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of similar ordinance were conflict preempted whereas housing provisions were field preempted). I agree with the opinion that an issue of preemption is no doubt present in the federal cases, and poses federal questions, and that the resolution of the preemption issue, in the absence of a state law claim, may well resolve the entire federal controversy. I would not assume the preemption outcome to be the same with respect to the distinct issues regarding housing and employment and would not assume for certification purposes that construction of state law necessarily lacks relevance in equal measure as to housing and employment.

Because the showing in this request lacks specificity regarding the nature of the challenge in the federal consolidated case and the question does not direct us to the specific state law at issue, I agree with the opinion which declines this request.

Countryside Cooperative and Michigan Millers Mutual Insurance Company, appellees and cross-appellants, v. The Harry A. Koch Co., appellant and cross-appellee.

790 N.W.2d 873

Filed November 12, 2010. No. S-09-896.

1. **Actions: Parties: Standing.** Whether a party who commences an action has standing and is therefore the real party in interest presents a jurisdictional issue.
2. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional issue that does not involve a factual dispute presents a question of law, which an appellate court independently decides.
3. **Insurance: Contracts.** The interpretation of an insurance policy is a question of law.
4. **Judgments: Appeal and Error.** In reviewing questions of law, an appellate court resolves the question independently of the lower court's conclusion.
5. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts 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. **Actions: Parties: Statutes: Public Policy.** Neb. Rev. Stat. § 25-301 (Reissue 2008) provides that every action shall be prosecuted in the name of the real party in interest. The purpose of the statute is to prevent the prosecution of actions by persons who have no right, title, or interest in the cause. The statute also

discourages harassing litigation and keeps litigation within certain bounds in the interest of sound public policy.

7. **Actions: Parties: Standing.** The focus of the real party in interest inquiry is whether the party has standing to sue due to some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. The purpose of the inquiry is to determine whether the party has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.
8. **Insurance: Brokers: Principal and Agent.** An insurance broker acts as an agent of the insured.
9. **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.
10. **Appeal and Error.** Errors argued but not assigned will not be considered on appeal.
11. **Subrogation: Words and Phrases.** Generally, subrogation is the right of one, who has paid an obligation which another should have paid, to be indemnified by the other.
12. ____: ____. Subrogation is the substitution of one person in the place of another with reference to a lawful claim, demand, or right, so that the one who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities.
13. **Subrogation: Liability.** The doctrine of subrogation applies where a party is compelled to pay the debt of a third person to protect his or her own rights or interest, or to save his or her own property.
14. ____: ____. To be entitled to subrogation, one must pay a debt for which another is liable.
15. **Insurance: Contracts: Subrogation: Tort-feasors.** In the context of insurance, the right to subrogation is based on two premises: (1) A wrongdoer should reimburse an insurer for payments that the insurer has made to its insured, and (2) an insured should not be allowed to recover twice from the insured's insurer and the tort-feasor.
16. **Insurance: Contracts: Claims: Time.** A claims-made policy provides coverage only where a claim is made and reported to the insurance carrier during the policy period or a specified period thereafter.
17. ____: ____: ____: ____. Where an insurance policy requires that a claim be made and reported during the policy period or an extended reporting period in order for the loss to be treated as falling within the coverage of the policy, failure to comply with the reporting requirement is sufficient to defeat coverage without a showing of prejudice to the insurer in the absence of a specific policy provision to the contrary.
18. **Insurance: Brokers: Principal and Agent.** As a general principle, it is not necessary for an insured, in order to recover from the broker or agent, to show that he or she has sued the insurance company.
19. **Laches: Equity: Estoppel.** In Nebraska, both laches and equitable estoppel are affirmative defenses.

20. **Pleadings.** An affirmative defense must be specifically pled to be considered.
21. **Appeal and Error.** An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal.
22. **Prejudgment Interest: Appeal and Error.** Prejudgment interest may be awarded only as provided in Neb. Rev. Stat. § 45-103.02 (Reissue 2004), and whether prejudgment interest should be awarded is reviewed de novo on appeal.
23. **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. A two-pronged inquiry is required. There must be no dispute either as to the amount due or as to the plaintiff's right to recover, or both.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Chad G. Marzen and Dan H. Ketcham, of Engles, Ketcham, Olson & Keith, P.C., and Kenneth R. Rothschild and Audrey L. Shields, of Golden, Rothschild, Spagnola, Lundell, Levitt & Boylan, P.C., for appellant.

