer of property was not a transaction under § 21-1987 because it was the result of an internal decision by the corporation, instead of a bilateral arrangement with another party. Thus, the conflict-of-interest provision does not apply. Having determined that the Board legally transferred Glad Tidings' property to the District Council, we need not address the District Council's cross-appeal. We affirm.

AFFIRMED.

¹³ *Id.*

¹⁴ *Cerny v. Longley*, 270 Neb. 706, 708 N.W.2d 219 (2005).

IN RE ESTATE OF ALAN BAER, DECEASED.
THEODORE G. BAER, PERSONAL REPRESENTATIVE OF THE
ESTATE OF ALAN BAER, DECEASED, APPELLEE, V.
DOUGLAS COUNTY, NEBRASKA, APPELLANT.

735 N.W.2d 394

Filed July 13, 2007. No. S-06-372.

1. **Decedents' Estates: Taxation: Appeal and Error.** The scope of review in an appeal of an inheritance tax determination is review for error appearing on the record.

2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Pleadings: Records: Evidence: Proof: Presumptions: Appeal and Error.** It is the appellant's burden to present a record to support the errors assigned, and in the absence of a complete bill of exceptions, it is presumed that an issue of fact raised by the pleadings was sustained by the evidence and that it was correctly determined.
4. **Records: Appeal and Error.** A party's brief may not expand the evidentiary record.
5. **Records: Evidence: Proof: Presumptions: Appeal and Error.** When it is clear that the appellant presented a full record of the evidence before the lower court and the inadequacy of the record on appeal is due to the failure of the party with the burden of proof below to present evidence, there is no presumption that the order of the trial court was supported by the evidence.
6. **Evidence: Records: Appeal and Error.** Evidence not made part of the record cannot be given a favorable reading, nor can any beneficial inferences be deduced therefrom.

Appeal from the County Court for Douglas County: LAWRENCE BARRETT, Judge. Reversed.

Stuart J. Dornan, Douglas County Attorney, and Bernard J. Monbouquette for appellant.

Robert J. Murray, Angela M. Pelan, and Kyle Wallor, of Lamson, Dugan & Murray, L.L.P., for appellee.

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

McCORMACK, J.

NATURE OF CASE

Under Nebraska law, inheritance taxes are imposed upon contingent bequests at the highest rate which would be possible on the happening of any of the contingencies.¹ In this case, inheritance taxes were assessed and paid on various contingent bequests in the distribution of the estate of Alan Baer (the Estate). Slightly less than 2 years after the original tax determination and payment, the personal representative of the Estate filed a "Protective Claim for Refund of Inheritance Tax," asserting that the contingencies of the bequests were unlikely to occur and that the taxes paid should be refunded to the

¹ Neb. Rev. Stat. § 77-2008.01 (Reissue 2003).

Estate. Douglas County objected. After an informal hearing in which no exhibits were offered into evidence or formal testimony adduced, the court granted the refund. Douglas County appeals.

BACKGROUND

The record of the proceedings below consists of the Estate's motion for a refund with two attached tax worksheets, the court's order granting the refund, and 12 pages transcribing the discussion of the parties with the county judge concerning the refund request. The parties agree that no evidentiary hearing was held on the matter and that no evidence was formally adduced to support the Estate's motion.

In their appellate briefs, the parties explain that on or about November 5, 2003, \$99,165 was paid in inheritance taxes on bequests contingent upon Comoretel, a company being sold at a profit before the death of Baer's surviving spouse. The personal representative's "Protective Claim for Refund of Inheritance Tax" was filed with the county court on August 4, 2005. In support of the claim for a refund, the personal representative asserted that although Baer's spouse was still alive, it was a "virtual certainty" that Comoretel would never be sold at a profit.

The bequests themselves are not in the record, but according to the parties' briefs, they are found in "Article VI, Item Two, Paragraph (I) of the Alan Baer Revocable Trust of February 9, 1996."² According to the briefs, the trust states in relevant part:

(I) In the event that Settlor's interest in Comoretel (a private equity interest) is sold and a profit realized, as determined in the sole and absolute discretion of Trustee, Trustee shall distribute outright in amounts and to those individuals set out below in the order set forth herein and with each specific bequest having to be fully funded before the next listed bequest is funded. In the event any of these bequests are not funded prior to the death of [Baer's spouse], they shall automatically lapse.³

² Brief for appellee at 6. Accord brief for appellant at 4.

³ *Id.*

The trust names the various contingent beneficiaries and the specific amount to be paid to each of those beneficiaries if the contingency occurs. The inheritance worksheets, prepared and signed by the personal representative, reflect the contingent beneficiaries and calculated inheritance tax as if the contingency had occurred and the specified amounts had been paid out.

At the hearing on the Estate's motion, the personal representative explained that the reason the contingency would likely never occur is because from the time of its inception, Comoretel had never operated at a profit. The personal representative admitted, however, that there was a remote possibility that the company's profitability could change. Because of this remote possibility, the personal representative suggested that the Estate would be willing to file an annual report with the county attorney's office to keep it informed as to whether the contingency had occurred. The personal representative expressed concern that if the refund were not granted at that time, pursuant to his pending motion, then the refund would later be barred by the statute of limitations for refunds of "erroneous payment[s]" found in Neb. Rev. Stat. § 77-2018 (Reissue 2003).

The county attorney argued at the hearing that anything was possible and that the value of the company could go up. The county attorney offered to put the taxes paid on the contingent bequests into an interest-bearing investment for the benefit of the beneficiaries, as allowed by § 77-2008.01. The county attorney did not believe that the statute of limitations found in § 77-2018 was of any concern because the payment of taxes on the contingent bequests was not "erroneous."

The county court granted the personal representative's motion and ordered a refund of the taxes paid on the contingent bequests. The court further ordered that until the contingency became "impracticable or impossible," the trustees of Baer's revocable trust must make annual reports to the county attorney's office to inform that office whether the contingency of the trust had occurred. In the event that the contingency occurred, the court ordered that the trustees would repay the refunded tax amount with interest pursuant to Neb. Rev. Stat. §§ 77-2010 (Reissue 2003) and 45-104.01 (Reissue 2004).

ASSIGNMENTS OF ERROR

Douglas County assigns that the county court erred in (1) ordering a redetermination of inheritance tax, and the resulting refund of \$99,165 to the heirs of Baer's estate, based on the court's finding that the contingent bequests of article VI, item two, paragraph (I), of Baer's trust would never be funded; (2) finding that the statute of limitations of § 77-2018 applies to inheritance taxes paid on contingent bequests of article VI, item two, paragraph (I), of Baer's trust; and (3) finding that the contingent bequests of Baer's trust will not be fulfilled.

STANDARD OF REVIEW

[1,2] The scope of review in an appeal of an inheritance tax determination is review for error appearing on the record.⁴ When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.⁵

ANALYSIS

The taxes in issue were calculated pursuant to § 77-2008.01, which states that when property is bequeathed in a manner subject to inheritance taxes, but the bequest is contingent, the tax "shall be imposed upon [the contingent bequest] at the highest rate which, on the happening of any of the contingencies or conditions, would be possible under the provisions of Chapter 77, article 20." Section 77-2008.01 further provides that on the happening of a contingency by which the property is transferred to a party for whom the tax rate is less, the party "shall be entitled to a redetermination of the tax and to a return by the county treasurer . . . of so much of the tax imposed and paid as equals the difference between the amount imposed and paid and the amount which such person, corporation, or institution should pay." When payment of a tax on a contingent request is made pursuant to § 77-2008.01, the county court is authorized to direct the county treasurer to invest the tax proceeds in U.S.

⁴ *In re Estate of Reed*, 271 Neb. 653, 715 N.W.2d 496 (2006).

⁵ *Id.*

Treasury bonds and similar investments, and if the tax is redetermined, the refund includes the interest on the sum refunded, while the balance goes to the general inheritance tax fund.⁶

Notwithstanding all of those provisions, the court also has the authority, on written application of one of the inheritance taxpayers, “to determine a final inheritance tax on any property devised, bequeathed, or otherwise transferred, based upon the probabilities at the time of the decedent’s death rather than taxing the property at the rates specified in such sections.”⁷ Alternatively, a contingent beneficiary may elect not to pay the tax resulting from the contingent interest until the contingency has occurred, but the beneficiary must then post a bond with the county court for an amount not to exceed two times the amount of the estimated tax.⁸

We note, in passing, that in this case, the personal representative of the Estate filed the motion for a refund in the belief that if it was not made within 2 years, the Estate would be barred from obtaining a refund by the 2-year statute of limitations found in § 77-2018, regardless of whether the contingency would ever occur. The parties, on appeal, disagree about the applicability of § 77-2018. However, § 77-2018 is applicable only to inheritance tax “paid erroneously,” and a tax paid at the correct rate, pursuant to statute, is not paid erroneously. The parties do not argue, in this case, that the inheritance tax initially paid was incorrectly determined, based on § 77-2008.01. This is not a case of erroneous payment. Rather, any refund available to the Estate in this case is necessarily based on the redetermination provision of § 77-2018.05.

The court apparently relied on § 77-2018.05 for its authority to issue its order of redetermination and refund in accordance with the probabilities, rather than the possibilities, of the contingencies. Section 77-2018.05 states in full:

Notwithstanding sections 77-2001 to 77-2039, the court shall have the authority, upon the written application of

⁶ § 77-2008.01

⁷ Neb. Rev. Stat. § 77-2018.05 (Reissue 2003).

⁸ Neb. Rev. Stat. § 77-2009 (Reissue 2003).

any of the parties subject to the tax imposed under such sections, to determine a final inheritance tax on any property devised, bequeathed, or otherwise transferred, based upon the probabilities at the time of the decedent's death rather than taxing the property at the rates specified in such sections.

We note that § 77-2018.05 does not expressly authorize the county court to redetermine and order refund of a tax already assessed and paid, as opposed to making a determination based upon probabilities in the first instance. Furthermore, there is some question whether the personal representative's proposal to keep the county informed of the status of the contingency, and the court's decision to refund the tax subject to repayment, is consistent with the directive in § 77-2018.05 to determine a "final" inheritance tax based upon the probabilities at the time of the decedent's death. But we do not reach these issues in this proceeding because of a more fundamental problem with the county court's order.

Assuming, without deciding, that the county court had the statutory authority to issue an order redetermining and refunding taxes already assessed, subject to repayment, we find that the county court's order in this case was unsupported by competent evidence. As already mentioned, the record does not contain the bequests in issue or any evidence as to the probability that the contingency of the bequests will occur. All that is reflected by the record is the informal discussion of the attorneys with the county court. The parties agree that the record is a full reflection of what occurred below. The personal representative admits that the Estate did not present formal evidence or testimony to the county court to support its motion.

[3] Generally, it is the appellant's burden to present a record to support the errors assigned, and in the absence of a complete bill of exceptions, it is presumed that an issue of fact raised by the pleadings was sustained by the evidence and that it was correctly determined.⁹ Stated another way, "[i]n the absence of a record of the evidence considered by the court, it is presumed

⁹ *Blanco v. General Motors Acceptance Corp.*, 180 Neb. 365, 143 N.W.2d 257 (1966).

that the order of the trial court was supported by the evidence and was correct.”¹⁰

[4,5] But the reason for this rule is to ensure that this court reviews the case upon the evidence actually received and considered in the trial court.¹¹ A party’s brief may not expand the evidentiary record.¹² In this case, it is clear that the inadequacy of the record is due to the failure of the party with the burden of proof below to present evidence. The appellant met *its* burden to present this court with a complete bill of exceptions containing the evidence relied upon by the trial court. The aforementioned presumption, that the order of the trial court was supported by the evidence, does not apply to this case.

[6] It is clear from the record and admissions of the parties that the county court’s determination was made without the benefit of evidence supporting the allegations of the Estate. As we have stated before, we will reverse a judgment which depends on a finding of fact that was manifestly unsupported by the evidence.¹³ While under our clearly erroneous standard of review, we consider the evidence in the light most favorable to the successful party, evidence not made part of the record cannot be given a favorable reading, nor can any beneficial inferences be deduced therefrom.¹⁴ There was no competent evidence to support the county court’s judgment in this case. Accordingly, we reverse the judgment of the county court.

REVERSED.

¹⁰ *Keystone Ranch Co. v. Central Neb. Pub. Power & Irr. Dist.*, 237 Neb. 188, 192, 465 N.W.2d 472, 476 (1991).

¹¹ *State v. Jacobsen*, 194 Neb. 105, 230 N.W.2d 219 (1975).

¹² *Home Fed. Sav. & Loan v. McDermott & Miller*, 243 Neb. 136, 497 N.W.2d 678 (1993).

¹³ *American Fire Ins. Co. v. Buckstaff Bros. Mfg. Co.*, 52 Neb. 676, 72 N.W. 1047 (1897). See, also, *Board of Regents v. Thompson*, 6 Neb. App. 734, 577 N.W.2d 749 (1998).

¹⁴ *Home Fed. Sav. & Loan v. McDermott & Miller*, *supra* note 12.

CLYDE A. WILLIAMS, APPELLEE, v.

SHEILA BAIRD, APPELLANT.

735 N.W.2d 383

Filed July 13, 2007. No. S-06-889.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. ____: _____. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
4. **Final Orders: Appeal and Error.** An order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.
5. **Actions: Statutes.** A special proceeding includes every special statutory remedy which is not in itself an action.
6. **Actions: Final Orders.** A judgment rendered by the district court that is merely a step or proceeding within the overall action is not a special proceeding.
7. **Actions: Statutes.** A special proceeding entails civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes.
8. **Jurisdiction: Final Orders: Appeal and Error.** Generally, in the absence of a final order from which an appeal may be taken, the appeal must be dismissed for lack of jurisdiction.
9. **Final Orders: Appeal and Error.** To fall within the collateral order doctrine, an order must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment.
10. **Claims: Immunity: Final Orders.** The denial of a claim of qualified immunity, where the issues presented are purely questions of law, is immediately reviewable under the collateral order doctrine.
11. **Civil Rights: Public Officers and Employees: Immunity.** Qualified immunity provides a shield from liability for public officials sued under 42 U.S.C. § 1983 (2000) in their individual capacity, so long as an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.
12. **Public Officers and Employees: Immunity.** Whether an official may prevail in his or her qualified immunity defense depends upon the objective reasonableness of his or her conduct as measured by reference to clearly established law.
13. **Civil Rights: Public Officers and Employees: Proof.** An official sued under 42 U.S.C. § 1983 (2000) bears the burden of demonstrating that in performing the acts complained of, he or she was acting in a discretionary authority. Once this burden is met, the plaintiff bears the burden of proof as to whether the right allegedly violated was clearly established.

14. **Trial: Immunity.** Where appropriate, the issues relating to qualified immunity may be determined via a separate trial or evidentiary hearing.
15. **Final Orders: Appeal and Error.** In order to determine whether a case presents an order reviewable under the collateral order doctrine, an appellate court engages in a three-part inquiry: (1) whether the plaintiff has alleged the violation of a constitutional right, (2) whether that right was clearly established at the time of the alleged violation, and (3) whether the evidence shows that the particular conduct alleged was a violation of the right at stake.

Petition for further review from the Nebraska Court of Appeals, IRWIN, MOORE, and CASSEL, Judges, on appeal thereto from the District Court for Hall County, TERESA K. LUTHER, Judge. Judgment of Court of Appeals reversed in part, and in part dismissed.

Jon Bruning, Attorney General, and Vicki L. Adams for appellant.

No appearance for appellee.

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

HEAVICAN, C.J.

I. INTRODUCTION

Clyde A. Williams brought a civil rights action under 42 U.S.C. § 1983 (2000) against the Nebraska Department of Health and Human Services (DHHS) and Sheila Baird, a DHHS employee. Baird motioned for summary judgment, arguing that she was entitled to qualified immunity from suit, but the district court denied Baird's motion. She appealed. The Court of Appeals summarily dismissed her appeal for lack of a final, appealable order.¹ We granted Baird's petition for further review to address whether the denial of a claim of qualified immunity is final for the purpose of immediate appellate review.

II. FACTUAL BACKGROUND

Baird has been employed as a caseworker for DHHS since 1991. In February 2004, Baird was assigned to investigate

¹ *Williams v. Baird*, 15 Neb. App. ____ (No. A-06-889, Sept. 11, 2006).

claims of physical neglect of Williams' three stepdaughters, ages 11, 8, and 6, by their natural mother, Janette Williams, and also physical abuse of those children by their stepfather, Williams. The allegations arose from reports from a teacher at the children's school. On March 2, Baird first interviewed the children, then met with Janette. A deputy with the Howard County sheriff's office was present during these interviews. After interviewing Janette, Baird and the deputy interviewed Williams. During that interview, Williams was defensive and asked whether he needed an attorney.

Based upon statements made by Janette and the children, as well as Williams' defensive attitude during his interview, Baird removed the children from the home shared by Janette and Williams. At that time, Williams was also placed under arrest. The reasons for Williams' arrest are not entirely clear from the record; however, during his deposition, Williams testified that he thought he was arrested for viewing pornography on the Internet and for showing the children pornography on the Internet. Williams was released the following day, and no charges were filed against him in connection with the allegations of abuse. However, the safety plan entered into by Janette and Baird required that in order for the children to be returned to Janette, Williams had to move out of the family home. In accordance with this plan, Janette obtained a protection order against Williams.

Though Janette later retracted her statements, in the affidavit to obtain the protection order, she stated that she did not want Williams to have contact with the children due to several recent "red flags," including allegations that Williams had yelled at the children and spanked the children. Janette also noted that the children had admitted to DHHS they were afraid of Williams and that there was evidence that Williams had been viewing pornography on the family computer. Finally, Janette indicated in the affidavit that she suspected sexual abuse of both the 11-year-old and 6-year-old, though she does not explicitly accuse Williams of that abuse. Approximately 2 months after the issuance of the protection order, Janette had the order withdrawn. Williams returned to the home in late April 2004.

Williams then brought this action against DHHS and Baird under 42 U.S.C. § 1983. Williams generally alleged violations of his rights under the 4th and 14th Amendments to the U.S. Constitution and article I, §§ 3 and 5, of the Nebraska Constitution. Williams also alleged he was denied the quiet use and enjoyment of his home, property, and effects without due process of law under both the U.S. and the Nebraska Constitutions. In their answers, DHHS and Baird asserted several affirmative defenses, including a claim that Baird was entitled to qualified immunity.

Eventually, Williams voluntarily dismissed his action against DHHS, leaving the action pending against Baird. Baird filed a motion for summary judgment, arguing that she was entitled to qualified immunity. The district court denied Baird's claim of qualified immunity, noting that there were genuine issues of material facts, "including whether any reasonable person could believe in good faith that there was probable cause to arrest [Williams] or on an objective basis, whether officers of reasonable competence could disagree whether or not probable cause existed to arrest [Williams]." Baird appealed. The Nebraska Court of Appeals dismissed her appeal on its own motion, concluding that the denial of a motion for summary judgment was not a final order.² We granted Baird's petition for further review.

III. ASSIGNMENTS OF ERROR

Baird assigns that the district court erred in (1) implicitly finding that Williams had a clearly established right to be free from illegal seizures within the context of this case, (2) finding there was a genuine issue of material fact regarding whether there was probable cause to arrest Williams, and (3) failing to find that Williams failed to establish a violation of the right to familial integrity.

As an initial matter, this court is presented with the question of whether this case presents a final, appealable order under our final order jurisprudence or, alternatively, is reviewable under our collateral order doctrine.

² *Williams v. Baird*, *supra* note 1.

IV. 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.³

V. ANALYSIS

1. FINAL ORDER UNDER NEB. REV. STAT. § 25-1902

[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.⁴ 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.⁵

[4] An order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.⁶ We note that the order denying Baird's motion for summary judgment did not determine the action or prevent a judgment, as the denial allowed Williams' action against Baird to proceed. In addition, the order was not made on summary application in an action after judgment was rendered. The initial question presented in this case is whether the district court's order was made during a special proceeding.

[5-7] A special proceeding includes every special statutory remedy which is not in itself an action.⁷ A judgment rendered by the district court that is merely a step or proceeding within the overall action is not a special proceeding.⁸ Generally, a "special proceeding" entails civil statutory remedies not

³ *Pfeil v. State*, ante p. 12, 727 N.W.2d 214 (2007).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* See, also, Neb. Rev. Stat. § 25-1902 (Reissue 1995).

⁷ *Pfeil v. State*, supra note 3.

⁸ *Id.*

encompassed in chapter 25 of the Nebraska Revised Statutes.⁹ Examples of special proceedings include juvenile court proceedings,¹⁰ probate actions,¹¹ and workers' compensation cases.¹²

In Baird's petition for further review, she contends first that the nature of her qualified immunity means that "the use of the motion for summary judgment for asserting qualified immunity essentially initiates a 'special proceeding' in the federal courts."¹³ Baird also contends this court has previously held in *Currie v. Chief School Bus Serv.*¹⁴ that the summary judgment process can be a special proceeding.

In *Currie*, this court noted that "the fact that the summary judgment process is encompassed in chapter 25 . . . does not preclude this court from finding the summary judgment process to be a special proceeding."¹⁵ However, we later distinguished *Currie* and concluded that situations involving partial motions for summary judgment were not special proceedings.¹⁶

It has been the repeated conclusion of this court that the denial of a motion for summary judgment is not a final order for purposes of § 25-1902.¹⁷ Moreover, in considering the summary judgment process in light of the definition of a special proceeding, it becomes obvious that a summary judgment proceeding is not itself an action, but, rather, is merely a step in the

⁹ *Id.*

¹⁰ *In re Guardianship of Rebecca B. et al.*, 260 Neb. 922, 621 N.W.2d 289 (2000).

¹¹ *In re Estate of Peters*, 259 Neb. 154, 609 N.W.2d 23 (2000).

¹² *Thompson v. Kiewit Constr. Co.*, 258 Neb. 323, 603 N.W.2d 368 (1999).

¹³ Brief for appellant in support of petition for further review at 7.

¹⁴ *Currie v. Chief School Bus Serv.*, 250 Neb. 872, 553 N.W.2d 469 (1996).

¹⁵ *Id.* at 880, 553 N.W.2d at 475.

¹⁶ *O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998). See, also, *Cerny v. Longley*, 266 Neb. 26, 661 N.W.2d 696 (2003); *Keef v. State*, 262 Neb. 622, 634 N.W.2d 751 (2001).

¹⁷ See, *Big River Constr. Co. v. L & H Properties*, 268 Neb. 207, 681 N.W.2d 751 (2004); *Gruenewald v. Waara*, 229 Neb. 619, 428 N.W.2d 210 (1988); *Rehn v. Bingaman*, 157 Neb. 467, 59 N.W.2d 614 (1953).

overall action. As such, a summary judgment proceeding is not a special proceeding.

As the district court's order was not made in a special proceeding, we are not presented with a final order under § 25-1902.

2. COLLATERAL ORDER DOCTRINE

[8] Generally, in the absence of a final order from which an appeal may be taken, the appeal must be dismissed for lack of jurisdiction.¹⁸ However, we must determine whether the collateral order doctrine might operate to vest this court with the jurisdiction to decide this appeal.

[9] This court most recently explained the collateral order doctrine in *Hallie Mgmt. Co. v. Perry*.¹⁹ In that case, we noted that this court had previously adopted the collateral order doctrine,²⁰ an exception to the final order rule which was announced by the U.S. Supreme Court in *Cohen v. Beneficial Loan Corp.*²¹ We noted with approval the U.S. Supreme Court's pronouncement of the doctrine and held that for an order to fall within the doctrine, it must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment.²²

We noted also in *Hallie Mgmt. Co.* that the U.S. Supreme Court had emphasized the modest scope of the collateral order doctrine, explaining 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

¹⁸ See, *Pfeil v. State*, *supra* note 3; *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006); *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997).

¹⁹ *Hallie Mgmt. Co. v. Perry*, *supra* note 18.

²⁰ See *Richardson v. Griffiths*, *supra* note 18.

²¹ *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949).

²² *Hallie Mgmt. Co. v. Perry*, *supra* note 18.

judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated.”²³

The U.S. Supreme Court has specifically concluded that under the doctrine, the denial of a claim of qualified immunity is appealable, notwithstanding the absence of a final judgment,²⁴ if the denial of immunity turns on a question of law.²⁵ Various states have similarly concluded that the denial of qualified immunity can be immediately reviewable.²⁶ The U.S. Supreme Court noted:

The upshot is that . . . considerations of delay, comparative expertise of trial and appellate courts, and wise use of appellate resources argue in favor of limiting interlocutory appeals of “qualified immunity” matters to cases presenting more abstract issues of law. Considering these “competing considerations,” we are persuaded that “[i]mmunity appeals . . . interfere less with the final judgment rule if they [are] limited to cases presenting neat abstract issues of law.”²⁷

In *Stella v. Kelley*,²⁸ the First Circuit Court explained the distinction:

[O]n the one hand, a district court’s pretrial rejection of a proffered qualified immunity defense remains immediately appealable as a collateral order to the extent that it

²³ *Id.* at 86, 718 N.W.2d at 535 (quoting *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 114 S. Ct. 1992, 128 L. Ed. 2d 842 (1994)).

²⁴ *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985).

²⁵ *Johnson v. Jones*, 515 U.S. 304, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995); *Mitchell v. Forsyth*, *supra* note 24.

²⁶ See, *Webb v. Haas*, 728 A.2d 1261 (Me. 1999); *Park County v. Cooney*, 845 P.2d 346 (Wyo. 1992); *Carillo v. Rostro*, 114 N.M. 607, 845 P.2d 130 (1992); *Henke v. Superior Court*, 161 Ariz. 96, 775 P.2d 1160 (Ariz. App. 1989). See, also, *Farrell v. Transylvania County Bd. of Educ.*, 175 N.C. App. 689, 625 S.E.2d 128 (2006) (denial of qualified immunity substantial right and reviewable).

²⁷ *Johnson v. Jones*, *supra* note 25, 515 U.S. at 317.

²⁸ *Stella v. Kelley*, 63 F.3d 71, 74 (1st Cir. 1995).

turns on a pure issue of law, notwithstanding the absence of a final judgment. [Citations omitted.] On the other hand, a district court's pretrial rejection of a qualified immunity defense is not immediately appealable to the extent that it turns on either an issue of fact or an issue perceived by the trial court to be an issue of fact.

[10] We find this reasoning persuasive and agree with the U.S. Supreme Court that the denial of a claim of qualified immunity, where the issues presented are purely questions of law, should be immediately reviewable under the collateral order doctrine. Thus, as a threshold issue for appellate jurisdiction, we must consider whether the qualified immunity issue in this case presents disputed questions of fact.

[11] Qualified immunity provides a shield from liability for public officials sued under 42 U.S.C. § 1983 in their individual capacity, so long as an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.²⁹ Though potentially available to all public officials, qualified immunity is often invoked by law enforcement³⁰ and prison officials,³¹ as well as social service workers.³²

[12,13] Whether an official may prevail in his or her qualified immunity defense depends upon the objective reasonableness of his or her conduct as measured by reference to clearly established law.³³ An official sued under 42 U.S.C. § 1983 bears the burden of demonstrating that in performing the acts complained of, he or she was acting in a discretionary

²⁹ *Shearer v. Leuenberger*, 256 Neb. 566, 591 N.W.2d 762 (1999), *disapproved on other grounds*, *Simon v. City of Omaha*, 267 Neb. 718, 677 N.W.2d 129 (2004).

³⁰ *Diaz v. Martinez*, 112 F.3d 1 (1st Cir. 1997); *Newton v. Huffman*, 10 Neb. App. 390, 632 N.W.2d 344 (2001).

³¹ *Crow v. Montgomery*, 403 F.3d 598 (8th Cir. 2005); *Martin v. Curry*, 13 Neb. App. 171, 690 N.W.2d 186 (2004).

³² *Gottlieb v. County of Orange*, 84 F.3d 511 (2d Cir. 1996); *Manzano v. South Dakota Dept. of Social Services*, 60 F.3d 505 (8th Cir. 1995); *Shearer v. Leuenberger*, *supra* note 29.

³³ *Shearer v. Leuenberger*, *supra* note 29.

authority.³⁴ Once this burden is met, the plaintiff bears the burden of proof as to whether the right allegedly violated was “clearly established.”³⁵

[14] Where appropriate, the issues relating to qualified immunity may be determined via a separate trial or evidentiary hearing.³⁶ In some instances, it might be unclear, based upon the record before a court, whether a defendant is entitled to qualified immunity. In those instances, “[a] hearing would likely clarify the matter. It may be that resolution of the qualified immunity defense . . . depends upon the resolution of disputed fact issues or on a credibility determination. On the other hand, a more developed record might render such a determination unnecessary.”³⁷

(a) Appellate Court Conducts Three-Part Inquiry Into
Whether Collateral Order Doctrine Applies

[15] Thus, in order to determine whether a case presents an order reviewable under the collateral order doctrine, an appellate court engages in a three-part inquiry. First, we determine whether the plaintiff has alleged the violation of a constitutional right.³⁸ Second, we determine whether that right was clearly established at the time of the alleged violation.³⁹ Finally, we determine whether the evidence shows that the particular conduct alleged was a violation of the right at stake.⁴⁰ The first two inquiries are questions of law; the last could require factual determinations to the extent that evidence is in conflict.⁴¹

³⁴ *Harbert Intern., Inc. v. James*, 157 F.3d 1271 (11th Cir. 1998).

³⁵ See, *Sparr v. Ward*, 306 F.3d 589 (8th Cir. 2002); *Conrod v. Davis*, 120 F.3d 92 (8th Cir. 1997).

³⁶ See, e.g., *Thompson v. Mahre*, 110 F.3d 716 (9th Cir. 1997); *Johnson v. Garraghty*, 57 F. Supp. 2d 321 (E.D. Va. 1999).

³⁷ *Johnson v. Garraghty*, *supra* note 36, 57 F. Supp. 2d at 329.

³⁸ *Shearer v. Leuenberger*, *supra* note 29.

³⁹ *Id.*

⁴⁰ See, *Stella v. Kelley*, *supra* note 28; *Shearer v. Leuenberger*, *supra* note 29.

⁴¹ See *Stella v. Kelley*, *supra* note 28.

(b) Williams' Allegations

In Williams' complaint, he generally alleged violations of his rights under the 4th and 14th Amendments to the U.S. Constitution and article 1, §§ 3 and 5, of the Nebraska Constitution. Williams also alleged that he was denied the "quiet use and enjoyment of his property, home, and effects without due process of law" under both the U.S. and the Nebraska Constitutions.

We note that no one appears to contest the fact that Baird was acting in a discretionary function as an employee of DHHS, and in any case, we conclude that Baird was doing so. For the purposes of a qualified immunity analysis, a defendant is acting within his or her discretionary authority when his or her actions were undertaken pursuant to the performance of his or her duties and within the scope of his or her authority.⁴² Baird averred in two separate affidavits that she was acting in her capacity as a DHHS caseworker when investigating claims of abuse made against Williams.

(i) *Unreasonable Seizure Under Fourth Amendment*

We first address Williams' contention that he was unreasonably seized in violation of his Fourth Amendment rights. In his complaint, Williams alleges facts, and introduces evidence in support of these allegations, suggesting that he was arrested without probable cause due to false and misleading representations made by Baird. We conclude that with respect to this allegation, Williams, while having alleged the violation of a constitutional right, has failed to allege a *legally cognizable claim* for the violation of such a right.⁴³

That one cannot be arrested in the absence of probable cause is clearly established.⁴⁴ Williams in fact alleges he was arrested without probable cause. However, Williams also alleges he was arrested by law enforcement at Baird's direction. Williams does not contend that Baird arrested him; indeed, she would appear

⁴² See *Rich v. Dollar*, 841 F.2d 1558 (11th Cir. 1988).

⁴³ See *Shearer v. Leuenberger*, *supra* note 29 (Connolly, J., concurring).

⁴⁴ See, *Beck v. Ohio*, 379 U.S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964); *Donovan v. Thames*, 105 F.3d 291 (6th Cir. 1997).

to have no authority to do so,⁴⁵ as generally only peace officers have the authority to effect an arrest.⁴⁶

Further, this court has noted on more than one occasion that “probable cause . . . requires that the facts available to the officer would cause a reasonably cautious person to believe that the suspect has committed an offense.”⁴⁷ Therefore, it is inconsequential whether Baird might have directed law enforcement to arrest Williams, as law enforcement would have been required to make its own assessment of probable cause. There is no indication either from the record or state law that Baird was a member of law enforcement. Given this, we conclude as a matter of law that Williams has failed to state a legally cognizable claim for the violation of a constitutional right. As such, we conclude as to this contention that Baird is entitled to qualified immunity.

(ii) *Familial Integrity*

In his second contention, Williams argues that his rights under the U.S. and Nebraska Constitutions to quiet use and enjoyment of his property were violated without due process of law. Williams alleges in his complaint that Baird informed Janette that unless Williams ceased to reside in the family home, Baird would not allow Williams’ stepchildren to return to the family home. Relying on these statements, Williams alleges that Janette obtained a protection order against him and that he was barred from his home for approximately 2 months.

Based upon the record presented to us, a fair characterization of the right at issue would be the right to familial integrity, wherein parents and children have a constitutionally protected liberty interest in the care and companionship of one another.⁴⁸ This right is clearly established.⁴⁹ However, there is a high

⁴⁵ See Neb. Rev. Stat. §§ 29-404.02 (Reissue 1995) and 49-801(15) (Reissue 2004).

⁴⁶ § 29-404.02.

⁴⁷ *State v. Eberly*, 271 Neb. 893, 902, 716 N.W.2d 671, 679 (2006) (emphasis supplied, citing *State v. Ball*, 271 Neb. 140, 710 N.W.2d 592 (2006)).

⁴⁸ *Manzano v. South Dakota Dept. of Social Services*, *supra* note 32.

⁴⁹ *Id.*

burden upon plaintiffs attempting to establish a violation of the right to familial integrity.⁵⁰ The Eight Circuit has repeatedly noted that “when a state official pursuing a child abuse investigation takes an action which would otherwise unconstitutionally disrupt familial integrity, he or she is entitled to qualified immunity, if such action [was] properly founded upon a reasonable suspicion of child abuse.”⁵¹

Based upon the record presented to us, we conclude that certain factual determinations remain unresolved. In particular, we note that factual determinations are necessary in order to decide whether Baird had a reasonable suspicion that Williams was abusing the children. Complicating this matter further is the fact that the district court failed to address in any manner Williams’ claim of familial integrity. These unresolved factual determinations prevent us from utilizing the collateral order doctrine to decide whether Baird, in fact, violated the clearly established right alleged by Williams. We note that a hearing on these factual determinations might assist the district court in clarifying Baird’s entitlement to qualified immunity on this second claim.

VI. CONCLUSION

The order of the district court denying Baird’s claims of qualified immunity is not a final order under § 25-1902. However, under the collateral order doctrine, we are permitted to review Baird’s qualified immunity claim with respect to Williams’ first claim. As such, we conclude that Baird is entitled to qualified immunity on that claim, as Williams failed to allege a legally cognizable constitutional claim. We accordingly reverse the district court’s denial of Baird’s claim of qualified immunity.

Baird’s appeal with regard to the second claim is not reviewable under the collateral order doctrine at this time. Baird’s appeal on this claim is dismissed.

REVERSED IN PART, AND IN PART DISMISSED.

⁵⁰ *Thomason v. SCAN Volunteer Services, Inc.*, 85 F.3d 1365 (8th Cir. 1996).

⁵¹ *Manzano v. South Dakota Dept. of Social Services*, *supra* note 32, 60 F.3d at 511. See, also, *Thomason v. SCAN Volunteer Services, Inc.*, *supra* note 50.

GAIL FICKLE, BOTH INDIVIDUALLY AND AS PARENT AND GUARDIAN OF
JACOB WAGNER, APPELLEE AND CROSS-APPELLANT, V. STATE OF
NEBRASKA, APPELLANT AND CROSS-APPELLEE.

735 N.W.2d 754

Filed July 20, 2007. No. S-04-1250.

1. **Tort Claims Act: Appeal and Error.** A district court's findings of fact in a proceeding under the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1996), will not be set aside unless such findings are clearly erroneous.
2. ____: _____. Whether the allegations made by a plaintiff constitute a claim under the State Tort Claims Act or whether the allegations set forth a claim that is precluded by the exemptions set forth in the act are questions of law. An appellate court has an obligation to reach its conclusions on these questions independent from the conclusions reached by the trial court.
3. **Tort Claims Act: Damages: Appeal and Error.** The amount of damages awarded in a case under the State Tort Claims Act is a matter solely for the finder of fact, whose action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of damages proved at trial.
4. **Tort Claims Act: Proof.** In order to recover in a negligence action brought under the State Tort Claims Act, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.
5. **Negligence.** The threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff.
6. _____. The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
7. **Governmental Subdivisions: Highways.** The State has a duty to use reasonable and ordinary care in the construction, maintenance, and repair of its highways so that they will be reasonably safe for the traveler using them while exercising reasonable and ordinary care and prudence.
8. **Tort Claims Act: Highways: Negligence: Notice.** Under the plain language of Neb. Rev. Stat. § 81-8,219(9) (Reissue 1996), the State has a duty to correct a malfunctioning traffic signal within a reasonable time after receiving notice of the defect.
9. **Negligence: Proof.** Foreseeability is a factor in establishing a defendant's duty.
10. **Negligence: Proximate Cause: Words and Phrases.** A proximate cause is a cause that produces a result in a natural and continuous sequence, and without which the result would not have occurred.
11. **Trial: Negligence: Proximate Cause.** Determination of causation is ordinarily a matter for the trier of fact.
12. **Judgments: Appeal and Error.** When reviewing the sufficiency of the evidence to sustain a judgment, appellate courts are mindful that every controverted fact must be resolved in favor of the successful party, and such party is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
13. **Trial: Witnesses.** In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony.

14. **Negligence: Proximate Cause.** Plaintiffs are contributorily negligent if (1) they fail to protect themselves from injury, (2) their conduct concurs and cooperates with the defendant's actionable negligence, and (3) their conduct contributes to their injuries as a proximate cause.
15. **Negligence: Proof.** To entitle a defendant to judgment under the comparative negligence statutory scheme, the defendant must prove that any contributory negligence chargeable to the plaintiff is equal to or greater than the total negligence of all persons against whom recovery is sought.
16. **Trial: Negligence: Damages: Appeal and Error.** Because the purpose of comparative negligence is to allow triers of fact to compare relative negligence and to apportion damages on that basis, the determination of apportionment is solely a matter for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by credible evidence and bears a reasonable relationship to the respective elements of negligence proved at trial.
17. **Negligence: Motor Vehicles: Proximate Cause: Liability: Evidence: Damages.** Under Neb. Rev. Stat. § 60-6,273 (Reissue 2004), evidence that a person was not wearing a seatbelt is admissible only as evidence concerning the mitigation of damages and cannot be used with respect to the issue of liability or proximate cause.
18. **Negligence: Motor Vehicles: Damages.** The failure to use a seatbelt cannot be used to allocate the percentage of negligence to a party.
19. **Appeal and Error.** Errors argued but not assigned will not be considered on appeal.
20. **Trial: Expert Witnesses: Appeal and Error.** An appellate court reviews the record de novo to determine whether a trial court has abdicated its gatekeeping function.
21. **Rules of Evidence: Expert Witnesses.** When a court is faced with a decision regarding the admissibility of expert opinion evidence, the trial judge must determine at the outset, in accordance with Neb. Evid. R. 702, whether the expert is proposing to testify to (1) scientific, technical, or other specialized knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.
22. **Trial: Expert Witnesses.** A trial court adequately demonstrates that it has performed its gatekeeping duty in determining the reliability of expert testimony when the record shows (1) the court's conclusion whether the expert's opinion is admissible and (2) the reasoning the court used to reach that conclusion, specifically noting the factors bearing on reliability that the court relied on in reaching its determination.
23. **Trial: Evidence.** A trial court may not abdicate its gatekeeping duty under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), in a bench trial, but the court is afforded more flexibility in performing this function.
24. **Trial: Evidence: Damages.** Under the collateral source rule, the fact that the party seeking recovery has been wholly or partially indemnified for a loss by insurance or otherwise cannot be set up by the wrongdoer in mitigation of damages.
25. **Damages: Medical Assistance.** Social legislation benefits, including payments by Medicare and Medicaid, are excluded by the collateral source rule.
26. **Damages.** The general rule in Nebraska is that an award for future damages must be reduced to its present value.