Terry R. Wittler, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellees.

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

STEPHAN, J.

This is a negligence action against The Harry A. Koch Co. (Koch), an insurance broker. Countryside Cooperative (Countryside) and Michigan Millers Mutual Insurance Company (Michigan Millers) allege that they sustained damages when Koch failed to timely report a personal injury claim against Countryside to the company that insured Countryside under a claims-made policy. Koch appeals from a judgment in favor of Countryside and Michigan Millers, and Countryside and Michigan Millers cross-appeal. We affirm the judgment of the district court.

I. BACKGROUND

In late October 2004, William Boden was working on his property in rural Lancaster County. A tank owned by Countryside and filled with anhydrous ammonia was mounted

on a trailer and parked on land adjacent to the property where Boden was working. Boden subsequently sued Countryside, alleging that the tank leaked and that he suffered extensive physical injuries as a result of his exposure to the anhydrous ammonia.

At the time of this incident, Countryside, formerly known as Firth Cooperative Co., Inc., was insured under two liability insurance policies: a commercial general liability policy issued by Michigan Millers and a commercial pollution legal liability policy issued by American International Specialty Lines Insurance Company (American International). The American International policy was a claims-made policy, and Koch was the broker for Countryside on the policy. Countryside timely notified Koch of the Boden claim, but Koch did not notify American International until several days after the reporting period in the American International policy had expired. Michigan Millers was timely notified of the Boden claim.

American International subsequently refused to defend Countryside against Boden's claim on grounds that (1) Boden's claim was not reported within the time periods specified in the policy, (2) Countryside was not an insured under the policy, (3) an underground tank exclusion in the policy applied, and (4) a "known contamination" exclusion in the policy applied. Michigan Millers defended Countryside under its policy and eventually settled Boden's claim for $900,000.

After the settlement with Boden was concluded, Countryside and Michigan Millers entered into a "Memorandum of Understanding" in which they agreed to jointly sue Koch based upon Koch's alleged negligence in failing to timely report the Boden claim to American International. Michigan Millers agreed to control the litigation and pay all attorney fees and costs, and Countryside agreed to cooperate fully in the prosecution of the action and execute any necessary documents. It was also agreed that Countryside would receive 2 percent of the net proceeds of a judgment or settlement and that Michigan Millers would receive the remaining 98 percent.

Countryside and Michigan Millers filed this action against Koch on December 12, 2006, alleging that Koch's negligence

in failing to timely report the Boden claim to American International resulted in damages because Countryside lost the benefit of the American International policy. After Koch answered, both parties filed motions for summary judgment on the issue of Koch's liability. The district court denied both motions after an evidentiary hearing, ruling in part that genuine issues of material fact existed as to whether the American International policy would have applied to the Boden claim but for Koch's failure to give timely notice. But in its order, the district court determined that Michigan Millers sustained a loss by reason of defending and settling the Boden claim and, pursuant to the memorandum of understanding, had standing to bring the action. The court also rejected Koch's contention that Countryside had not suffered any loss because Michigan Millers had defended Boden's lawsuit and paid the settlement, noting that the memorandum of understanding and the collateral source rule refuted this contention. The court also determined that because the action was brought under a negligence theory, American International was not a necessary party.

The parties subsequently filed renewed motions for summary judgment. After reviewing the previously submitted evidence and receiving one additional exhibit, the district court determined (1) that no genuine issues of material fact existed, (2) that Countryside was a named insured under the American International policy, (3) that none of the policy exclusions applied, (4) that Countryside's right to coverage under the American International policy "was lost due to Koch's failure to notify [American International] within the policy period or extended reporting period," and (5) that American International would have been obligated to defend Countryside on the Boden claim if proper notice had been given by Koch. The court reiterated its previous determinations regarding the standing of Countryside and Michigan Millers to maintain the action.

The parties then waived a jury trial and submitted the issue of damages to the court on a stipulation of facts. The court determined that both the Michigan Millers and the American International policies included "other insurance" clauses which

provided that if each policy was primary, then the loss would be shared equally up to the policy limits. The court held that both policies were primary, and therefore awarded Countryside and Michigan Millers one-half of the $900,000 settlement amount, one-half of the $37,445.49 incurred by Michigan Millers defending the Boden claim, and attorney fees incurred by Countryside in the amount of $9,514.39, for a total judgment against Koch of $478,237.14. After Koch's motion for new trial or to reconsider was overruled, it filed this timely appeal. We granted a petition to bypass filed by Countryside and Michigan Millers.