27. **Words and Phrases.** Present value is the current worth of a certain sum of money due on a specified future date after taking interest into consideration.
28. **Damages: Appeal and Error.** An award of damages may be set aside as inadequate when, and not unless, it is so inadequate as to be the result of passion, prejudice, mistake, or some other means not apparent in the record.
29. **Damages.** If an award of damages shocks the conscience, it necessarily follows that the award was the result of passion, prejudice, mistake, or some other means not apparent in the record.
30. _____. There is no mathematical formula for the translation of pain and suffering and permanent disability into terms of dollars and cents.

Appeal from the District Court for Colfax County: MARY C. GILBRIDE, Judge. Affirmed in part, and in part reversed and remanded with directions.

Jon Bruning, Attorney General, Michele M. Lewon, and Matthew F. Gaffey for appellant.

Douglas J. Peterson and Joel Bacon, 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.

WRIGHT, J.

I. NATURE OF CASE

Jacob Wagner was seriously injured when the car he was driving collided with a semitrailer truck at an intersection controlled by a traffic signal. His mother, Gail Fickle, sued the State of Nebraska under the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1996). She alleged that the accident was caused by a malfunction of the traffic signal, which displayed green lights in conflicting directions. Following a bench trial, a judgment was entered against the State. The issues in this appeal are whether the State had notice of the alleged malfunction and, if so, whether the State corrected the malfunction within a reasonable time. On cross-appeal, Fickle challenges the amount of the awards for economic and noneconomic damages.

II. SCOPE OF REVIEW

[1] A district court's findings of fact in a proceeding under the State Tort Claims Act will not be set aside unless such findings

are clearly erroneous. *Hradecky v. State*, 264 Neb. 771, 652 N.W.2d 277 (2002).

[2] Whether the allegations made by a plaintiff constitute a claim under the State Tort Claims Act or whether the allegations set forth a claim that is precluded by the exemptions set forth in the act are questions of law. See, *Blitzkie v. State*, 241 Neb. 759, 491 N.W.2d 42 (1992); *Hammond v. Nemaha Cty.*, 7 Neb. App. 124, 581 N.W.2d 82 (1998). An appellate court has an obligation to reach its conclusions on these questions independent from the conclusions reached by the trial court. *Blitzkie v. State, supra*.

[3] The amount of damages awarded in a case under the State Tort Claims Act is a matter solely for the finder of fact, whose action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of damages proved at trial. *Woollen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999).

III. FACTS

Shortly after 10 p.m. on February 14, 1999, Wagner was driving a car southbound on Nebraska Highway 15 in Colfax County. At approximately the same time, a semitrailer truck owned by Metz Baking Company (Metz) was westbound on U.S. Highway 30. The two vehicles collided at the intersection of Highways 15 and 30 in Schuyler, Nebraska, which was controlled by a traffic signal. The semitrailer truck struck the driver's side of Wagner's car, and Wagner was seriously injured.

In her individual capacity and as Wagner's parent and guardian, Fickle sued the city of Schuyler, the county of Colfax, Metz, and the State. The city, the county, and Metz were dismissed from the action before trial. The record reflects that Fickle entered into settlement agreements with the city and Metz. There is no indication whether a settlement agreement or other release was reached with the county, and no such information was presented to the district court.

Fickle presented evidence that at the time of the accident, the traffic signal was displaying green lights for both southbound and westbound traffic. Evidence showed that in the 6 months preceding the accident, the city of Schuyler, the county

of Colfax, and the State had received complaints from citizens regarding conflicting green lights at the same intersection.

As a result of the accident, Wagner was in a coma for 19 days. He was subsequently transferred to a rehabilitation hospital that specialized in treating traumatic brain injuries. Wagner experienced problems with vision, respiration, blood pressure, and the ability to communicate. After 8 months of physical therapy, Wagner could communicate by blinking his eyes and vocalizing a few words.

Wagner continues to have cognitive and visual impairment and requires a wheelchair. He has significant spasticity in his arms and legs. It is unlikely that his condition will improve. Because Wagner's family found it difficult to meet his needs at home, he resides in Village Northwest Unlimited, an intermediate care facility in Sheldon, Iowa. The facility treats persons with severe brain injuries. This type of facility provides Wagner with the best chance to maintain the functioning level he achieved at the rehabilitation hospital. He will probably need to live at this or a similar facility for the remainder of his life. His life expectancy from the time of trial was approximately 40 years.

The district court concluded that the State was negligent in the operation, maintenance, inspection, and repair of the traffic signal and that this negligence proximately caused the collision in which Wagner was injured. The court found that the negligence of Wagner, the city of Schuyler, and Metz also contributed to the accident. The court assigned 10 percent of the negligence to Wagner, 10 percent to Metz, 15 percent to the city, and 65 percent to the State.

The district court found that Fickle, in her individual capacity, had incurred economic damages of \$1,013,417.01. In her representative capacity for Wagner, Fickle's economic damages were \$3.5 million, and her noneconomic damages were \$500,000. The court then took into account the percentages of negligence assigned to Wagner and the other actors and considered Fickle's settlements with Metz and the city of Schuyler. Judgment was entered against the State for economic damages in the amount of \$3,928,575.31 and noneconomic damages in the amount of \$325,000.

The State appealed, and Fickle has cross-appealed. Additional facts will be set forth below as they are relevant for analyzing the issues presented.

IV. ASSIGNMENTS OF ERROR

The State claims, rephrased, that the district court erred (1) in denying the State immunity from liability under § 81-8,219, (2) in finding that the State was liable for Wagner's injuries, and (3) in permitting Fickle's expert to testify at trial.

On cross-appeal, Fickle claims that the district court's awards for economic and noneconomic damages were inadequate.

V. ANALYSIS

1. STATE'S APPEAL

(a) Question of Sovereign Immunity

The first question is whether this action against the State was precluded by exemptions set forth in the State Tort Claims Act. At all times relevant to this case, the applicable statute provided:

The State Tort Claims Act shall not apply to:

.....

(9) Any claim arising out of the malfunction, destruction, or unauthorized removal of any traffic or road sign, signal, or warning device unless it is not corrected by the governmental entity responsible within a reasonable time after actual or constructive notice of such malfunction, destruction, or removal.

§ 81-8,219.

Under this provision, the State is immune from liability against allegations of a malfunctioning traffic signal unless the malfunction was not corrected by the State within a reasonable time after it received actual or constructive notice of the problem. Whether the allegations made by a plaintiff present a claim that is precluded by exemptions set forth in the State Tort Claims Act is a question of law. See, *Blitzkie v. State*, 241 Neb. 759, 491 N.W.2d 42 (1992); *Hammond v. Nemaha Cty.*, 7 Neb. App. 124, 581 N.W.2d 82 (1998). An appellate court has an obligation to reach its conclusion on this question independent from the conclusion reached by the trial court. *Blitzkie v. State*,

supra. To determine whether Fickle's action was precluded by the traffic-signal exemption in the State Tort Claims Act, the district court had to determine that the State had notice of a malfunction in the traffic signal but did not correct the malfunction within a reasonable time. On appeal under the State Tort Claims Act, the findings of the trial court will not be disturbed unless clearly wrong. *Blitzkie v. State, supra*.

(i) *Notice of Signal Malfunction*

We first consider whether the State had actual or constructive notice that the traffic signal had malfunctioned. The State argues it had no notice of a malfunction on February 14, 1999, the date of the accident. The State claims it was contacted only twice about conflicting green lights at the intersection in the months preceding the accident. Fickle asserts that the State received several complaints concerning the malfunction of the traffic signal before and immediately after the accident.

Evidence presented at trial showed that the State was notified of conflicting green lights at the intersection of Highways 15 and 30. Joseph Sobota reported conflicting green lights from the traffic signal on September 22, 1998. Sobota's call was confirmed by Robert Simard, a traffic signal engineer for the State. The telephone log of the Colfax County Sheriff's Department recorded that on October 16, a person named "Chrissy" reported that the traffic signal was displaying red lights for westbound and southbound traffic and green lights for eastbound and northbound traffic. The log reflects that the sheriff's department notified the State about the signal problem. This call was also confirmed by Simard at trial.

Brenda Rist, a dispatcher for the sheriff's department and a manager for the Gas 'N Shop located on the corner of Highways 15 and 30, testified that on various occasions in 1998 and 1999, she had observed that the lights on the traffic signal in question were all red or all green. She observed conflicting green lights numerous times before the accident occurred. She contacted the State once or twice before the accident.

Eugene Sindelar traveled through the intersection on a daily basis. Before the accident, he observed many times that the lights on the traffic signal were green in conflicting directions.

On September 5, 1998, he was traveling westbound on Highway 30 and as he approached the intersection, he noticed a semi-trailer truck coming from the south on Highway 15 that was not going to stop. Sindelar applied the brakes of his vehicle in order to miss the truck, and after he stopped, he noticed that the traffic signal was green for both directions. Sindelar testified that he contacted the city several times and the State once about the recurring problem. He was told by the State that it was aware of the situation and that it would be taken care of.

Thomas McCoy, a district maintenance superintendent for Nebraska's Department of Roads, testified he remembered having a telephone conversation before February 14, 1999, in which he was told about conflicting green signals at the intersection. He had no record of whether anyone from the State responded to that complaint, and he admitted that the State had received other calls from people complaining about conflicting green lights displayed at the intersection. A coordinated investigation to repair the signal was not initiated because the lights appeared to work properly each time an employee of the State observed the traffic signal.

Warren Racely, a highway maintenance superintendent with the State, testified that he remembered seeing a notice about conflicting green lights at the intersection in the latter part of 1998 or early 1999. Keith Rabe, an electronics technician for the State, was responsible for complaint calls and troubleshooting for malfunctioning traffic signals. He testified to having a discussion with someone before February 14, 1999, regarding conflicting green lights at the intersection in question.

The State asserts there was no evidence that it had either actual or constructive notice of a conflicting green signal at the Schuyler intersection on February 14, 1999. The State claims that no defect to the signal was apparent on February 14 and that no person or agency informed the Department of Roads that conflicting green signals were being displayed on that date. The State contends it had no actual notice of the malfunction on that date and therefore had no opportunity to respond to or correct the malfunction.

The State contends it was contacted only twice regarding conflicting lights at the intersection and that those calls were

made 4 to 5 months before the accident. The State claims that each time a report of conflicting green lights was received, no defect was found in the signal or any of its components. Maintenance on the signal was last performed before the accident on January 12, 1999, and the signal was working properly. The State emphasizes that no malfunctions were reported between January 12 and the date of the accident and argues that the complaints 4 to 5 months before the accident were too remote in time to support an allegation of conflicting green lights on February 14. Therefore, the State argues that it did not have notice of any malfunction of the signal and that the district court should have found the State immune from liability under § 81-8,219(9).

Whether the State had notice of the malfunction of the traffic signal on February 14, 1999, does not exempt the State from liability. It is clear the State had notice on numerous occasions prior to that date that the traffic signal in question was malfunctioning.

(ii) Correction of Signal Malfunction

Once it is found that the State had notice of the malfunction, the question becomes whether the malfunction was corrected within a reasonable time. The State maintains it made reasonable efforts to ascertain whether the traffic signal was malfunctioning but that the signal did not display conflicting green lights whenever State employees checked on the problem. The State had corrected other problems with the traffic signal during the 6 months preceding the accident. For example, the conflict monitor was replaced in August 1998 due to a DC-voltage failure. A conflict monitor is a component in a traffic-signal cabinet that detects improper electrical current sent between the other components. The traffic-signal cabinet at the intersection was designed so that if conflicting current was detected by the conflict monitor, the traffic signal was put into "flash" mode. The State also corrected a problem with a defective loop detector that caused the red lights to stay on too long.

McCoy, a district maintenance superintendent for the Department of Roads, testified that someone from the State checked the signal in response to all complaints. He did not

believe that the lights could have been green and conflicting at the time of the accident because each time the State responded to a complaint, “everything was functioning normally.” Racely, a highway maintenance superintendent, testified that the State had checked the traffic signal after receiving complaints. He did not have a key to access the traffic-signal cabinet, but he visually inspected the signal after complaints and found it to be working properly. This evidence establishes that the State attempted to fix the malfunctioning traffic signal.

Fickle presented numerous eyewitness reports of conflicting green lights before, during, and after the accident. Several of such instances have been detailed previously.

Two eyewitnesses testified that the traffic signal was displaying conflicting green lights the evening of February 14, 1999, before the accident. John Gardner, Jr., who lived in Schuyler, stated that he traveled through the intersection between 5 and 6 p.m. As he approached and entered the intersection from the west, his light was green. After entering the intersection, he nearly collided with another car coming from the south. After Gardner stopped, he could see that both lights were green.

Rist had driven to her job at the Gas 'N Shop that evening between 9:30 and 9:45 p.m. When she arrived at the store, she observed that the traffic signal was displaying green in all directions. She reported the situation to police officers who were in the store around 10 p.m. About the same time, Gardner was seated at a table in the Gas 'N Shop and was looking out the window. He could see both the westbound light for Highway 30 and the southbound light for Highway 15. He saw the collision and noticed that both lights were green at the time.

Michelle Egr testified that between 6 and 6:30 a.m. the day after the accident, she approached the intersection from the south and could see that the light was green, but she also saw eastbound and westbound vehicles on Highway 30 traveling through the intersection. She slowed down because she “obviously knew that there was something not right.” By the time Egr arrived at the intersection, her light had changed to red, and she stopped. When her northbound light again turned green, Egr was “shocked” to find that an eastbound semitrailer truck passed through the intersection. She looked at the traffic signal

and discovered that both the northbound and eastbound lights were green.

The State was not immune from liability under § 81-8,219(9) if it did not correct the malfunction of the traffic signal within a reasonable time after having actual or constructive notice of such malfunction. An attempt to correct the malfunction does not exempt the State from liability. The evidence and the reasonable inferences therefrom establish that the State failed to repair the defective traffic signal.

The district court was not clearly wrong in its implicit finding that the State had notice of the malfunctioning traffic signal but did not correct the malfunction within a reasonable time.

(b) Liability of State

[4] The State next claims the district court erred in holding the State liable for the injuries sustained by Wagner on February 14, 1999. In order to recover in a negligence action brought under the State Tort Claims Act, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages. *Bartunek v. State*, 266 Neb. 454, 666 N.W.2d 435 (2003).

(i) Duty

[5,6] The threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff. *Spear T Ranch v. Nebraska Dept. of Nat. Resources*, 270 Neb. 130, 699 N.W.2d 379 (2005). The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *Id.* The State does not assert that it owed no duty to Wagner with regard to the traffic signal; rather, the State contends it did not breach any duty owed.

[7-9] Concerning highways in general, the State has a duty to use reasonable and ordinary care in the construction, maintenance, and repair of its highways so that they will be reasonably safe for the traveler using them while exercising reasonable and ordinary care and prudence. See *Malolepszy v. State*, ante p. 313, 729 N.W.2d 669 (2007). Under the plain language of § 81-8,219(9), the State had a duty to correct the malfunctioning traffic signal within a reasonable time after receiving

notice of the defect. Foreseeability is a factor in establishing a defendant's duty. *Woollen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999). It was clearly foreseeable that an automobile accident would occur at an intersection where the traffic signal was showing green lights in conflicting directions.

(ii) *Breach*

Although in its order the district court did not expressly discuss duty and breach, the court found that Fickle had met the burden of proof on her negligence claim. Therefore, the court implicitly found that the State breached its duty to correct the malfunctioning traffic signal within a reasonable time after notice of such malfunction.

The State's argument that it did not breach such duty because the components of the traffic signal were regularly maintained is without merit. Although the signal's specifications may have complied with the standards in the traffic-engineering industry, sufficient evidence demonstrated that the signal malfunctioned, resulting in the accident. The State's duty was to correct the malfunctioning traffic signal within a reasonable time after receiving notice of the problem. The State failed to do so and thus breached its duty.

(iii) *Causation*

[10-12] Fickle met the burden of proof to show that the malfunctioning traffic signal was the proximate cause of the traffic accident. A proximate cause is a cause that produces a result in a natural and continuous sequence, and without which the result would not have occurred. *Baldwin v. City of Omaha*, 259 Neb. 1, 607 N.W.2d 841 (2000). Determination of causation is ordinarily a matter for the trier of fact. *Id.* When reviewing the sufficiency of the evidence to sustain a judgment, we are mindful that every controverted fact must be resolved in favor of the successful party, and such party is entitled to the benefit of every inference that can reasonably be deduced from the evidence. See *id.*

[13] The State relies on certain testimony which it claims established that the traffic signal did not malfunction at the time of the accident. Accordingly, the State argues that the traffic signal could not have proximately caused the accident. The

district court heard the witnesses, considered the evidence, and found against the State on this issue. In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Sherrod v. State*, 251 Neb. 355, 557 N.W.2d 634 (1997).

Giving Fickle, as the successful party, the benefit of every inference that can reasonably be deduced from the evidence, the evidence is sufficient to support the district court's finding that the negligence of the State was the proximate cause of the accident and Wagner's resulting injuries. The court was not clearly wrong in so finding.

(iv) Comparative Negligence

The State argues that its negligence did not proximately cause Wagner's injuries because the negligence of Wagner and the dismissed parties combined to proximately cause the accident. Thus, the State contends the district court erred in allocating only 10 percent of the negligence to Wagner, 10 percent to Metz, and 15 percent to the city of Schuyler.

The State argues that credible evidence was presented to support an apportionment of more than 10 percent of the negligence to Wagner. The State relies on cases in which this court has declared that drivers must "maintain a proper lookout and have the duty to see what is in plain sight." See, e.g., *Kimberling v. Omaha Public Power Dist.*, 225 Neb. 744, 746, 408 N.W.2d 269, 271 (1987). According to the State, Wagner's negligence was at least 50 percent because he failed to keep a proper lookout at the intersection and entered the intersection when it was clearly unsafe to enter—i.e., when the semitrailer truck was crossing the intersection.

The State also argues that parties dismissed from the action were negligent and that their negligent acts, in addition to Wagner's, represented the total proximate cause of the accident. Evidence showed that the Colfax County Sheriff's Department and the Schuyler Police Department had received complaints about the traffic signal's displaying conflicting green lights, but they failed to report all the complaints to the State. The court found that the negligence of Metz and the city

(both dismissed from the action based on settlements) contributed to the accident.

Evidence was presented by Fickle indicating that the conflicting green lights, attributed to the State's negligence, played a greater role in the accident than did other negligent acts. Conflicting green lights at an intersection create a much more dangerous condition than if the signal displays all red lights. Ronald Hensen, a civil engineer who specialized in traffic engineering, testified that a situation in which green lights are displayed in conflicting directions is "clearly the most egregious possibility . . . for a failure of intersection traffic control." He explained that when an intersection is controlled by a traffic signal, the responsibility for "who yields to who[m]" is taken away from the drivers and it is assigned to the equipment. One driver assumes that if he or she has a green light, the other does not. When two lights display green in conflicting directions, it "sets up a situation where both drivers believe they are assigned the right of way."

[14,15] The district court concluded that Wagner was negligent and that in relation to the negligence of the other actors, his negligence was 10 percent responsible for the accident. The judgment against the State for damages was reduced accordingly. It is well settled that plaintiffs are contributorily negligent if (1) they fail to protect themselves from injury, (2) their conduct concurs and cooperates with the defendant's actionable negligence, and (3) their conduct contributes to their injuries as a proximate cause. *Baldwin v. City of Omaha*, 259 Neb. 1, 607 N.W.2d 841 (2000). To entitle a defendant to judgment under the comparative negligence statutory scheme, the defendant must prove that any contributory negligence chargeable to the plaintiff is equal to or greater than the total negligence of all persons against whom recovery is sought. *Id.* See Neb. Rev. Stat. § 25-21,185.09 (Reissue 1995).

[16] Because the purpose of comparative negligence is to allow triers of fact to compare relative negligence and to apportion damages on that basis, the determination of apportionment is solely a matter for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by credible evidence and bears a reasonable relationship to

the respective elements of negligence proved at trial. *Baldwin v. City of Omaha, supra*. We conclude that the district court's apportionment of damages was supported by credible evidence and bore a reasonable relationship to the negligence proved at trial.

(v) *Failure to Use Seatbelt*

[17-19] As part of its argument that the district court improperly allocated negligence in determining causation, the State asserts that the damages should have been reduced by 5 percent because Wagner allegedly was not wearing a seatbelt at the time of the accident. Under Neb. Rev. Stat. § 60-6,273 (Reissue 2004), evidence that a person was not wearing a seatbelt is admissible only as evidence concerning the mitigation of damages and cannot be used with respect to the issue of liability or proximate cause. The failure to use a seatbelt cannot be used to allocate the percentage of negligence to a party. And the State did not assign as error the district court's award of damages. Errors argued but not assigned will not be considered on appeal. *County of Sarpy v. City of Gretna, ante* p. 92, 727 N.W.2d 690 (2007).

(vi) *Damages*

No real dispute exists as to whether Fickle sufficiently proved damages. In her cross-appeal, Fickle challenges the *amount* of damages awarded, but that issue will be addressed later in this opinion.

(c) *Admission of Expert Testimony*

[20] The State next asserts that the district court abused its discretion in permitting Fickle's expert, Hensen, to testify. An appellate court reviews the record de novo to determine whether a trial court has abdicated its gatekeeping function. *Zimmerman v. Powell*, 268 Neb. 422, 684 N.W.2d 1 (2004).

(i) *Procedural Background Involving Fickle's Expert*

Hensen, a civil engineer specializing in traffic engineering, testified as an expert for Fickle. During the discovery phase of this litigation, Hensen opined that the conflicting green lights could have been caused by a low-voltage situation. At trial, the State filed a motion to prevent Hensen from testifying about

certain subjects, and a separate hearing was held. The State asked the district court to preclude Hensen from testifying that (1) a voltage failure occurred, (2) low voltage caused the traffic signal to display conflicting green lights, (3) the signal cabinet should have been replaced, (4) the State and the city of Schuyler lacked a coordinated policy to address problems with the traffic signal, and (5) the State had a duty to correct the problem of conflicting green lights. The court concluded that Fickle could adduce testimony from Hensen but noted that its ruling did not preclude the State from objecting to Hensen's testimony as deemed necessary.

(ii) Relevant Law Governing Expert Testimony

[21] When a court is faced with a decision regarding the admissibility of expert opinion evidence, the trial judge must determine at the outset, in accordance with Neb. Evid. R. 702, whether the expert is proposing to testify to (1) scientific, technical, or other specialized knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001). This entails a preliminary assessment to determine 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.*

[22] A trial court adequately demonstrates that it has performed its gatekeeping duty in determining the reliability of expert testimony when the record shows (1) the court's conclusion whether the expert's opinion is admissible and (2) the reasoning the court used to reach that conclusion, specifically noting the factors bearing on reliability that the court relied on in reaching its determination. *Zimmerman v. Powell, supra*.

(iii) Trial Testimony by Fickle's Expert

We note that Hensen did not testify at trial with regard to some of the subjects that constitute the basis for the State's assigned error. The State argues that Hensen should have been precluded at trial from testifying about the cause of the alleged conflicting green lights and about insufficient coordination between the City of Schuyler and the State. But no such testimony was elicited from Hensen at trial.

Hensen testified about the adequacy of the State's response to the complaints it received with regard to the traffic signal. He also testified concerning whether the State should have replaced the signal cabinet. Hensen's testimony was based on his knowledge and experience in traffic engineering. He opined that the State's response to the complaints was inadequate. Regarding the keeping of records pertaining to such complaints, Hensen also relied on a publication by the Institute of Transportation Engineers. The State has not taken issue with the publication. Hensen testified as to his extensive knowledge and experience in traffic engineering. Since 1979, Hensen had worked full time as a consultant to various public agencies, including state road departments and municipalities.

(iv) *District Court's Gatekeeping Duty*

The State argues that the district court did not make adequate findings on the record with regard to the admissibility of Hensen's testimony. At a hearing concerning Hensen's proposed testimony, the court did not specifically and expressly make findings. However, the record shows the court concluded that Hensen's testimony was admissible, see *Zimmerman v. Powell*, 268 Neb. 422, 684 N.W.2d 1 (2004), and the court left open the opportunity for the State to object at trial. During trial, the court permitted Hensen to testify that the signal cabinet should have been replaced. The record indicates, in accordance with *Zimmerman v. Powell*, that the court expressed its reason for allowing Hensen to testify and the factor considered by the court bearing on the reliability of his testimony: Hensen's testimony was based on his expertise, and he was "entitled to rely on his experience in the field to make the recommendation that the cabinet be pulled."

[23] A trial court may not abdicate its gatekeeping duty under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), in a bench trial, but the court is afforded more flexibility in performing this function. See, generally, *Seaboard Lumber Co. v. U.S.*, 308 F.3d 1283 (Fed. Cir. 2002) (holding that while concerns underlying *Daubert* requirements are of lesser import in bench

trials, *Daubert* standards must nevertheless be met); *City of Owensboro v. Adams*, 136 S.W.3d 446 (Ky. 2004) (noting that *Daubert* is applied in procedurally different manner in bench trial in that trial court often admits evidence first and then disregards it upon deciding it is unreliable); *USGen New England v. Town of Rockingham*, 177 Vt. 193, 862 A.2d 269 (2004) (holding that admissibility standards of *Daubert* are required in bench trial but in more relaxed manner). In determining whether an expert's testimony is reliable, a trial court necessarily must first hear the testimony. And we presume that a trial court considers only competent and relevant evidence in rendering its decision. See *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005).

Based on a de novo review of the record, we conclude that the district court did not err in admitting Hensen's testimony. When the trial court has not abdicated its gatekeeping function, an appellate court reviews the trial court's decision to admit or exclude the evidence for an abuse of discretion. *Zimmerman v. Powell*, *supra*. The district court did not abuse its discretion in permitting Fickle's expert to testify.

For the reasons stated above, we conclude that the State's appeal is without merit and affirm the district court's judgment holding the State liable in this matter under the State Tort Claims Act. We now turn to the cross-appeal.

2. FICKLE'S CROSS-APPEAL

The district court found that Fickle, in her individual capacity, had incurred economic damages of \$1,013,417.01. The court found that in her representative capacity for Wagner, Fickle had sustained economic damages of \$3.5 million and noneconomic damages for pain and suffering in the amount of \$500,000. The issue is whether these sums were adequate.

The amount of damages awarded in a case under the State Tort Claims Act is a matter solely for the finder of fact, whose action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of damages proved at trial. *Woolen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999). We must determine whether the award bears a reasonable relationship to the damages proved at trial.

(a) Future Economic Damages

Fickle asserts that the amount of future economic damages awarded was inadequate. At the time of trial, Wagner was 20 years old. George Wolcott, a neurologist, testified that Wagner could expect to live “into his 60’s.” The evidence established that Wagner’s life expectancy from the time of trial was approximately 40 years. Fickle claims that Wagner’s future medical care and loss of wages require a much greater award than was given by the district court.

(i) *Future Medical Care*

The evidence established that Wagner’s future medical expenses (including the cost of residential care at Village Northwest Unlimited) would be between \$193,610 and \$198,355 per year. This range did not reflect inflation or future increases in cost. These amounts were shown in a “Life Care Plan” compiled by Robin Welch-Shaver. Welch-Shaver has a bachelor of science degree in nursing and is a certified life care planner. The plan was formulated using information from Fickle, Wagner, the providers at Village Northwest Unlimited, and Drs. Wolcott, Lester Sach, Sarah Zoelle, and Lyal Leibrock.

The life care plan considered that Wagner would remain a resident of Village Northwest Unlimited, which provided appropriate treatment, including 24-hour nursing care, physical and occupational therapy, cognitive-skills training, and other services. The plan also was based upon the fact that Wagner would always need a residential setting in which he would receive services similar to those he was receiving from Village Northwest Unlimited. The cost associated with Wagner’s need for this residential setting was \$462 per day, which equated to an annual cost of \$168,630.

Evidence at trial suggested that Wagner had been receiving Medicaid payments and that Village Northwest Unlimited was charging him at the Medicaid rate, which was lower than the rate paid by private parties. The State argues that the lower Medicaid rate should have been considered in calculating damages instead of the private-party rate. This argument has no merit.

[24,25] The private-party rate, not the Medicaid rate, is the proper rate to use in calculating Wagner's future medical expenses. Under the collateral source rule, the fact that the party seeking recovery has been wholly or partially indemnified for a loss by insurance or otherwise cannot be set up by the wrongdoer in mitigation of damages. *Mahoney v. Nebraska Methodist Hosp.*, 251 Neb. 841, 560 N.W.2d 451 (1997). Social legislation benefits, including payments by Medicare and Medicaid, are excluded by the collateral source rule. See, *Bynum v. Magno*, 106 Haw. 81, 101 P.3d 1149 (2004) (holding that collateral source rule prohibited reducing patient's damages award to reflect discounted Medicare and Medicaid payments); Restatement (Second) of Torts § 920A, comment c. (1979). Moreover, once Fickle receives the judgment awarded in this case, Wagner may no longer be eligible for Medicaid (or Village Northwest Unlimited's Medicaid rate), because eligibility standards take into account the resources available to a Medicaid applicant or recipient. See *Wilson v. Nebraska Dept. of Health & Human Servs.*, 272 Neb. 131, 718 N.W.2d 544 (2006).

The State also claims that certain medical expenses should not be included because they were controverted at trial. For instance, the State points out that Wagner was not required to take the following medications and supplements as a result of the accident: "Aterol," multivitamins, and calcium supplements. The State also asserts that the cost of a motorized wheelchair should not be included as a future medical expense. The State further claims that the standard cost of a minivan should be deducted from the value of a minivan with customization; however, Welch-Shaver testified that it is not a common practice to deduct the base cost of a minivan without modification. Disregarding any adjusted figures for the modified van, we summarize that the State disputes various future medical expenses in the amount of \$203,480 and argues that this amount should not be considered in the damages award.

When reviewing the sufficiency of the evidence to sustain a judgment, we are mindful that every controverted fact must be resolved in favor of the successful party, and such party is entitled to the benefit of every inference that can reasonably

be deduced from the evidence. See *Baldwin v. City of Omaha*, 259 Neb. 1, 607 N.W.2d 841 (2000). Giving Fickle the benefit of every inference that can reasonably be deduced from the evidence, Wagner's future medical expenses without inflation are between \$7,744,400 and \$7,934,200.

(ii) *Future Lost Wages*

Evidence showed that Wagner was unable to earn a living in the labor market due to his injuries. At trial, the State contested whether Wagner would have been a skilled laborer. At the time of the accident, Wagner was a high school student who had difficulties in school and whose academic performance was not stellar. He planned to obtain a diploma through GED and pursue training through Job Corps to acquire a skill. Fickle argues that the evidence presented indicated that even if Wagner did not complete vocational training or obtain a diploma through GED, he could have expected to make at least \$8 per hour as an unskilled laborer. A laborer working at this rate would earn a minimum of \$16,000 per year. Over a period of 40 years, Wagner's earnings would amount to at least \$640,000.

The State argues that Wagner's potential earnings should have been based upon the minimum wage. But the State fails to direct us to evidence in the record indicating that minimum wage was all that Wagner could have expected to earn. Therefore, the record supports the fact that Wagner could have expected to earn at least \$640,000.

(iii) *Total Future Economic Damages*

Giving Fickle the benefit of every inference that can reasonably be deduced from the evidence, the evidence indicated that future medical expenses for Wagner would be between \$7,744,400 and \$7,934,200 and that future lost wages would be a minimum of \$640,000. Thus, without consideration for inflation, the evidence presented at trial established Wagner's future economic damages would be between \$8,384,400 and \$8,574,200.

(iv) *Reduction to Present Value*

[26,27] The general rule in Nebraska is that an award for future damages must be reduced to its present value. *Cassio v.*

Creighton University, 233 Neb. 160, 446 N.W.2d 704 (1989). Present value is the current worth of a certain sum of money due on a specified future date after taking interest into consideration. *Thiltges v. Thiltges*, 247 Neb. 371, 527 N.W.2d 853 (1995).

Present value must be determined because the money awarded can be invested and earn interest. A present award should also consider the fact that inflation will increase the expenses incurred by the plaintiff. Although the plaintiff can earn interest, the value of the dollar will decline because of inflation. See, generally, G. Michael Fenner, *About Present Cash Value*, 18 *Creighton L. Rev.* 305 (1985) (discussing various approaches for determining present value). These factors are left to the judgment of the trial court but should, nevertheless, be considered in the amount of the award.

(v) *Conclusion Regarding Future Economic Damages*

We conclude that the evidence supports a finding that Wagner will suffer a much greater amount of future economic damages than was awarded by the district court. Therefore, the award for economic damages did not bear a reasonable relationship to the damages proved at trial.

(b) *Noneconomic Damages*

[28] The district court found noneconomic damages in the amount of \$500,000. On appeal, the fact finder's determination of damages is given great deference. *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006). An award of damages may be set aside as inadequate when, and not unless, it is so inadequate as to be the result of passion, prejudice, mistake, or some other means not apparent in the record. *Brandon v. County of Richardson*, 264 Neb. 1020, 653 N.W.2d 829 (2002).

Wagner sustained a traumatic brain injury. He was comatose for 19 days. He subsequently was transferred to a hospital that specialized in treating such injuries. He was fed by a tube and had difficulty with his vision, respiration, and blood pressure. He received 8 months of physical therapy to reduce the spasticity in his arms and legs and had a "Baclofen pump" surgically implanted in his stomach to deliver medication to relieve

the spasticity. He has ongoing problems with spasticity in his arms and legs.

Wagner has received speech and psychological therapy. Initially, he was able to communicate only by blinking. At the time of trial, he could vocalize a few words. He continues to have cognitive and visual impairment, and his medical progress has reached a plateau. He requires a wheelchair and can speak and communicate only at a modest level. These impairments are likely permanent. Evidence showed that it will be necessary for Wagner to remain in an intermediate-care facility for the remainder of his life, and he will be limited in his abilities to complete simple tasks.

[29] Wagner's injuries were catastrophic and permanent, and the award of \$500,000 for noneconomic damages does not fairly and reasonably compensate him for his pain and suffering. If an award of damages shocks the conscience, it necessarily follows that the award was the result of passion, prejudice, mistake, or some other means not apparent in the record. *Id.*

[30] There is no mathematical formula for the translation of pain and suffering and permanent disability into terms of dollars and cents. *Schaefer v. McCreary*, 216 Neb. 739, 345 N.W.2d 821 (1984). It is a matter left largely to the discretion of the fact finder, which saw the witnesses and heard the evidence. See *id.* Here, the award of noneconomic damages did not bear a reasonable relationship to the injuries Wagner sustained and was the result of a mistake or an error by the court.

VI. CONCLUSION

The State's appeal is without merit. As to the cross-appeal, the amount of the award for economic damages was significantly lower than the amount shown by the evidence. The awards for economic and noneconomic damages did not bear a reasonable relationship to the elements of the damages proved.

We therefore affirm the judgment of liability against the State, but we reverse the judgment as to damages. The cause is remanded with directions that the district court award economic and noneconomic damages consistent with this opinion.

Cite as 273 Neb. 1013

We direct the court to our interpretation of Neb. Rev. Stat. § 25-21,185.11 (Reissue 1995) in *Tadros v. City of Omaha*, ante p. 935, 735 N.W.2d 377 (2007).

AFFIRMED IN PART, AND IN PART REVERSED
AND REMANDED WITH DIRECTIONS.

GERALD JACKSON, APPELLEE, v. BROTHERHOOD'S RELIEF
AND COMPENSATION FUND, APPELLANT.

734 N.W.2d 739

Filed July 20, 2007. No. S-06-177.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
2. **Rules of Evidence: Appeal and Error.** 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.
3. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
4. **Rules of Evidence: Expert Witnesses.** Under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995), a witness can testify concerning scientific, technical, or other specialized knowledge only if the witness is qualified as an expert.
5. **Evidence.** Opinion evidence which is unsupported by appropriate foundation is not admissible.
6. **Trial: Evidence: Appeal and Error.** To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded.
7. **Testimony: Evidence: Appeal and Error.** Testimony objected to which is substantially similar to evidence admitted without objection results in no prejudicial error.
8. **Trial: Evidence: Presumptions: Appeal and Error.** Error in the admission of evidence is presumed to be prejudicial when the evidence admitted may have influenced the verdict or affected unfavorably the party against whom it was admitted.
9. **Trial: Evidence: Appeal and Error.** Where it cannot be gleaned from the record that evidence wrongfully admitted did not affect the result of the trial unfavorably to the party against whom such evidence was admitted, reception of that evidence must be considered prejudicial error.
10. **Directed Verdict: Evidence.** The party against whom the verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If

there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law.

11. **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 Box Butte County: BRIAN SILVERMAN, Judge. Reversed and vacated, and cause remanded for a new trial.

Renee Eveland, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellant.

Andrew W. Snyder, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, for appellee.

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

WRIGHT, J.

I. NATURE OF CASE

Gerald Jackson sued Brotherhood's Relief and Compensation Fund (the Fund), alleging that the Fund breached its agreement to pay him "Held Out of Service" benefits in the event he was suspended by his employer. Following a trial, a jury found in favor of Jackson. The district court awarded attorney fees and costs to Jackson in addition to the damages found by the jury. The Fund appealed.

II. SCOPE OF REVIEW

[1] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *In re Trust of Rosenberg*, ante p. 59, 727 N.W.2d 430 (2007).

[2] 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. *Worth v. Kolbeck*, ante p. 163, 728 N.W.2d 282 (2007).

[3] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Roth v. Wiese*, 271 Neb. 750, 716 N.W.2d 419 (2006).

III. FACTS

1. JACKSON DOES NOT PROVIDE URINE SAMPLE FOR RANDOM DRUG TEST

Jackson was employed as an engineer for Burlington Northern Santa Fe Railway (BNSF). When he reported to work on January 2, 2003, he was asked to provide a urine sample for a random drug test. Jackson had successfully performed similar tests in the past, but on this day, he stated that he could not urinate. Over a 3-hour period, Jackson neither provided nor attempted to provide a urine sample. He said he had urinated at home before leaving for work and that he lacked "the urge to go." He also said he had eaten a large meal just before work, and he refused to drink any liquid because he claimed he would suffer from indigestion and heartburn if he drank anything.