II. ASSIGNMENTS OF ERROR

Koch assigns that the district court erred in entering judgment for Countryside and Michigan Millers, because (1) there was no valid assignment of rights from Countryside to Michigan Millers, (2) Koch did not owe any duty to Michigan Millers, (3) Countryside did not sustain a loss, (4) the American International policy was a windfall policy to Michigan Millers and therefore Michigan Millers had no right to assert coverage or receive the benefit of the American International policy, and (5) Michigan Millers failed to pursue American International's denial of the Boden claim.

On cross-appeal, Countryside and Michigan Millers assign that the district court erred in failing to award as damages the full amount of the Boden settlement and in failing to award prejudgment interest.

III. STANDARD OF REVIEW

[1,2] Whether a party who commences an action has standing and is therefore the real party in interest presents a jurisdictional issue.[1] A jurisdictional issue that does not involve a factual dispute presents a question of law, which we independently decide.[2]

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[1] *In re Estate of Hedke*, 278 Neb. 727, 775 N.W.2d 13 (2009); *Burnison v. Johnston*, 277 Neb. 622, 764 N.W.2d 96 (2009).

[2] *Id.*

[3,4] The interpretation of an insurance policy is a question of law.[3] In reviewing questions of law, an appellate court resolves the question independently of the lower court's conclusion.[4]

[5] An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts 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]

IV. ANALYSIS

1. Koch's Appeal

(a) Real Party in Interest

For various reasons, Koch contends that neither Countryside nor Michigan Millers possessed rights or interests which would entitle either of them to recover damages in this case. We generally interpret these arguments to assert that neither Countryside nor Michigan Millers is a real party in interest in this case.

[6,7] Neb. Rev. Stat. § 25-301 (Reissue 2008) provides that "[e]very action shall be prosecuted in the name of the real party in interest . . . ." The purpose of the statute is to prevent the prosecution of actions by persons who have no right, title, or interest in the cause.[6] The statute also discourages harassing litigation and keeps litigation within certain bounds in the interest of sound public policy.[7] The focus of the real party in interest inquiry is whether the party has standing to sue due to some real interest in the cause of action, or a legal or equitable

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[3] *Dutton-Lainson Co. v. Continental Ins. Co.*, 279 Neb. 365, 778 N.W.2d 433 (2010); *Rickerl v. Farmers Ins. Exch.*, 277 Neb. 446, 763 N.W.2d 86 (2009).

[4] *Id.*

[5] *Community Dev. Agency v. PRP Holdings*, 277 Neb. 1015, 767 N.W.2d 68 (2009).

[6] *Schmidt v. Henke*, 192 Neb. 408, 222 N.W.2d 114 (1974); *Scholting v. Alley*, 185 Neb. 549, 178 N.W.2d 273 (1970).

[7] *Id.*

right, title, or interest in the subject matter of the controversy.[8] The purpose of the inquiry is to determine whether the party has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.[9] We examine Koch's arguments with respect to each party separately.

(i) Countryside

[8] It is uncontroverted that Koch acted as a broker with respect to the American International policy issued to Countryside. An insurance broker acts as an agent of the insured.[10] We have recognized that a broker who agrees to obtain insurance coverage for another but fails to do so is liable for damage proximately caused by such negligence, including the amount that would have been due under such policy if it had been obtained.[11] In this case, Countryside alleged that it reported the Boden claim to Koch and that Koch undertook to report the claim to American International within the time period specified in its policy but negligently failed to do so. Koch does not dispute that it had a duty to Countryside to timely report the Boden claim to American International or that it breached such duty. Rather, it argues that because the Boden claim and related defense costs were paid by Michigan Millers under its policy, Countryside did not suffer a loss and therefore could not maintain this action.

[9] The district court rejected Koch's argument that Countryside had suffered no loss by relying upon the collateral source rule. 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

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[8] See, *Stevens v. Downing, Alexander*, 269 Neb. 347, 693 N.W.2d 532 (2005); *Misle v. Misle*, 247 Neb. 592, 529 N.W.2d 54 (1995).