Because Jackson did not provide a urine sample, he was "pulled out of service" by BNSF. A formal investigation was initiated by the railway. BNSF advised Jackson that he would be "withheld from service pending results of this investigation."

During a BNSF investigative hearing held March 19, 2003, Jackson asserted several reasons why he did not furnish the required urine sample. He said he had urinated 15 minutes before leaving for work. He said he was taking a prescription drug called Effexor, and he claimed that a side effect of the drug was difficulty in urinating. Jackson also claimed he had been diagnosed with prostatitis, which he said could cause a person to have trouble urinating. He claimed he had been afflicted with diarrhea for several days before the drug test and that this illness could have caused dehydration. Jackson further claimed he had eaten a large meal at home before work and thus felt too full to drink liquids to help him urinate. He stated that drinking liquids after such a large meal would have given him indigestion.

Following the BNSF investigation, Jackson was suspended for 9 months for failing to provide a urine sample without a valid medical reason, in violation of the BNSF alcohol and drug policy.

2. JACKSON GETS NO RELIEF FROM FUND

In consideration for the payment of dues, the Fund provides benefits to railroad workers who are employed in hazardous

occupations. A member is compensated when he or she has been held out of service for disciplinary reasons if the suspension was not the result of an intentional rule violation. A member of the Fund must be a member of the local railroad union. The Fund bases its determination of benefits eligibility upon the results of the grievance process provided under the member's collective bargaining agreement. The terms of the agreement between the Fund and a member are contained in the Fund's "constitution," which governs the claims process.

Jackson was a member of the Fund on January 2, 2003. In accordance with the agreement, Jackson underwent a formal investigation by his employer, BNSF, and was represented at the BNSF hearing by the union. He timely submitted a claim to the Fund for benefits, along with copies of the transcript and exhibits from the BNSF investigative hearing.

The Fund denied Jackson's claim because his suspension was based upon the "refusal to perform any duty or service for the employer" or the "failure to take . . . or pass any examination or test required by the employer." The Fund also based its denial of benefits to Jackson on the definition of the term "'Held Out of Service'" as set forth in the Fund's constitution. A member could claim benefits if he had been permanently or temporarily

relieved by his employer from the performance of his said usual duties after formal investigation, at which said employee was properly represented by a representative of the local grievance committee or other employee, as discipline for an offense or offenses, *not, however, because of any willful or intentional violation or infraction of any order . . . rule . . . or regulation . . . of his employer* (Emphasis supplied.)

3. JACKSON SUES FUND AND PREVAILS AT TRIAL

Jackson filed a complaint against the Fund in the district court for Box Butte County. He alleged that the Fund had breached its contract with him by failing to compensate him while he was suspended. Jackson sought damages and attorney fees and costs.

A jury trial was held in July 2005. Evidence was adduced concerning Jackson's failure to provide a urine sample for the

BNSF drug test and the Fund's denial of benefits for Jackson's suspension from work. Over the Fund's objection on grounds of hearsay, insufficient foundation, and relevance, exhibits 17 and 18 were received into evidence with no limiting instruction. Exhibit 17 contained the exhibits from the BNSF investigative hearing. Exhibit 18 was a complete transcript of the testimony from that hearing.

The jury found in Jackson's favor and awarded him \$53,010, the amount of damages to which the parties had stipulated. The district court sustained Jackson's motion for attorney fees and costs.

The Fund's motion for new trial was overruled, and the Fund appealed. We transferred the appeal to our docket in accordance with our statutory authority to regulate the case-loads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

IV. ASSIGNMENTS OF ERROR

The Fund claims, restated, reordered, and summarized, that the district court erred (1) in admitting into evidence exhibits 17 and 18, (2) in overruling the Fund's motion for a new trial, (3) in overruling the Fund's motion for a directed verdict, and (4) in awarding attorney fees and costs to Jackson.

V. ANALYSIS

1. ADMISSION OF EXHIBITS 17 AND 18

In proceedings in which the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. *In re Trust of Rosenberg*, ante p. 59, 727 N.W.2d 430 (2007). Preliminary questions concerning the admissibility of evidence are determined by the trial judge. See Neb. Evid. R. 104, Neb. Rev. Stat. § 27-104 (Reissue 1995). When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion. *Worth v. Kolbeck*, ante p. 163, 728 N.W.2d 282 (2007).

Over the Fund's objections, exhibits 17 and 18 were received into evidence. Exhibit 17 contained the exhibits submitted at

the BNSF investigative hearing. Exhibit 18 was a transcript of that hearing. The Fund objected to the admission of these exhibits on the grounds of hearsay, insufficient foundation, and relevance.

(a) Alleged Medical Reasons for Not
Providing Urine Sample

During the BNSF investigative hearing, Jackson claimed he was unable to urinate for the random drug test due to medical reasons. He testified that he had been diagnosed with prostatitis, which he said can cause a person to experience difficulty in urinating. He based this claim on information gathered from two sources—a book entitled “Prescription for Nutritional Healing,” by Phyllis A. Balch and James F. Balch, and a medical encyclopedia. Jackson read aloud from sections in these sources addressing prostatitis.

Jackson further described difficulty in urinating as a side effect of a prescription medication called Effexor, which he was taking at the time of the BNSF drug test. Jackson stated that Effexor “probably had the biggest part of my not being able to urinate.” Jackson relied upon and read aloud from the prescribing information for Effexor published by the drug’s manufacturer, which listed dehydration and impairment of urination as side effects of the drug. Jackson maintained that a correlation existed between the use of Effexor and his inability to provide a urine sample “because of all the [drug’s] side effects.” When Jackson attempted to testify about these side effects at trial, however, the district court sustained the Fund’s objection on foundation.

Jackson also claimed in the BNSF hearing that he did not drink liquids to help him urinate during the BNSF drug test because drinking liquids would have given him indigestion. He said he had eaten a large meal before work and opined that “[d]rinking liquids with meals contributes to indigestion because it dilutes the enzymes needed” for digestion. This claim was based on the nutrition book described above, and Jackson read aloud from a section about indigestion.

The information Jackson submitted at the BNSF hearing, including the prescribing information for Effexor and the excerpts from the nutrition book and medical encyclopedia, were

all part of exhibit 17, which was admitted at trial. Jackson's entire testimony from the hearing, during which he testified about and read from those materials, was received into evidence at trial as exhibit 18, the transcript from the hearing.

[4,5] Under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995), a witness can testify concerning scientific, technical, or other specialized knowledge only if the witness is qualified as an expert. *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004). Opinion evidence which is unsupported by appropriate foundation is not admissible. *Stukenholtz v. Brown*, 267 Neb. 986, 679 N.W.2d 222 (2004).

The record provides no indication that Jackson was qualified to testify as an expert about the symptoms of prostatitis, the causes of indigestion, or the side effects of the drug Effexor. However, his opinion that each of these items contributed to his alleged inability to provide a urine sample was presented to the jury at trial in the form of exhibit 18, the hearing transcript. Furthermore, no foundation was laid at trial for the prescribing information and medical texts from which Jackson read aloud and on which he based his testimony at the BNSF hearing. This information was placed before the jury through exhibit 17.

In *Stang-Starr v. Byington*, 248 Neb. 103, 532 N.W.2d 26 (1995), we stated that standard medical texts and other authorities may be used for the purpose of impeaching, contradicting, or discrediting a witness through cross-examination and during rebuttal testimony; however, such authorities may not be used as independent evidence of the opinions and theories advanced by the parties. Since *Stang-Starr*, Nebraska has adopted the learned-treatise hearsay exception. See 1999 Neb. Laws, L.B. 64, § 1. With such adoption, statements from certain published treatises, periodicals, or pamphlets may be admissible. See Neb. Evid. R. 803(17), Neb. Rev. Stat. § 27-803(17) (Cum. Supp. 2006). However, the foundational requirements for their admission must still be met. For example, the writing must be established as a reliable authority. See *id.* Moreover, learned treatises that have been established as reliable authority are admissible into evidence only to the extent called to the attention of an expert witness upon cross-examination or relied upon by the

expert witness in direct examination. *Breeden v. Anesthesia West*, 265 Neb. 356, 656 N.W.2d 913 (2003). Even then, statements from such writings may be read into evidence but may not be received as exhibits. See § 27-803(17).

In this case, there was no foundation laid at trial for the documents Jackson read from and submitted at the BNSF hearing. The jury should not have been permitted to consider this evidence at trial.

(b) Results of March 2003 Drug Tests

During the BNSF investigative hearing, Jackson said that drug tests conducted at his own expense “prove[d] that there were no illegal drugs in [his] system before the day in question, during, or after.” He submitted documents purporting to show that in March 2003, samples of Jackson’s hair were tested by two laboratories for the presence of certain drugs within a 90-day time period. Negative results were shown. At trial, these documents were included in exhibit 17, and Jackson’s testimony about the drug tests was contained in exhibit 18.

It goes without saying that to be admissible, testimony and exhibits concerning the results of drug tests must have sufficient foundation. In *Priest v. McConnell*, 219 Neb. 328, 363 N.W.2d 173 (1985), we found that insufficient foundation had been laid for testimony regarding the testing of the decedent’s blood and urine for alcohol when there was no evidence as to the origin of the urine sample and, at best, the chain of custody concerning the blood sample was equivocal. In *Raskey v. Hulewicz*, 185 Neb. 608, 177 N.W.2d 744 (1970), the trial court refused to admit evidence as to the result of a urine test due to lack of foundation. Affirming this ruling, this court held that the authenticity of the urine sample must be unequivocally established before its admission into evidence. In *Houghton v. Houghton*, 179 Neb. 275, 137 N.W.2d 861 (1965), the results of blood tests conducted to establish paternity were admitted because they were supported by testimony of the doctor who supervised the tests.

In the present case, the purported results of the March 2003 forensic hair analyses and Jackson’s testimony concerning them were incorporated in exhibits 17 and 18, which were admitted into evidence. However, no competent evidence was

presented of the origin of the samples and when they were obtained. Admission on such insufficient foundation would be the equivalent of allowing the defendant in a paternity case to offer a sample of blood as his own without establishing its origin by independent evidence. Neither was any evidence presented about the testing itself. We need not delve into what type or how much foundation was required for the admissibility of the results of Jackson's forensic hair analyses. Suffice it to say that in this case, there was no foundation laid at trial, and therefore, the results of the March 2003 drug tests and Jackson's testimony about them at the BNSF hearing should not have been admitted.

(c) Inadmissibility of Exhibits 17 and 18

The Fund objected to the admission of exhibits 17 and 18 on the basis of insufficient foundation. If a general objection on the basis of insufficient foundation is overruled, the objecting party may not complain on appeal unless (1) the ground for exclusion was obvious without stating it or (2) the evidence was not admissible for any purpose. *Ford v. Estate of Clinton*, 265 Neb. 285, 656 N.W.2d 606 (2003). In this case, the first criterion is met.

When exhibits 17 and 18 were introduced at trial, Jackson testified that exhibit 17 contained "all the exhibits that were in the [BNSF] formal investigation." He further stated that exhibit 18 was "the complete transcript of the investigation." The foundation laid for these exhibits consisted of Jackson's testimony that he was required by the Fund's constitution to send these items to the Fund along with his claim for benefits. However, at trial, it was never disputed that Jackson had properly submitted his claim for benefits. In the Fund's admissions, already in evidence, it acknowledged that Jackson had "provided transcript, letter of discipline and information for submission of claim benefits." The parties stipulated during trial that Jackson had properly submitted his claim for benefits in accordance with the Fund's constitution. Thus, while Jackson unnecessarily testified why he had submitted exhibits 17 and 18 to the Fund, the testimony failed to establish the admissibility of the 39 separate documents contained in exhibit 17 or the

122 single-spaced pages of hearing testimony encompassed in exhibit 18.

Insufficient foundation was laid for Jackson's opinions regarding medical causation, the excerpts from the medical and nutrition books, the prescribing information for Effexor, and the results of the forensic hair analyses. Evidence that would not have made it through the front door of admissibility nevertheless made its way to the jury through the back door, cloaked as exhibits 17 and 18. We conclude that the district court abused its discretion in admitting exhibits 17 and 18 into evidence.

(d) Reversible-Error Analysis

[6,7] To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded. *Koehler v. Farmers Alliance Mut. Ins. Co.*, 252 Neb. 712, 566 N.W.2d 750 (1997). Testimony objected to which is substantially similar to evidence admitted without objection results in no prejudicial error. *Id.* In the present case, exhibits 17 and 18 were the only evidence that established a correlation between Jackson's failure to provide a urine sample and the condition of prostatitis, the side effects of Effexor, and indigestion.

Although other evidence at trial indicated that Jackson had been diagnosed with prostatitis, no other evidence established a causal connection between the failure to provide a urine sample for the BNSF drug test and this condition. The office notes of Dr. Robert Graves, a urologist, were in evidence. He examined Jackson and diagnosed him with prostatitis a week after the BNSF drug test, but the notes do not state that prostatitis caused (or could have caused) Jackson to be incapable of providing a urine sample. In fact, in a letter to Jackson dated January 23, 2003, Graves was unable to "give a medical explanation for [Jackson's] inability to give a urine specimen during the three-hour period" on January 2. Graves wrote that "the inability to give the urine specimen would be more related to dehydration rather than from the prostatitis itself," and he encouraged Jackson to "drink several glasses of water" the next time he was required to provide his employer a urine sample.

Evidence regarding the side effects of Effexor was presented to the jury only through exhibits 17 and 18. When Jackson attempted to testify at trial about the drug's side effects, the district court sustained the objection as to lack of foundation. As to indigestion, Jackson was permitted to testify that he sometimes got indigestion if he drank liquids after eating a large meal; however, a scientific explanation for indigestion (the "'dilut[ion]'" of "'enzymes'") came in only through exhibits 17 and 18. Finally, the jury was presented with the results of the March 2003 drug tests only in exhibits 17 and 18. Accordingly, the evidence contained in exhibits 17 and 18 was not merely cumulative.

[8,9] The Fund argues that the admission of exhibits 17 and 18 was presumptively prejudicial because the Fund was unable to cross-examine or rebut Jackson's unqualified opinions and documents contained therein and because the record does not disclose whether the evidence influenced the jury verdict. Error in the admission of evidence is presumed to be prejudicial when the evidence admitted may have influenced the verdict or affected unfavorably the party against whom it was admitted. *Kvamme v. State Farm Mut. Auto. Ins. Co.*, 267 Neb. 703, 677 N.W.2d 122 (2004). Where it cannot be gleaned from the record that evidence wrongfully admitted did not affect the result of the trial unfavorably to the party against whom such evidence was admitted, reception of that evidence must be considered prejudicial error. *Id.*

In considering what effect the admission of exhibits 17 and 18 may have had on the jury, we note that the jury's attention was directed to the BNSF investigative hearing and the information submitted therein. References to the hearing were made throughout trial. Jackson testified that exhibit 17 contained all the documents submitted at the hearing and that exhibit 18 was the complete transcript of the hearing. Moreover, although Jackson was not permitted to testify about the side effects of Effexor, the jury was essentially told that it could find information about these side effects in exhibit 17. The following colloquy transpired during the redirect examination of Jackson:

Q[:] Were you aware that [E]ffexor has side effects which would affect urination?

[Counsel for the Fund]: I'll object to the form, object on hearsay, and foundation and form of the question.

THE COURT: The objection is sustained.

Q[:] . . . Jackson, you provided the [Fund] and [its] attorney the book of exhibits, correct?

A[:] Yes, I did.

Q[:] It's been received by the Court. Didn't you provide them the side effects of urination for [E]ffexor?

A[:] Yes.

Q[:] How did you get that?

A[:] I wrote the manufacture[r] of the drug . . . I was taking.

Q[:] Did they respond to you and send you back something that listed the side effects?

A[:] Yes.

Q[:] Did it indicate it can affect urination?

[Counsel for the Fund]: I'll object on foundation.

At this point, the parties approached the bench and an off-the-record discussion was had between the parties and the court.

The overall issue at trial was whether Jackson was entitled to benefits pursuant to the Fund's constitution. In order to make such a finding, the jury had to determine that Jackson did not "willful[ly] or intentional[ly]" violate any order, rule, or regulation of his employer, BNSF. The BNSF alcohol and drug policy authorized a 9-month suspension for an employee who failed to provide a urine sample for a drug test "without a valid medical reason." Thus, the key question for the jury was whether Jackson simply *refused* to provide a urine sample for the drug test or whether he was *physically incapable* of urinating at that time.

The admission of exhibits 17 and 18 into evidence could have unfairly prejudiced the Fund in a number of ways. The jury could have accepted as fact Jackson's unqualified opinions relating to possible medical reasons for his alleged inability to urinate on January 2, 2003. The jury could have read the material submitted at the BNSF hearing and concluded that prostatitis and the taking of Effexor contributed to Jackson's failure to provide a urine sample. The results of the March 2003 drug tests were susceptible to being used by the jury as proof that

Jackson had nothing to hide in the BNSF drug test and therefore that he must have been physically incapable of providing a urine sample. Because we are unable to determine that exhibits 17 and 18 did not affect the result of the trial unfavorably to the Fund, we conclude that reception of that evidence was prejudicial and reversible error.

2. MOTION FOR NEW TRIAL

The Fund's argument concerning the denial of its motion for new trial is tied to its argument regarding the admission of exhibits 17 and 18. The Fund argues that its motion for new trial should have been sustained because the admission of exhibits 17 and 18 was presumptively prejudicial. A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Roth v. Wiese*, 271 Neb. 750, 716 N.W.2d 419 (2006). Having determined that the admission of exhibits 17 and 18 was prejudicial error, we further conclude that the district court abused its discretion in overruling the Fund's motion for new trial.

3. MOTION FOR DIRECTED VERDICT

[10] The Fund's assignment of error concerning the overruling of its motion for directed verdict is without merit. The party against whom the verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. *Billingsley v. BFM Liquor Mgmt.*, 264 Neb. 56, 645 N.W.2d 791 (2002). If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law. *Id.*

4. AWARD OF ATTORNEY FEES AND COSTS

[11] The award of attorney fees and costs to Jackson was based upon his obtaining a judgment against the Fund. Because we have concluded that the district court committed reversible error in admitting exhibits 17 and 18 into evidence, the jury verdict and subsequent award of attorney fees and costs are vacated. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Ferer v. Erickson, Sederstrom*, 272 Neb. 113,

718 N.W.2d 501 (2006). Thus, we need not address the Fund's arguments concerning attorney fees and costs.

VI. CONCLUSION

The district court erred in admitting exhibits 17 and 18 into evidence. Accordingly, we vacate the jury's verdict and the judgment entered against the Fund. We reverse the order overruling the Fund's motion for new trial and remand the cause to the district court for a new trial.

REVERSED AND VACATED, AND CAUSE
REMANDED FOR A NEW TRIAL.

POLK COUNTY RECREATIONAL ASSOCIATION, DOING BUSINESS AS
RYAN HILL COUNTRY CLUB, ET AL., APPELLANTS, v. SUSQUEHANNA
PATRIOT COMMERCIAL LEASING COMPANY, INC., AND
ROYAL LINKS USA, INC., APPELLEES.

734 N.W.2d 750

Filed July 20, 2007. No. S-06-442.

1. **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.
2. **Motions to Dismiss: Courts: Jurisdiction.** The proper procedure in Nebraska courts for a party to enforce a forum selection clause naming another state as a forum is to file a motion to dismiss pursuant to Neb. Rev. Stat. § 25-415 (Reissue 1995).
3. **Motions to Dismiss: Pleadings: Appeal and Error.** Aside from factual findings, a ruling on a motion to dismiss pursuant to Neb. Rev. Stat. § 25-415 (Reissue 1995) is subject to de novo review. Where the trial court's decision is based upon the complaint and its own determination of disputed factual issues, an appellate court reviews the factual findings under the "clearly erroneous" standard.
4. **Dismissal and Nonsuit: Jurisdiction.** In the absence of one of the five listed exceptions, Neb. Rev. Stat. § 25-415 (Reissue 1995) requires dismissal of an action only when the forum selection clause is mandatory. If the forum selection clause is permissive rather than mandatory, § 25-415 does not require dismissal of the Nebraska action.
5. **Contracts: Jurisdiction: States: Proof.** A party seeking to avoid a contractual forum selection clause bears a heavy burden of showing that the clause should not be enforced, and, accordingly, the party seeking to avoid the forum selection clause bears the burden of proving that one of the statutory exceptions applies.

6. **Jurisdiction.** A forum is seriously inconvenient only if one party would be effectively deprived of a meaningful day in court.
7. **Jurisdiction: Fraud.** A forum selection clause can be avoided for fraud only when the fraud relates to procurement of the forum selection clause itself, standing independently from the remainder of the agreement.
8. **Declaratory Judgments.** Whether to entertain an action for declaratory judgment is within the discretion of the trial court.
9. _____. In connection with actions for declaratory judgment, relief will not be entertained if there is pending, at the commencement of the declaratory action, another action or proceeding to which the same persons are parties and in which are involved, and may be adjudicated, the same issues involved in the declaratory action.

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

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

Douglas J. Peterson and Joel Bacon, of Keating, O’Gara, Nedved & Peter, P.C., L.L.O., for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

I. NATURE OF CASE

Various Nebraska golf courses that leased equipment from Susquehanna Patriot Commercial Leasing Company, Inc. (Patriot), filed this declaratory judgment action in the district court for Polk County against Patriot and Royal Links USA, Inc. (Royal Links), seeking a declaration that their leases were void. Because it filed for bankruptcy, the action was stayed as to Royal Links. The court concluded that the action should be dismissed as to Patriot because the leases at issue contained forum selection clauses and because Patriot had already filed actions on the leases in Pennsylvania. The golf courses appeal the dismissal of the action as to Patriot. We affirm the dismissal.

II. STATEMENT OF FACTS

Royal Links manufactured the “Beverage Caddy Express” (the Caddy), a cart from which beverages and snacks may be

sold. Royal Links marketed the Caddy to golf courses to be used as a stationary unit or as a movable unit towed by another cart. Royal Links' marketing strategy was to offer golf courses a two-part arrangement. First, a golf course would acquire the Caddy and finance the purchase by entering into a leasing arrangement with a financing company. The typical lease was for a term of 60 months with monthly payments of approximately \$300 and an option to purchase at the end of the term. Patriot was one of the financing companies Royal Links used for the leasing portion of the marketing arrangement. Under the second part of Royal Links' marketing arrangement, the golf course would enter into a separate "Program Agreement" with Royal Links under which Royal Links agreed to secure advertising from large national companies and the golf course agreed to display advertising on the Caddy. Under the program agreement, Royal Links would share the advertising revenue with the golf course in an amount equal to the golf courses' payments under the lease. Based on this arrangement, Royal Links' sales people marketed the Caddy as being essentially free to the golf courses because their payments under the lease would be offset by revenue from Royal Links under the program agreement.

In 2003 and 2004, the Royal Links' regional sales representative in Nebraska sold the Caddy under the marketing arrangement described above to various golf courses, including the eight plaintiffs-appellants in this case, Polk County Recreational Association, doing business as Ryan Hill Country Club; Calamus Area Golf & Recreation Club, Inc.; Crofton Lakeview Golf Association, Inc.; Henderson Golf Association, Inc.; O'Neill Country Club; Summerland Golf Club, Inc.; Thornridge Golf Course; and Atkinson-Stuart Country Club (collectively referred to as "the golf courses" herein). When each of the golf courses agreed to participate in the marketing arrangement, it entered into a program agreement with Royal Links and completed an application for financing. Royal Links forwarded the application to Patriot, and upon approval, the golf course executed a lease agreement with Patriot.

The lease agreements named Patriot as the lessor and did not contain any provision making monthly payments contingent on the golf courses' receipt of advertising revenue from Royal

Links. The lease agreements contained forum selection and choice-of-law clauses. The lease agreements executed by seven of the eight golf courses provided as follows:

JURISDICTION AND VENUE. This Lease shall be binding and effective when accepted by an officer of Lessor at its home office in Pennsylvania, shall be deemed to have been made in Pennsylvania and, accept [sic] for local filing requirements, shall be governed by and construed in accordance with the laws of the Commonwealth of Pennsylvania. Lessee knowingly and voluntarily consents and submits to the jurisdiction of the Federal and State courts of Pennsylvania for purposes of adjudicating the rights and liabilities of the parties pursuant to the Lease. Lessee also knowingly and voluntarily waives the right to trial by jury in any matter or proceeding brought under this Lease.

The lease agreement executed by the eighth golf course, Thornridge Golf Course (hereinafter Thornridge), provided as follows:

Both parties agree to waive all rights to a jury trial. This Lease shall be governed by the laws of Pennsylvania. Any legal action concerning this Lease shall be brought in federal or state court located within or for Montgomery County, Pennsylvania. You consent to the jurisdiction and venue of federal and state courts in Pennsylvania.

The program agreements that the golf courses executed with Royal Links contained forum selection and choice-of-law clauses providing that the agreements were to be governed by Ohio law and that the actions related to the program agreements were to be brought only in the courts of Lucas County, Ohio.

Royal Links eventually failed to secure advertising and experienced financial difficulty. In October 2004, Royal Links sent letters to the golf courses informing them that it would “no longer fund the monthly payments” under the program agreements. Royal Links gave the golf courses the option of continuing in the advertising program under new agreements or terminating the agreements. After receiving the letters from Royal Links, each of the golf courses stopped making payments to Patriot under the leasing agreements.

In late 2004 and early 2005, Patriot filed separate actions against each of the golf courses to enforce Patriot's rights under the leases. Patriot filed the actions in Montgomery County, Pennsylvania. Patriot had confessions of judgment entered against five of the golf courses. Patriot filed complaints against the three remaining golf courses but did not have confessions of judgment entered. Each of the golf courses made appearances in the respective Pennsylvania cases. On April 25, 2005, the Pennsylvania court granted the golf courses' uncontested motions to consolidate the Pennsylvania cases.

On May 4, 2005, the golf courses filed the present action for declaratory relief in the district court for Polk County, Nebraska. The golf courses named both Patriot and Royal Links as defendants. The golf courses asserted, inter alia, that the forum selection clauses in the agreements were void and should not be enforced. They further asserted that they were fraudulently induced to enter into the program agreements and the lease agreements as a "package deal." The golf courses sought a declaration of their rights pertaining to the agreements. They specifically sought as relief declarations that the agreements were void, declarations that the forum selection clauses of the agreements did not apply, injunctions preventing Patriot from enforcing the lease agreements, and a judgment for any amounts recovered by Patriot in the Pennsylvania proceedings plus other damages. As the basis for a declaration that the agreements were void, the golf courses asserted that the agreements violated various provisions of Nebraska law, including the Seller-Assisted Marketing Plan Act, Neb. Rev. Stat. §§ 59-1701 to 59-1762 (Reissue 2004). On August 25, Royal Links filed a notice in the Nebraska case stating that Royal Links had filed a petition for bankruptcy and that therefore, the proceedings in the Nebraska case were stayed as to Royal Links.

On May 31, 2005, the golf courses moved the Pennsylvania court to stay the consolidated Pennsylvania case. On December 14, the Pennsylvania court entered an order granting the motion and ordering the Pennsylvania case stayed until the proceedings in the Nebraska case were concluded or until further order of the Pennsylvania court.

On June 1, 2005, Patriot had filed a motion for summary judgment in the Nebraska case, and on July 25, the golf courses had filed a motion for partial summary judgment. On April 14, 2006, the court entered an order ruling on Patriot's motion for summary judgment and the golf courses' motion for partial summary judgment. The court noted the forum selection clauses in the leases and stated that "it can hardly be said that the [golf courses] could not reasonably anticipate being haled into court in another state with respect to disputes over the lease." The court concluded that even if the forum selection clauses were unenforceable, the present Nebraska action should be dismissed because "the Pennsylvania action was obviously pending at the time of commencement of this declaratory judgment action." The court therefore overruled the golf courses' motion for partial summary judgment and granted Patriot's motion for summary judgment. The court stated that because the action was stayed as to Royal Links, the order was a final judgment as to the claims between the golf courses and Patriot. The court dismissed the complaint as to Patriot.

The golf courses appeal the April 14, 2006, order of the district court for Polk County.

III. ASSIGNMENTS OF ERROR

The golf courses assert that the district court erred in granting summary judgment in favor of Patriot and dismissing the action as to Patriot. They specifically assert that the court erred in concluding (1) that the forum selection clauses in the leases were enforceable under applicable common-law principles and under Nebraska's Model Uniform Choice of Forum Act (the Act), Neb. Rev. Stat. §§ 25-413 to 25-417 (Reissue 1995), and (2) that a Nebraska court was precluded from entertaining this declaratory judgment action because of the prior pending action in Pennsylvania.

IV. STANDARDS OF REVIEW

[1] 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. *Peterson v. Ohio Casualty Group*, 272 Neb. 700, 724 N.W.2d 765 (2006).

Other applicable standards of review are discussed in the analysis portion of this opinion.

V. ANALYSIS

The golf courses claim that the district court erred in granting Patriot's motion and dismissing their complaint as to Patriot. They assert that the court erred in concluding that the forum selection clauses in the leases were enforceable and in concluding that this declaratory judgment action should be dismissed because of the prior pending Pennsylvania action. We conclude that the forum selection clause in the Thornridge lease was a mandatory forum selection clause that was enforceable pursuant to § 25-415 and that the court therefore did not err in dismissing the complaint as to Patriot with regard to that lease. We further conclude that although the forum selection clauses in the remaining seven leases were permissive rather than mandatory, the court did not err in dismissing the complaint as to Patriot with regard to these leases because the Pennsylvania action was pending at the time the golf courses filed this action for declaratory judgment in Nebraska.

1. FORUM SELECTION CLAUSES

(a) Law Related to Forum Selection Clauses

(i) Nature of Motion and Order and Standard of Review

As a preliminary matter, we find it necessary to determine the nature of the motion and order under review as they relate to the enforcement of the forum selection clauses. Although Patriot fashioned its motion raising the forum selection issue as a motion for summary judgment, we determine that the appropriate procedure in Nebraska for raising an issue seeking to enforce a forum selection clause which provides that an action be brought in another state is a motion to dismiss pursuant to § 25-415. We treat the proceedings below accordingly.

In *Ameritas Invest. Corp. v. McKinney*, 269 Neb. 564, 694 N.W.2d 191 (2005), we stated that under the facts present therein, the defendant properly raised a challenge to forum selection clauses as a motion to dismiss for lack of jurisdiction

over the person pursuant to Neb. Ct. R. of Pldg. in Civ. Actions 12(b)(2) (rev. 2003). The forum selection clauses in the relevant contracts in *Ameritas Invest. Corp.* named Nebraska, and in particular Lancaster County, as the forum for suits under the contracts. We noted that § 25-414 of the Act applies where the Nebraska court would have no jurisdiction but for the fact that the parties have consented to its exercise by the choice-of-forum agreement. We determined that a challenge which claims that a forum selection clause naming Nebraska as the forum does not meet the requirements of the Act is properly viewed as a challenge to the personal jurisdiction over the defendant by the Nebraska court and that therefore, the challenge was properly raised in a rule 12(b)(2) motion to dismiss.

[2] In contrast to *Ameritas Invest. Corp.*, wherein the defendant resisted a forum selection clause which named Nebraska as the forum, in the present action, Patriot, in the Nebraska case, seeks to enforce a forum selection clause which names another jurisdiction, Pennsylvania, as the forum. The issue raised by Patriot in the present case therefore is not an issue challenging personal jurisdiction, and a rule 12(b)(2) motion to dismiss would not be the proper procedure to raise the forum selection issue. While, as noted in *Ameritas Invest. Corp.*, forum selection clauses naming Nebraska as the forum are governed by § 25-414 of the Act, forum selection clauses naming a jurisdiction other than Nebraska are governed by § 25-415. Section 25-415 is titled “Choice of forum in another state; action pending in this state; procedure” and provides:

If the parties have agreed in writing that an action on a controversy shall be brought only in another state and it is brought in a court of this state, the court will dismiss or stay the action, as appropriate, unless (1) the court is required by statute to entertain the action; (2) the plaintiff cannot secure effective relief in the other state, for reasons other than delay in bringing the action; (3) the other state would be a substantially less convenient place for the trial of the action than this state; (4) the agreement as to the place of the action was obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; or (5) it would for some

other reason be unfair or unreasonable to enforce the agreement.

We read § 25-415 to provide the procedure in Nebraska whereby a party may enforce a forum selection clause naming another state as the forum. Section 25-415 provides that “the court will dismiss or stay the action, as appropriate, unless” one of the exceptions is present. Giving meaning to the word “dismiss” in § 25-415, we determine that the proper procedure in Nebraska courts for a party to enforce a forum selection clause naming another state as a forum is to file a motion to dismiss pursuant to § 25-415. See *Haakinson & Beaty Co. v. Inland Ins. Co.*, 216 Neb. 426, 344 N.W.2d 454 (1984). We determine that the motion for summary judgment filed by Patriot in this case can be treated as a motion to dismiss pursuant to § 25-415 and that the court’s April 14, 2006, order can be treated as an order granting such motion to dismiss.

[3] With regard to the standard of review, we determine that in ruling on a motion to dismiss pursuant to § 25-415, a trial court engages in a procedure similar to ruling on a motion to dismiss for lack of subject matter jurisdiction under rule 12(b)(1), in that the court may base its decision solely on the complaint or may need to make findings of fact. See, generally, *Bohaboj v. Rausch*, 272 Neb. 394, 721 N.W.2d 655 (2006) (regarding standard of review for ruling on rule 12(b)(1) motion to dismiss). Thus, when deciding a motion to dismiss pursuant to § 25-415, the existence and enforceability of a forum selection clause may be determined by a review of the complaint if the contract containing such clause is attached to the complaint, but the court might need to consider additional evidence in order to determine whether any of the exceptions to enforcement of a forum selection clause under § 25-415 is present. We determine that the standard of review for a ruling on a motion to dismiss pursuant to § 25-415 should be similar to that for a ruling on a rule 12(b)(1) motion and therefore is as follows: Aside from factual findings, a ruling on a motion to dismiss pursuant to § 25-415 is subject to de novo review. Where the trial court’s decision is based upon the complaint and its own determination of disputed factual issues, we review the factual findings under the “clearly erroneous” standard.

(ii) *Mandatory Versus Permissive Forum Selection Clause*

As noted above, § 25-415 provides that unless one of the exceptions applies, a court in Nebraska will dismiss an action “[i]f the parties have agreed in writing that an action on a controversy shall be brought *only* in another state” (Emphasis supplied.) We note that while the forum selection clause in the lease executed by Thornridge provides that “[a]ny legal action concerning this Lease *shall be brought* in federal or state courts located within or for Montgomery County, Pennsylvania” (emphasis supplied), the forum selection clauses in the leases executed by the remaining golf courses provide that “[l]essee knowingly and voluntarily consents and submits to the jurisdiction of the Federal and State courts of Pennsylvania for purposes of adjudicating the rights and liabilities of the parties pursuant to the Lease.” We determine that while the forum selection clause in the Thornridge lease is a mandatory forum selection clause requiring actions to be brought only in Pennsylvania, the forum selection clauses in the remaining leases are merely permissive forum selection clauses providing that actions may be brought in Pennsylvania, but not requiring that actions be brought only in Pennsylvania or prohibiting actions from being brought in an another appropriate forum.

We note that other jurisdictions have distinguished between forum selection clauses that are mandatory in nature and those that are permissive in nature. In *Converting/Biophile v. Ludlow Composites*, 296 Wis. 2d 273, 287-88, 722 N.W.2d 633, 640-41 (Wis. App. 2006), the Wisconsin Court of Appeals stated:

“Clauses in which a party agrees to ‘submit’ to jurisdiction are not necessarily mandatory.” [Citation omitted.] “Such language means that the party agrees to be subject to that forum’s jurisdiction *if sued there*. It does not prevent the party from bringing suit in another forum.” [Citation omitted.] The language of a mandatory clause shows more than that jurisdiction is *appropriate* in a designated forum; it unequivocally mandates *exclusive* jurisdiction. [Citation omitted.] Absent specific language of exclusion, an agreement conferring jurisdiction in one forum will not be interpreted as excluding jurisdiction elsewhere.

(Emphasis in original.)

[4] Under a plain reading, we determine that § 25-415 necessarily makes a similar distinction between mandatory and permissive forum selection clauses when it refers to agreements providing “that an action on a controversy shall be brought *only* in another state.” (Emphasis supplied.) In the absence of one of the five listed exceptions, § 25-415 requires dismissal of an action only when the forum selection clause is mandatory. If the forum selection clause is permissive rather than mandatory, § 25-415 does not require dismissal of the Nebraska action.

The forum selection clause in the Thornridge lease provides that any action concerning the lease “shall be” brought in Pennsylvania. We read this forum selection clause to be a mandatory clause requiring that an action with respect to the lease shall be brought only in Pennsylvania. The forum selection clauses in the other seven leases provide only that the parties consent and submit to the jurisdiction of Pennsylvania courts. We read these forum selection clauses to be permissive clauses providing that an action may be brought in Pennsylvania, but not requiring that an action be brought only in Pennsylvania and not prohibiting an action from being brought in another state.

Because the forum selection clause in the Thornridge lease is mandatory, we will consider the enforceability of such clause pursuant to § 25-415 in this section of the opinion. Because the forum selection clauses in the remaining leases are permissive, such clauses are not a barrier to an action in Nebraska and we will consider in the following section of this opinion whether dismissal of the action regarding the remaining leases was appropriate on another basis.

(iii) Choice of Law

We note that our analysis of the enforceability of the Thornridge forum selection clause is somewhat complicated by the fact that in addition to the forum selection clause, the Thornridge lease, like the remaining leases, contains a choice-of-law clause providing that the lease is to be governed by the law of Pennsylvania. When a party to such an agreement files suit in a state that is not designated by either the forum selection clause or the choice-of-law clause, it is necessary to determine which state’s law will govern the enforceability of the forum selection clause itself. However, because in the

present case we determine that the forum selection clause in the Thornridge lease is enforceable under either Nebraska law or Pennsylvania law, we need not decide which jurisdiction's law governs the question of enforceability of the forum selection clause. See *Turcheck v. Amerifund Financial, Inc.*, 272 Mich. App. 341, 725 N.W.2d 684 (2006).

(b) Application of Law to Forum Selection
Clause in Thornridge Lease

[5] Under the Act, Nebraska courts are generally directed to enforce forum selection clauses unless certain statutory exceptions apply. A party seeking to avoid a contractual forum selection clause bears a heavy burden of showing that the clause should not be enforced, and, accordingly, the party seeking to avoid the forum selection clause bears the burden of proving that one of the statutory exceptions applies. See, *Turcheck v. Amerifund Financial, Inc.*, *supra* (applying Michigan law similar to the Act in Nebraska).

As noted above, § 25-415 provides that a forum selection clause naming another state is to be enforced and the action dismissed unless one of the listed exceptions is present. Although Pennsylvania has not enacted the Model Uniform Choice of Forum Act, Pennsylvania's analysis regarding the enforceability of forum selection clauses is similar to the analysis that would be undertaken pursuant to Nebraska law. Recently, in *Patriot Leasing Co. v. Kremer Restaurant*, 915 A.2d 647 (Pa. Super. 2006), the Superior Court of Pennsylvania found that a forum selection clause identical to the clause in the Thornridge lease was enforceable. The Pennsylvania court stated that under Pennsylvania law,

a forum selection clause in a commercial contract between business entities is presumptively valid and will be deemed unenforceable only when: 1) the clause itself was induced by fraud or overreaching; 2) the forum selected in the clause is so unfair or inconvenient that a party, for all practical purposes, will be deprived of an opportunity to be heard; or 3) the clause is found to violate public policy.