[9] *Id.*

[10] See, *Broad v. Randy Bauer Ins. Agency*, 275 Neb. 788, 749 N.W.2d 478 (2008); *Moore v. Hartford Fire Ins. Co.*, 240 Neb. 195, 481 N.W.2d 196 (1992). See 3 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 45:1 (2007).

[11] *Flamme v. Wolf Ins. Agency*, 239 Neb. 465, 476 N.W.2d 802 (1991); *Kenyon & Larsen v. Deyle*, 205 Neb. 209, 286 N.W.2d 759 (1980).

up by the wrongdoer in mitigation of damages.[12] 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. The theory underlying the adoption of this rule by a majority of jurisdictions is to prevent a tort-feasor from escaping liability because of the act of a third party, even if a possibility exists that the plaintiff may be compensated twice."[13]

Here, Countryside alleged that because of Koch's negligence, it lost coverage for the Boden claim which would otherwise have been provided under the American International policy, for which Countryside paid a premium. The provision of coverage under the Michigan Millers policy, for which Countryside also paid a premium, is a collateral source with respect to Countryside's negligence claim against Koch. Koch, as the alleged tort-feasor, cannot escape liability to Countryside on the basis of the benefits paid under the Michigan Millers policy.

[10] We also note that the complaint included a claim for defense costs incurred by Countryside on the Boden claim which were not paid by Michigan Millers, and these costs were included in the final judgment for damages. Although Koch argues in its brief that these costs should not have been included in the award of damages, Koch makes no corresponding assignment of error. We therefore do not address this issue further because of the established principle that errors argued but not assigned will not be considered on appeal.[14]

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[12] *Fickle v. State*, 274 Neb. 267, 759 N.W.2d 113 (2007); *Mahoney v. Nebraska Methodist Hosp.*, 251 Neb. 841, 560 N.W.2d 451 (1997); *Chadron Energy Corp. v. First Nat. Bank*, 236 Neb. 173, 459 N.W.2d 718 (1990).

[13] *Mahoney v. Nebraska Methodist Hosp., supra* note 12, 251 Neb. at 847, 560 N.W.2d at 456, quoting *Hiway 20 Terminal, Inc. v. Tri-County Agri-Supply, Inc.*, 232 Neb. 763, 443 N.W.2d 872 (1989).

[14] *Vokal v. Nebraska Acct. & Disclosure Comm.*, 276 Neb. 988, 759 N.W.2d 75 (2009); *Agena v. Lancaster Cty. Bd. of Equal.*, 276 Neb. 851, 758 N.W.2d 363 (2008).

We conclude from the record that Countryside had rights and interests which could be benefited by the relief sought in this action and was therefore a real party in interest.

(ii) Michigan Millers

Koch argues that Michigan Millers cannot be a real party in interest "because there is no privity of contract between Koch and Michigan Millers, nor did Koch owe any legal duty to Michigan Millers."[15] But in making this argument, Koch concedes that it owed a duty to Countryside. The district court regarded the memorandum of understanding as an assignment of Countryside's claim against Koch to Michigan Millers. In its appellate brief, Koch assigns as error that "[t]here was no valid assignment of rights from Countryside to Michigan Millers," but includes no argument on this point. Because this alleged error was not both specifically assigned and specifically argued in Koch's brief, we do not reach it in this appeal.[16] Instead, for purposes of this appeal, we regard the memorandum of understanding as an assignment pursuant to which Michigan Millers could maintain the action against Koch.[17]

[11-15] Michigan Millers also has standing because of its subrogation right arising from its payment of the Boden claim. In *Midwest PMS v. Olsen*,[18] an insurance carrier which had paid a workers' compensation claim on behalf of its insured sought reimbursement from another insurance carrier which it alleged to be liable for a portion of the settlement. We characterized the claim as one of subrogation and summarized the applicable principles as follows:

> Generally, subrogation is the right of one, who has paid an obligation which another should have paid, to be indemnified by the other. It is the substitution of one person in the place of another with reference to a lawful claim, demand, or right, so that the one who is substituted

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[15] Brief for appellant at 19.

[16] See *Obad v. State*, 277 Neb. 866, 766 N.W.2d 89 (2009).

[17] See, Neb. Rev. Stat. § 25-302 (Reissue 2008); *Eli's Inc. v. Lemen*, 256 Neb. 515, 591 N.W.2d 543 (1999).

[18] *Midwest PMS v. Olsen*, 279 Neb. 492, 778 N.W.2d 727 (2010).

> succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities. The doctrine of subrogation applies where a party is compelled to pay the debt of a third person to protect his or her own rights or interest, or to save his or her own property. To be entitled to subrogation, one must pay a debt for which another is liable.[19]

In the context of insurance, the right to subrogation is based on two premises: (1) A wrongdoer should reimburse an insurer for payments that the insurer has made to its insured, and (2) an insured should not be allowed to recover twice from the insured's insurer and the tort-feasor.[20]

In this case, it is claimed that but for Koch's negligence, the American International policy would have provided liability coverage to Countryside for the Boden claim. Had that occurred, Michigan Millers' liability to Countryside on the Boden claim would have been diminished by operation of the "other insurance" clause in the Michigan Millers policy. Therefore, to the extent that Michigan Millers paid more to Countryside on the Boden claim than it would have been required to pay if both policies had been in force, it is subrogated to Countryside's claim against Koch for negligently failing to report the Boden claim to American International. Recovery on the subrogation claim does not constitute an "[u]nbargained for [w]indfall"[21] to Michigan Millers, as Koch contends, because Michigan Millers' policy specifically provides for a diminished exposure in the event that its insured, Countryside, had other insurance coverage applicable to a claim which was also covered under the Michigan Millers policy. For all of these reasons, Michigan Millers is a real party in interest.

(b) Denial of Coverage by American International

Koch argues that the claims of Countryside and Michigan Millers must fail because there has never been a judicial

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[19] *Id.* at 498, 778 N.W.2d at 732.

[20] *Jensen v. Board of Regents*, 268 Neb. 512, 684 N.W.2d 537 (2004); *Tri-Par Investments v. Sousa*, 268 Neb. 119, 680 N.W.2d 190 (2004).

[21] Brief for appellant at 27.

determination that the American International policy would have applied to the Boden claim but for Koch's failure to timely report the claim. We address each of Koch's arguments in turn.

(i) Alternative Grounds for American International's Denial of Coverage

Koch argues that the late report was only one of four reasons given by American International for denying coverage on the Boden claim and that Countryside and Michigan Millers did not establish that the other three reasons given by American International were invalid. We find no merit to this argument.

The American International policy provided coverage for "[b]odily [i]njury" resulting from "[p]ollution [c]onditions." The policy defined "pollution conditions" as "the discharge, dispersal, release or escape of any solid, liquid, gaseous or thermal irritant or contaminant." The plain language of the policy therefore clearly covered Boden's claim that he was physically injured by exposure to anhydrous ammonia leaking from a tank owned by Countryside.

The first alternative reason which American International gave for denying coverage was that Countryside was not an insured under its policy. The record shows that the policy was originally issued to "Firth Cooperative Co., Inc." as the named insured. But after Firth Cooperative Co. changed its name to "Countryside Cooperative," an endorsement was added to the policy effective December 1, 2003, identifying the named insured as "Countryside Cooperative." We find nothing in the record to contradict this evidence. Thus, the record establishes as a matter of law that Countryside was the named insured under the American International policy.

The second alternative reason given by American International for denying coverage was an exclusion for claims arising from "Pollution Conditions resulting from an Underground Storage Tank" located on Countryside's property. But Countryside's president averred that the Boden claim "was based upon alleged release of anhydrous ammonia from a portable tank mounted upon a trailer; it did not in any way involve underground

storage tanks." His deposition testimony further substantiated this fact. And in responses to requests for admissions, Koch admitted that the Boden claim "involved an allegation of ammonia escaping from an above ground tank." We find no evidence in the record from which a reasonable inference could be drawn that the Boden claim involved an underground storage tank. The record thus establishes as a matter of law that this exclusion did not apply.

The third alternative reason given by American International for denying coverage was an exclusion applicable to claims arising from a "known contamination" on Countryside's premises as described in a 1995 report which is specifically identified in the exclusion. The evidence discussed above establishes as a matter of law that Boden's claim involved an alleged leak in a portable anhydrous ammonia tank which occurred on October 28, 2004, and was not in any way related to the 1995 contamination described in the policy exclusion. The record establishes as a matter of law that this exclusion did not apply.