Id. at 651. In sum, under both Nebraska and Pennsylvania law, forum selection clauses are to be enforced unless a specified exception is present.

The golf courses argue that under Nebraska law, three exceptions listed in § 25-415 exist in the present case: (1) that the golf courses cannot secure effective relief in Pennsylvania; (2) that Pennsylvania would be a less convenient place for trial; and (3) that agreement as to the forum selection clause was induced by fraudulent misrepresentations by Royal Links as an agent of Patriot. In addition, the golf courses argue that as a matter of common law, the entire agreement, including the forum selection clause, is void and unenforceable because it was predicated on fraudulent misrepresentations.

With regard to the first argument, the golf courses assert that they cannot secure effective relief in Pennsylvania “due to the complex and novel nature of their claims.” Brief for appellants at 36. They specifically assert that their action for declaratory judgment involves novel interpretations of Nebraska law, including the Seller-Assisted Marketing Plan Act, §§ 59-1701 to 59-1762. The golf courses argue that because such law is unique to Nebraska and has not been extensively interpreted by the courts of this state, Pennsylvania courts “would have an extremely difficult time applying this law.” The golf courses cite *R. C. A. v. Rotman*, 411 Pa. 630, 192 A.2d 655 (1963), for the proposition that Pennsylvania courts are prohibited from making “‘conclusive interpretations’” of another state’s law in the absence of clear guidance from case law from that other state. Brief for appellants at 36.

We reject the argument that the golf courses could not secure effective relief in Pennsylvania courts. We note again that the leases include choice-of-law provisions stating that the leases are to be governed by Pennsylvania law. Therefore, a question remains as to whether and to what extent the Nebraska laws cited by the golf courses are applicable to the leases. To the extent Nebraska law is applicable, we do not think that Pennsylvania courts are incapable of interpreting such law, nor do we read *Rotman* to prohibit Pennsylvania courts from so doing. The Pennsylvania Supreme Court stated in *Rotman* that “[a]lthough we have the power, and are often required, to give *our* interpretation of the statute of another state, the *conclusive* interpretation of that statute—the one which these parties desire—must emanate from the courts

of that state.” 411 Pa. at 632, 192 A.2d at 657 (emphasis in original). The Pennsylvania Supreme Court therefore acknowledged that Pennsylvania courts can and do interpret the statutes of other states; however, in *Rotman*, the court determined that because of the specific circumstances of that case and the necessity of a conclusive interpretation of another state’s law, it was wise judicial procedure to stay the proceedings in Pennsylvania until it was determined whether a conclusive interpretation could be obtained in the other state. The golf courses have not shown that the same considerations exist in the present case, and we therefore do not think that the Pennsylvania courts would be unable to interpret Nebraska law to the extent necessary in the present dispute.

The golf courses next argue that Pennsylvania is a substantially less convenient place for trial. Their main argument in this regard is that “the overwhelming majority of witnesses that will be called at trial are all from Nebraska.” Brief for appellants at 40. The golf courses also assert various factors of public interest that argue against trial in Pennsylvania.

[6] In this regard, we note that in *Patriot Leasing Co. v. Kremer Restaurant*, 915 A.2d 647 (Pa. Super. 2006), the Pennsylvania Superior Court rejected similar arguments that Pennsylvania was a substantially less convenient place for trial than the defendants’ home states of Missouri and Alabama. The court stated that “mere inconvenience or additional expense will not permit a forum selection clause to be avoided” and that “if the forum is available and can do substantial justice to the action, there is no serious impairment of a party’s ability to litigate.” *Id.* at 652. With regard to the golf courses’ argument that most of the witnesses are from Nebraska, we note that it has been stated that a forum is seriously inconvenient only if one party would be “effectively deprived of a meaningful day in court.” See *Interfund Corp. v. O’Byrne*, 462 N.W.2d 86, 88 (Minn. App. 1990) (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972)). The court in *Interfund Corp.* further stated that “location and convenience of witnesses [do] not necessarily make a forum seriously inconvenient because deposition testimony can be taken and used without disadvantage at trial.” *Id.* We note further that

the convenience of witnesses is a matter that should be within the contemplation of the parties when they agree to a forum selection clause and therefore generally should not be a basis for avoiding enforcement of the clause. We determine that the golf courses have not demonstrated that Pennsylvania is a substantially less convenient forum either under Pennsylvania law or under the Act.

Finally, the golf courses argue that the forum selection clause should not be enforced because the agreements were induced by fraudulent misrepresentations by Royal Links as an agent of Patriot. The golf courses argue that such alleged fraud is a barrier to enforcement of the agreements and of the forum selection clauses under both common law and the Act. Because the Act governs enforceability of forum selection clauses, we analyze this argument under the Act rather than under common-law principles.

[7] We note that the Pennsylvania court rejected similar arguments in *Patriot Leasing Co. v. Kremer Restaurant*, *supra*. The court in *Patriot Leasing Co.* stated that a “forum selection clause can be avoided for fraud only when the fraud relates to procurement of the forum selection clause itself, standing independently from the remainder of the agreement.” *Id.* at 653. The court concluded that “the fraud allegations relate to procurement of the equipment lease as a whole rather than the forum selection clause itself; therefore, the allegations will not invalidate the clause.” *Id.* The golf courses’ allegations of fraud in the present case similarly relate to the procurement of the lease as a whole rather than to the forum selection clause in particular. We therefore conclude that under both Nebraska and Pennsylvania law, such alleged fraud would not invalidate the forum selection clause.

Because none of the exceptions under § 25-415 and none of the exceptions under Pennsylvania law are present, we conclude that the mandatory forum selection clause in the Thornridge lease is enforceable under either Nebraska or Pennsylvania law. Because the forum selection clause required actions concerning the Thornridge lease to be brought in Pennsylvania, the district court properly dismissed the action as to Patriot with regard to the Thornridge lease.

2. DISMISSAL OF DECLARATORY JUDGMENT ACTION DUE TO PENDING ACTION IN PENNSYLVANIA

Because the remaining seven leases contained permissive forum selection clauses, the court was not required under § 25-415 to dismiss the action as to Patriot with respect to those leases, and we therefore consider whether the court erred in dismissing the action with respect to those leases for the reason that the action was pending in Pennsylvania. The golf courses assert that the district court erred when it concluded that this declaratory judgment action brought in Nebraska against Patriot should be dismissed because the action in Pennsylvania was pending at the time the golf courses filed this action. We conclude that dismissal of the action against Patriot with regard to the seven remaining leases was appropriate on this basis.

[8,9] We have noted that Neb. Rev. Stat. § 25-21,154 (Reissue 1995) provides that a court “‘may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding,’” and we have stated that the decision “‘whether to entertain an action for declaratory judgment is within the discretion of the trial court.’” *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co.*, 268 Neb. 439, 449, 684 N.W.2d 14, 23 (2004). In this context, we have stated that in connection with actions for declaratory judgment, “‘relief will not be entertained if there is pending, at the commencement of the declaratory action, another action or proceeding to which the same persons are parties and in which are involved, and may be adjudicated, the same issues involved in the declaratory action.’” *Id.* (quoting *Sim v. Comiskey*, 216 Neb. 83, 341 N.W.2d 611 (1983)).

This rule has been extended to situations in which an action is pending in another forum. In *Woodmen of the World Life Ins. Soc. v. Yelich*, 250 Neb. 345, 549 N.W.2d 172 (1996), we concluded that the trial court abused its discretion by entertaining a declaratory judgment action when an action involving the same parties and the same issues was pending in another state. We stated that where an action or proceeding is

already pending in another forum involving the same issues, it is ““manifestly unwise and unnecessary”” to permit a new petition for declaratory relief to be initiated by the defendant or plaintiff in that action. *Id.* at 350-51, 549 N.W.2d at 175 (quoting *Strawn v. County of Sarpy*, 146 Neb. 783, 21 N.W.2d 597 (1946)).

The golf courses acknowledge the district court’s reliance on *Yelich* in dismissing this action, but they argue that dismissal was not appropriate in this case because (1) the Pennsylvania action was stayed for the purpose of allowing litigation to proceed in Nebraska and (2) the action cannot be adequately determined in Pennsylvania. With regard to the first argument, the golf courses assert that the concerns which led to the ruling in *Yelich*, specifically the threat of conflicting judgments in different jurisdictions, are not present here because the Pennsylvania court stayed the action to allow litigation to proceed in Nebraska. We note that the Pennsylvania court, in its order staying the action, did not fully explain the reason for its decision, and contrary to the golf courses’ argument, we do not interpret the stay as a determination on the part of the Pennsylvania court that Nebraska was the more appropriate forum for this dispute. With regard to the second argument, the golf courses assert that all the issues in this dispute cannot be determined in the Pennsylvania action because the Pennsylvania courts cannot apply and interpret Nebraska law. This second argument is similar to the golf courses’ argument considered above in connection with enforceability of the forum selection clauses that they could not secure effective relief in the Pennsylvania courts. We similarly reject the golf courses’ argument in this context because we do not find that the Pennsylvania courts would be incapable of or prohibited from interpreting any portions of Nebraska law that might be applicable to the dispute between the golf courses and Patriot.

Because an action for declaratory relief should not be entertained when another action involving the same parties and the same issues is pending, we conclude that the district court did not abuse its discretion when it applied this rationale and dismissed this action as to Patriot with regard to the seven leases other than the Thornridge lease.

VI. CONCLUSION

We conclude that the forum selection clause in the Thornridge lease was mandatory and enforceable under § 25-415 and that therefore, the district court did not err in dismissing the action as to Patriot with regard to Thornridge. We further conclude that the district court did not err in dismissing the action as to Patriot with regard to the remaining leases because the Pennsylvania action was pending at the time this declaratory judgment action was filed. We therefore affirm the order dismissing the complaint as to Patriot.

AFFIRMED.

HEAVICAN, C.J., not participating.

JUSTIN B. ZAHL, APPELLANT, V.
TRISHA A. ZAHL, APPELLEE.
736 N.W.2d 365

Filed July 20, 2007. No. S-06-1123.

1. **Divorce: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Appeal and Error.** In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and attorney fees; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion.
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. **Child Custody.** A child custody determination that does not comport with statutory requisites is an abuse of discretion.
4. **Judgments.** Whether a decision conforms to the law is by definition a question of law.
5. **Judgments: Statutes: Appeal and Error.** Questions of law and statutory interpretation require an appellate court to reach a conclusion independent of the decision made by the court below.
6. **Trial: Appeal and Error.** The rule that a party who does not object to an error during trial fails to preserve that issue for appellate review has no application to a court's order following trial.
7. **Divorce: Child Custody.** When the parties in a marital dissolution action do not agree to joint custody, the last sentence of Neb. Rev. Stat. § 42-364(5) (Cum. Supp. 2006) governs the issue.

8. **Parental Rights: Due Process.** A trial court's authority under Neb. Rev. Stat. § 42-364(5) (Cum. Supp. 2006) to order joint physical custody when the parties have not requested it must be exercised in a manner consistent with due process requirements.
9. **Constitutional Law: Parental Rights: Due Process.** The fundamental liberty interest of natural parents in the care, custody, and management of their child is afforded due process protection.
10. **Due Process: Words and Phrases.** While the concept of due process defies precise definition, it embodies and requires fundamental fairness.
11. **Constitutional Law: Due Process.** Generally, procedural due process requires parties whose rights are to be affected by a proceeding to be given timely notice, which is reasonably calculated to inform the person concerning the subject and issues involved in the proceeding; a reasonable opportunity to refute or defend against a charge or accusation; a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by constitution or statute; and a hearing before an impartial decisionmaker.
12. **Child Custody.** Joint physical custody must be reserved for those cases where, in the judgment of the trial court, the parents are of such maturity that the arrangement will not operate to allow the child to manipulate the parents or confuse the child's sense of direction, and will provide a stable atmosphere for the child to adjust, rather than perpetuating turmoil or custodial wars.
13. _____. The factual inquiry necessary to impose joint physical custody is substantially different from that required for making a sole custody determination.
14. **Pleadings: Due Process.** A court's determination of questions raised by the facts, but not presented in the pleadings, should not come at the expense of due process.
15. **Child Custody: Visitation: Courts.** A trial court has an independent responsibility to determine questions of custody and visitation of minor children according to their best interests, which responsibility cannot be controlled by an agreement or stipulation of the parties.
16. **Child Custody.** When a trial court determines at a general custody hearing that joint physical custody is, or may be, in a child's best interests, but neither party has requested this custody arrangement, the court must give the parties an opportunity to present evidence on the issue before imposing joint custody.
17. _____. A district court abuses its discretion to order joint custody when it fails to specifically find that joint physical custody is in the child's best interests as required in the last sentence of Neb. Rev. Stat. § 42-364(5) (Cum. Supp. 2006).
18. **Judgments.** Implicit findings cannot satisfy procedural rules requiring explicit findings.

Appeal from the District Court for Lincoln County:
JOHN P. MURPHY, Judge. Reversed and remanded for further proceedings.

Claude E. Berreckman, Jr., of Berreckman & Berreckman, P.C., for appellant.

R. Bradley Dawson for appellee.

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

HEAVICAN, C.J.

NATURE OF CASE

This marital dissolution action presents issues related to an order of joint physical custody for the parties' minor child. When ordering joint custody under Neb. Rev. Stat. § 42-364(5) (Cum. Supp. 2006), a district court must specifically find that joint custody is in a child's best interests. The district court failed to make that finding in the dissolution decree. Further, because neither party had requested joint physical custody, the evidence presented at trial was limited to which parent should have sole custody. We conclude that under this circumstance, the court must conduct a separate hearing on joint physical custody before ordering such, and that its order must specifically find that joint physical custody is in the child's best interests.

BACKGROUND

Justin B. Zahl and Trisha A. Zahl were married in July 2004. At the time of their marriage, Trisha was in a custody dispute concerning her older son from a previous marriage.

Justin and Trisha's son, Jace Zahl, was born 3 months premature in June 2004 and suffered from respiratory problems. Trisha was unemployed at the time of Jace's birth and did not begin working again until Jace was 8 months old. Trisha testified that she was Jace's primary caregiver during this time. Justin's job as a locomotive engineer on runs from North Platte, Nebraska, to Marysville, Kansas, required him to be absent approximately six times each month for approximately 36 hours per trip.

The parties separated in March 2005, shortly after Trisha returned to work. By that time, Trisha had obtained sole custody of her older son, who was 3 years older than Jace. For a while, Justin and Trisha informally agreed to share custody of Jace and, according to Trisha's testimony and the guardian ad litem's report, had approximately equal custody time. When

Justin was gone for his job, Trisha had custody and took Jace to daycare while she was working. Justin had custody when he was at home.

In May 2005, Justin filed a complaint for dissolution, seeking permanent custody and control of Jace. Trisha filed an answer and a counterclaim for dissolution, also seeking sole custody. Neither party requested joint custody. In June, the court granted Trisha's ex parte request for temporary custody. Trisha continued to allow Justin to have custody while she was at work when he was in town.

After a hearing in October 2005, however, the court awarded temporary custody to Justin. The court did not give specific reasons in its order for the change. Trisha was granted visitation on Tuesday nights and every other weekend. After Justin was awarded temporary custody, one or both of Justin's parents, who lived 12 to 15 miles away, would come to stay with Jace when Justin was called in to work so that Jace's schedule would not be disrupted and Jace would not have to be moved. Justin normally had 1½ hours' notice in which to report to work.

The guardian ad litem filed a report in December 2005 and later filed a supplemental report on July 14, 2006, approximately 1 week before trial. The guardian ad litem was originally concerned about Justin's having so many of his relatives care for Jace while he was absent for work, rather than allowing Jace to spend more time with Trisha. But in the supplemental report, the guardian ad litem concluded that with the assistance of his family, Justin had been able to provide stability and a close family setting in his own residence. Also, in the first report, the guardian ad litem suggested that joint custody might be a way for both parents to maintain an equal and substantive role in caring for Jace. However, in the second report, the guardian ad litem concluded that although joint custody would be the most beneficial to Jace if his parents cooperated better, they did not get along well enough to carry out such a plan. The guardian ad litem ultimately recommended that the court maintain custody with Justin.

By the time of trial in July 2006, Justin had been Jace's primary custodian for close to 10 months, and Jace was 25 months

old. Justin testified that he and Trisha did not get along or communicate well, and he admitted that he did not advise Trisha of Jace's medical appointments. But he maintained that he had cooperated with Trisha on visitation and had informed her of Jace's medical needs for visitation purposes.

Justin testified that he had worked about six trips per month to Kansas during the past 8 months. He also testified that he was usually able to make some of his trips coincide with Trisha's weekend visitation and overnight visitation during the week so that he had 4 to 6 days at a time to be at home with Jace. Justin also stated that if his parents should become unavailable, he would find another job within the railroad. He admitted that he thought it was more appropriate for his parents to be raising Jace than for Trisha to do so. Both of Justin's parents testified that Justin was a good father.

Trisha testified that she had just started a new job as a clerk for the sheriff's office, working 9 a.m. to 5 p.m., Monday through Friday. Dr. Lisa Jones, a psychologist hired by Trisha to evaluate Trisha's relationship with her children, as well as her parenting skills, testified at trial. Jones stated that she had observed Trisha with her sons for approximately 1½ hours in her office and during a sporting event when Trisha did not know she was being observed.

Jones had also reviewed or conducted additional testing. Jones opined that Trisha was a high-functioning parent who interacted affectionately and positively with her children and set appropriate limits. Jones also concluded that Jace was bonded to his older half brother. Trisha's friend, brother, and mother also testified that Trisha was close to her sons and parented appropriately and that her sons were bonded.

Trisha also testified that Justin had not been actively involved in Jace's care during the first 8 months of Jace's life. Trisha testified that after they separated, she and Justin had equal custody time until Justin began "laying off" of work and keeping Jace for several days at a time, prompting Trisha to seek a custody order. Trisha testified that when she had temporary custody, she continued to allow Justin to have about the same custody arrangement, but that after Justin obtained

temporary custody, he did not reciprocate and refused to talk to her about additional visitation time.

Trisha also stated that Justin did not keep her informed of Jace's medical appointments or details of his upbringing, including daycare arrangements. Trisha did not believe Justin would work to maintain her relationship with Jace if he were granted sole custody. Trisha stated that if she were granted custody, she would continue to give Justin custody while she was working if he were in town and also that she would cooperate on a joint custody schedule if definite custody times were outlined.

After trial, the court ordered the parties to submit proposals for joint custody arrangements and delayed determining custody until it could review the feasibility of the proposals. In this order, the court stated that a child's best interests were normally served by having one parent make decisions and having one place the child calls home, but that a child's confusion caused by multiple children from multiple marriages should be minimized. The court found that both parties were manipulative and did not get along except that they recognized the other as a fit parent and sought the best interests of Jace. "[A]lthough hesitant," the court stated that it would "overcome its reluctance to determine that joint custody is the proper remedy and allow the parties to submit a proposal in regard to a joint custody arrangement."

Justin's proposal offered to expand Trisha's every-other-weekend visitation to Monday morning and to give Trisha an opportunity to pick up Jace when Justin was called in to work. Trisha proposed that the parties each have custody for 2 weekdays and alternate Wednesdays and weekends on a weekly basis.

After reviewing proposals from the parties and the guardian ad litem's reports, the court ordered joint custody in the dissolution decree but did not adopt either party's proposal. Instead, it decreed that the parties would have alternate weeks of custody, from Friday to Friday. The dissolution decree was focused on specific custody arrangements, and the court did not discuss Jace's best interests. Justin timely appeals.

ASSIGNMENTS OF ERROR

Justin assigns that the district court erred in ordering joint custody of Jace and failing to award Justin sole custody.

STANDARD OF REVIEW

[1] In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and attorney fees; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion.¹

[2,3] 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.² A child custody determination that does not comport with statutory requisites is an abuse of discretion.³

[4,5] Whether a decision conforms to the law is by definition a question of law.⁴ Questions of law and statutory interpretation require an appellate court to reach a conclusion independent of the decision made by the court below.⁵

ANALYSIS

Justin contends that the court erred in ordering joint physical custody without first allowing the parties to present evidence on that issue. He argues that § 42-364(5) requires a custody hearing on the specific issue of joint custody and a

¹ See, *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006); *Gress v. Gress*, 271 Neb. 122, 710 N.W.2d 318 (2006); *Robb v. Robb*, 268 Neb. 694, 687 N.W.2d 195 (2004).

² *Coral Prod. Corp. v. Central Resources*, ante p. 379, 730 N.W.2d 357 (2007).

³ See, *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988); *Peterson v. Peterson*, 196 Neb. 328, 243 N.W.2d 51 (1976).

⁴ See, *Robbins v. Neth*, ante p. 115, 728 N.W.2d 109 (2007); *Hauser v. Nebraska Police Stds. Adv. Council*, 269 Neb. 541, 694 N.W.2d 171 (2005).

⁵ *In re Interest of Antonio S. & Priscilla S.*, 270 Neb. 792, 708 N.W.2d 614 (2005).

specific finding that joint custody is in a child's best interests. Alternatively, Justin contends that the court abused its discretion in ordering joint physical custody because the parties do not cooperate well enough to effectively parent Jace under this custody arrangement.

Trisha argues that § 42-364(5) only requires a hearing on custody, which occurred; that both parties had an opportunity to present evidence on custody; and that the district court implicitly concluded joint custody was in Jace's best interests. She contends that Justin has failed to preserve this issue for appeal because he submitted a joint custody proposal instead of refusing to comply and exercising his right to appeal. Trisha also contends the court did not err in concluding that joint custody was in Jace's best interests because (1) Justin's work schedule leaves him unavailable for emergencies, (2) Jace's relationship with his sibling should be fostered, and (3) Justin will not foster Jace's relationship with Trisha if he has sole custody.

WAIVER OF ERROR

[6] Justin has not failed to preserve this issue for appeal. The court's first order stated: "[T]he Court finds that the parties jointly, or separately, *shall submit* a proposal in regard to a joint custody arrangement within 15 days of today's date." We conclude that this statement constituted an order, not a "finding" as Trisha contends. It is true that a party who does not object to an error during trial fails to preserve that issue for appellate review.⁶ But this rule has no application to a court's order following trial.

Justin could not have appealed from the court's first order because the court did not determine custody until it issued its second order.⁷ Trisha cites no authority for her argument that Justin should have refused to comply with the court's order, and this court has never held that a party must risk a contempt

⁶ See, e.g., *State v. Robinson*, 271 Neb. 698, 715 N.W.2d 531 (2006); *Hass v. Neth*, 265 Neb. 321, 657 N.W.2d 11 (2003).

⁷ See, e.g., *Pfeil v. State*, ante p. 12, 727 N.W.2d 214 (2007) (explaining final orders).

order or antagonize a trial judge in order to preserve an issue for appeal. Further, Justin's joint custody proposal did not offer joint physical custody.⁸ Instead of proposing custody on a rotating basis, Justin proposed to expand Trisha's every-other-weekend visitation to Monday morning and to give Trisha an opportunity to pick up Jace when Justin was called in to work. Even if Justin's compliance with the court's order could constitute a waiver of his opposition to joint custody, Trisha's argument would still fail.

TYPE OF HEARING REQUIRED UNDER § 42-364(5)

Section 42-364(5) provides:

After a hearing in open court, the court may place the custody of a minor child with both parents on a shared or joint custody basis when both parents agree to such an arrangement. In that event, each parent shall have equal rights to make decisions in the best interests of the minor child in his or her custody. The court may place a minor child in joint custody after conducting a hearing in open court and specifically finding that joint custody is in the best interests of the minor child regardless of any parental agreement or consent.

[7] In *Robb v. Robb*,⁹ this court stated that when the parties do not agree to joint custody, the last sentence of § 42-364(5) governs the issue. That sentence does not specify whether the court must hear evidence on the specific issue of joint custody before it may order such.

[8] The Court of Appeals has held that § 42-364(5) "gives the trial court the authority to order joint custody even where *one of the parents* refuses to consent, if the court holds a hearing and specifically finds that joint custody is in the child's best interests."¹⁰ But the issue in *Kay* was limited to joint legal

⁸ See *Heesacker v. Heesacker*, 262 Neb. 179, 629 N.W.2d 558 (2001).

⁹ *Robb v. Robb*, *supra* note 1.

¹⁰ *Kay v. Ludwig*, 12 Neb. App. 868, 881, 686 N.W.2d 619, 629 (2004) (emphasis supplied).

custody,¹¹ and the court's holding indicates it was not dealing with a case in which neither party had requested joint custody. This court has also not decided a case in which the district court determined joint physical custody was in a child's best interests, despite no request from either parent for this custody arrangement.¹² We conclude that a trial court's authority under § 42-364(5) to order joint physical custody when the parties have not requested it must be exercised in a manner consistent with due process requirements.

[9-11] The fundamental liberty interest of natural parents in the care, custody, and management of their child is afforded due process protection.¹³ While the concept of due process defies precise definition, it embodies and requires fundamental fairness.¹⁴ Generally, procedural due process requires parties whose rights are to be affected by a proceeding to be given timely notice, which is reasonably calculated to inform the person concerning the subject and issues involved in the proceeding; a reasonable opportunity to refute or defend against a charge or accusation; a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by constitution or statute; and a hearing before an impartial decisionmaker.¹⁵

When one of the parties in a marital dissolution action has requested joint physical custody of the parties' minor child, the other party has clear notice that this custody arrangement will be an issue at trial. But here, both parties sought sole custody in their pleadings, and except for Trisha's testimony at the end of the hearing that she would be willing

¹¹ See *Elsome v. Elsome*, 257 Neb. 889, 601 N.W.2d 537 (1999).

¹² Compare, *Robb v. Robb*, *supra* note 1; *Spence v. Bush*, 13 Neb. App. 890, 703 N.W.2d 606 (2005).

¹³ *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004).

¹⁴ *Id.*

¹⁵ See, *id.*; *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992), citing *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972).

to cooperate if the court imposed joint custody, each party presented evidence to show that he or she would be the best sole custodian of Jace.

[12,13] This court has held that joint physical custody must be reserved for those cases where, in the judgment of the trial court, the parents are of such maturity that the arrangement will not operate to allow the child to manipulate the parents or confuse the child's sense of direction,¹⁶ and will provide a stable atmosphere for the child to adjust, rather than perpetuating turmoil or custodial wars.¹⁷ Thus, the factual inquiry necessary to impose joint physical custody is substantially different from that required for making a sole custody determination. Under these facts, we cannot say that Justin received adequate notice that the court might order joint custody or an adequate opportunity to present evidence on this vital issue.

[14,15] A court's determination of questions raised by the facts, but not presented in the pleadings, should not come at the expense of due process.¹⁸ We have recognized that a trial court has an independent responsibility to determine questions of custody and visitation of minor children according to their best interests, which responsibility cannot be controlled by an agreement or stipulation of the parties.¹⁹ In *Lautenschlager v. Lautenschlager*,²⁰ we held that the trial court was free to make an independent determination even when it was inconsistent with the parties' stipulations and the parties did not contest sole custody with the mother in their pleadings. But we also held in *Lautenschlager* that if the court disapproves of a custody stipulation, it must give the parties an opportunity to present

¹⁶ *Trimble v. Trimble*, 218 Neb. 118, 352 N.W.2d 599 (1984).

¹⁷ *Moninger v. Moninger*, 202 Neb. 494, 276 N.W.2d 100 (1979).

¹⁸ See *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003).

¹⁹ See, § 42-364(1); *Deacon v. Deacon*, 207 Neb. 193, 297 N.W.2d 757 (1980), *disapproved on other grounds*, *Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002); *Lautenschlager v. Lautenschlager*, 201 Neb. 741, 272 N.W.2d 40 (1978).

²⁰ *Lautenschlager v. Lautenschlager*, *supra* note 19.

evidence relevant to a complete reexamination of the question of custody.²¹

[16] We conclude that fundamental fairness requires that we apply the rule from *Lautenschlager* to this circumstance. Therefore, we hold that when a trial court determines at a general custody hearing that joint physical custody is, or may be, in a child's best interests, but neither party has requested this custody arrangement, the court must give the parties an opportunity to present evidence on the issue before imposing joint custody.

[17,18] In addition, the district court abused its discretion to order joint custody by failing to specifically find that joint physical custody was in Jace's best interests as required in the last sentence of § 42-364(5). Although Trisha contends that the court implicitly made this finding, implicit findings cannot satisfy procedural rules requiring explicit findings.²² In *Torres v. Aulick Leasing*,²³ we reversed a judgment of the Workers' Compensation Court for failing to make explicit findings as required by Workers' Comp. Ct. R. of Proc. 11 (1998), despite the review panel's conclusion that the factual findings were implicit in the order. We explained that "[w]ithout such findings, there can be no meaningful appellate review."²⁴ The same reasoning applies here.

CONCLUSION

We conclude that the district court erred in ordering joint physical custody when both parties sought sole custody and did not agree to joint custody. Fundamental fairness requires that the parties be given notice that a court is considering

²¹ *Id.* See, also, *Strohmeyer v. Strohmeyer*, 183 Conn. 353, 439 A.2d 367 (1981); *In re Marriage of Rubey v. Vannett*, No. A05-310, 2007 WL 1412749 (Minn. App. May 15, 2007) (unpublished opinion). Compare, *In re Custody of Ayala*, 344 Ill. App. 3d 574, 800 N.E.2d 524, 279 Ill. Dec. 456 (2003); *Van Schaik v. Van Schaik*, 90 Md. App. 725, 603 A.2d 908 (1992); *Mabus v. Mabus*, 890 So. 2d 806 (Miss. 2003).

²² See *Torres v. Aulick Leasing*, 258 Neb. 859, 606 N.W.2d 98 (2000).

²³ *Id.*

²⁴ *Id.* at 863-64, 606 N.W.2d at 102.

joint physical custody and an opportunity to litigate the issues specific to that custody arrangement before it is imposed upon them. We further conclude that the court abused its discretion by failing to specifically find that joint physical custody was in the child's best interests as required by § 42-364(5). Accordingly, we reverse the district court's judgment and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.

HEADNOTES

Contained in this Volume

Abatement, Survival, and Revival 602
Actions 12, 123, 178, 247, 602, 694, 765, 800, 855, 908, 935, 977
Administrative Law 115, 133, 178, 262, 324, 406, 558, 647
Adoption 849
Affidavits 908
Alimony 436, 1043
Annexation 92
Appeal and Error 1, 12, 17, 24, 36, 42, 47, 59, 79, 92, 100, 115, 123, 133, 145, 148,
156, 163, 178, 198, 208, 219, 239, 247, 262, 271, 281, 289, 309, 313, 324, 330,
336, 346, 372, 379, 402, 406, 422, 436, 443, 456, 466, 474, 483, 490, 504, 518,
531, 558, 573, 583, 587, 592, 602, 612, 647, 660, 672, 689, 694, 701, 714, 724,
737, 744, 750, 765, 779, 789, 800, 817, 828, 837, 849, 855, 877, 889, 908, 918,
924, 935, 943, 960, 969, 977, 990, 1013, 1026, 1043
Arrests 346
Attorney and Client 336, 837, 924
Attorney Fees 17, 59, 156, 379, 436, 573, 924, 1043
Attorneys at Law 336

Bail Bond 100
Blood, Breath, and Urine Tests 178
Boundaries 92
Breach of Contract 877
Bridges 313

Child Custody 24, 1043
Child Support 443, 694, 1043
Circumstantial Evidence 239
Civil Rights 977
Claims 531, 765, 800, 943, 977
Class Actions 247
Collateral Attack 817
Collateral Estoppel 406, 789
Confessions 504
Conspiracy 573
Constitutional Law 24, 247, 289, 346, 372, 474, 531, 612, 647, 660, 750, 779, 837,
889, 1043
Contracts 17, 247, 379, 744, 924, 943, 960, 1026
Convictions 219, 474, 518, 612, 789
Corporations 960
Costs 59
Courts 24, 148, 178, 336, 346, 531, 612, 724, 737, 750, 800, 855, 889, 908, 918,
1026, 1043
Criminal Law 100, 219, 239, 309, 346, 474, 518, 583, 592, 612, 750, 789, 837

- Damages 163, 422, 724, 789, 855, 990
Debtors and Creditors 779
Decedents' Estates 59, 828, 908, 918, 969
Declaratory Judgments 208, 531, 889, 960, 1026
Deeds 765
Default Judgments 443
Directed Verdict 1013
Dismissal and Nonsuit 156, 714, 1026
Divorce 443, 1043
DNA Testing 36, 346, 817
Double Jeopardy 474, 592, 837
Due Process 24, 178, 443, 1043
- Effectiveness of Counsel 474, 660, 837
Employer and Employee 247, 300, 855
Employment Security 647
Equal Protection 889
Equity 59, 92, 123, 208, 324, 694, 701, 724, 765, 908
Estoppel 17, 208, 724
Evidence 163, 178, 219, 281, 289, 346, 518, 558, 592, 612, 672, 724, 779, 789, 877,
969, 990, 1013
Expert Witnesses 59, 219, 672, 990, 1013
Extradition and Detainer 456
- False Imprisonment 518
Final Orders 12, 42, 115, 123, 178, 198, 336, 490, 558, 602, 800, 817, 828, 977
Forbearance 724
Fraud 208, 573, 1026
- Gifts 701
Good Cause 436
Governmental Subdivisions 313, 990
Guaranty 779
- Habeas Corpus 100
Hearsay 289, 592
Highways 313, 990
- Immunity 79, 247, 271, 977
Impeachment 592
Implied Consent 178
Initiative and Referendum 889
Insurable Interest 744
Insurance 724, 744, 943
Intent 133, 156, 208, 219, 239, 281, 474, 518, 701, 744, 765, 849, 889, 935, 943
Investigative Stops 372
- Joint Tenancy 59, 828
Judges 163, 518, 612, 724, 779, 800
Judgments 1, 12, 24, 59, 115, 133, 163, 178, 262, 309, 330, 379, 406, 436, 466, 474,
490, 504, 531, 583, 587, 602, 612, 660, 689, 694, 724, 737, 750, 779, 789, 800,
817, 828, 877, 918, 935, 969, 990, 1043

- Judicial Notice 178
Juries 163, 346, 592, 612, 837
Jurisdiction 1, 12, 24, 42, 133, 178, 198, 247, 379, 483, 490, 531, 558, 583, 602,
612, 737, 800, 817, 828, 908, 918, 977, 1026
Jury Instructions 163, 612, 877
Jury Trials 750
Justiciable Issues 531
Juvenile Courts 47, 239, 504
- Kidnapping 24
- Leases 379
Legislature 17, 24, 115, 133, 156, 239, 247, 309, 474, 531, 779, 849, 889
Liability 79, 573, 935, 990
Licenses and Permits 178, 324, 558
Limitations of Actions 208, 422, 714
- Malpractice 163
Mandamus 148, 336, 889
Medical Assistance 990
Mental Competency 330
Mental Health 198
Mines and Minerals 379
Minors 219, 504, 612
Miranda Rights 346
Modification of Decree 436
Motions for Continuance 518
Motions for New Trial 178, 612, 877, 1013
Motions to Dismiss 79, 466, 531, 737, 908, 1026
Motions to Suppress 330, 372
Motions to Vacate 443
Motor Vehicles 178, 289, 313, 324, 372, 789, 990
Municipal Corporations 92, 558
- Natural Resources Districts 779
Negligence 79, 163, 219, 313, 573, 990
New Trial 592, 877
Notice 79, 178, 271, 346, 443, 531, 789, 990
Nuisances 123
- Ordinances 92, 558, 647
Other Acts 219
- Parent and Child 163, 694, 744
Parental Rights 1043
Parties 765, 800, 935
Partnerships 208
Paternity 443, 694
Pensions 247
Physicians and Surgeons 219
Pleadings 1, 17, 42, 79, 123, 163, 309, 466, 531, 558, 573, 737, 789, 837, 855, 877,
908, 969, 1026, 1043

- Police Officers and Sheriffs 178, 346, 372
- Political Subdivisions 79, 779
- Political Subdivisions Tort Claims Act 79, 271, 281, 689
- Postconviction 42, 474, 660, 817, 837
- Prejudgment Interest 943
- Presumptions 17, 123, 208, 443, 612, 647, 837, 889, 969, 1013
- Pretrial Procedure 148, 330, 336, 379, 817
- Prior Convictions 750
- Prisoners 100
- Probable Cause 346, 372, 592
- Probation and Parole 219, 346, 456
- Proof 1, 100, 148, 163, 178, 219, 239, 281, 289, 313, 330, 336, 436, 443, 474, 504, 531, 573, 587, 612, 647, 672, 701, 750, 765, 779, 789, 837, 877, 889, 908, 924, 960, 969, 977, 990, 1026
- Property 123, 208, 379, 744
- Property Division 1043
- Proximate Cause 163, 313, 990
- Public Meetings 148
- Public Officers and Employees 977
- Public Policy 17, 694, 855
- Public Utilities 558

- Quiet Title 765

- Real Estate 123
- Records 163, 402, 660, 969
- Res Judicata 466, 660, 789
- Restitution 47, 750
- Revocation 178, 324
- Right-of-Way 313
- Right to Counsel 474, 504, 837
- Rules of Evidence 59, 163, 219, 281, 592, 672, 779, 789, 990, 1013
- Rules of the Supreme Court 79, 379, 402, 443, 466, 531, 737, 849, 908

- Sales 379
- Schools and School Districts 531
- Search and Seizure 346, 372
- Self-Incrimination 346
- Sentences 100, 219, 456, 518, 612, 750
- Service of Process 443
- Sexual Assault 518, 612
- Specific Performance 208
- Speedy Trial 330, 587
- Standing 612, 765
- States 24, 324, 379, 779, 889, 1026
- Statutes 1, 12, 17, 24, 92, 115, 133, 145, 148, 156, 178, 208, 239, 247, 271, 309, 324, 346, 474, 558, 602, 612, 647, 689, 714, 724, 765, 779, 849, 889, 908, 918, 935, 943, 977, 1043
- Stock 701
- Subrogation 724

- Summary Judgment 79, 123, 271, 300, 313, 379, 422, 531, 744, 789, 800, 924, 943, 960
- Supreme Court 17, 531
- Tax Sale 765
- Taxation 969
- Taxes 247
- Termination of Employment 855
- Testimony 219, 672, 1013
- Theft 837
- Time 100, 271, 436, 443, 456, 474, 558
- Title 208, 765
- Tort Claims Act 313, 990
- Tort-feasors 724, 935
- Torts 300, 422
- Trial 59, 163, 219, 289, 346, 592, 701, 724, 837, 877, 960, 977, 990, 1013, 1043
- Trusts 59, 908
- Value of Goods 837
- Verdicts 346, 592, 612
- Visitation 1043
- Voting 889
- Waiver 17, 115, 247, 271, 330, 504
- Wills 59, 828
- Witnesses 163, 219, 612, 701, 960, 990
- Words and Phrases 79, 92, 123, 148, 163, 178, 271, 281, 309, 313, 336, 346, 379, 422, 436, 443, 518, 558, 612, 647, 724, 779, 789, 800, 817, 837, 889, 960, 990, 1043
- Workers' Compensation 1, 156, 300, 672, 724, 855
- Zoning 123