(ii) Effect of Untimely Report of Claim

The American International policy obligated it to pay, on behalf of Countryside, claims for bodily injury, property damage, or cleanup costs resulting from pollution conditions commencing after December 13, 2002, "provided such Claims are first made against the Insured and reported to the Company, in writing, during the Policy Period, or during the Extended Reporting Period if applicable." The policy period ended on December 13, 2004, and there was an automatic extended reporting period of 60 days. The extended reporting period therefore expired on February 11, 2005. There is undisputed evidence that a representative of Countryside reported the Boden claim to Koch on November 17, 2004, and requested that it be submitted to American International. There is also undisputed evidence that despite assuring Countryside that Koch would timely report the claim to American International, Koch did not do so until February 14, 2005. In denying coverage for the Boden claim, American International cited the fact that this report was not received within the time periods required under its claims-made policy. Koch argues that the district court erred

in concluding as a matter of law that American International was entitled to deny coverage on this basis, because there was no showing that American International was prejudiced by the delay.

[16] We have held that failure to give timely notice of a claim to an insurer is not a defense to the claim unless there is evidence of collusion or it is shown that the insurer has been prejudiced in its handling of the claim.[22] Our cases applying this principle have involved "occurrence" policies which provide coverage where the event resulting in liability occurs during the policy period.[23] As Koch correctly notes, we have not addressed the applicability of this principle to a claims-made policy such as the American International policy. A claims-made policy provides coverage only where a claim is made and reported to the insurance carrier during the policy period or a specified period thereafter.[24]

Koch relies on *Rentmeester v. Wis. Lawyers Mut. Ins.*[25] in arguing that its untimely reporting of the Boden claim could not justify American International's denial of coverage in the absence of a showing of prejudice. But in that case, the policy included a provision specifically stating that failure to provide notice of a claim within the time period specified in the policy "'shall not invalidate or reduce a claim unless we are prejudiced thereby, and it was reasonably possible to meet the time limits.'"[26] The American International policy includes no such language, and *Rentmeester* is therefore distinguishable and unpersuasive.

A majority of courts addressing the issue have held that the failure to report a claim within the time periods specified in a claims-made policy is sufficient to defeat coverage without

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[22] *Steffensmeier v. Le Mars Mut. Ins. Co.*, 276 Neb. 86, 752 N.W.2d 155 (2008); *Deprez v. Continental Western Ins. Co.*, 255 Neb. 381, 584 N.W.2d 805 (1998).

[23] See *id.*

[24] See *Esmailzadeh v. Johnson and Speakman*, 869 F.2d 422 (8th Cir. 1989).

[25] *Rentmeester v. Wis. Lawyers Mut. Ins.*, 164 Wis. 2d 1, 473 N.W.2d 160 (Wis. App. 1991).

[26] *Id.* at 8, 473 N.W.2d at 163.

a showing of prejudice to the insurer.[27] These holdings reflect the essential difference between an occurrence policy and a claims-made policy. As stated in *Lexington Ins. Co. v. St. Louis University*[28]:

> Both types of policies require the insured to promptly notify the insurer of possible covered losses. With a claims made policy, however, that notice is not simply part of the insured's duty to cooperate. It defines the limits of the insurer's obligation—if there is no timely notice, there is no coverage.

Under a claims-made policy, "the very description of the risk covered include[s] the requirement that claims be both made and reported within the policy period."[29] Other courts characterize the timely reporting of the claim to the insurer as "the most important characteristic"[30] and the "essence"[31] of a claims-made policy, so that "failure to give timely notice forfeits coverage under [a] claims-made policy as a matter of law."[32] Because of this essential difference between occurrence and claims-made policies, "allow[ing] an extension of reporting time where the insurer failed to demonstrate prejudice in a claims-made policy would extend the coverage the parties contracted for and, in

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[27] See, *Lexington Ins. Co. v. St. Louis University*, 88 F.3d 632 (8th Cir. 1996); *Esmailzadeh v. Johnson and Speakman, supra* note 24; *Simundson v. United Coastal Ins. Co.*, 951 F. Supp. 165 (D.N.D. 1997); *CMC v. Executive Risk Indem., Inc.*, 151 N.H. 699, 867 A.2d 453 (2005); *Tenovsky v. Alliance Syndicate, Inc.*, 424 Mass. 678, 677 N.E.2d 1144 (1997); *Gulf Ins. Co. v. Dolan, Fertig and Curtis*, 433 So. 2d 512 (Fla. 1983); *Thoracic Cardio. Assoc. v. St. Paul Fire*, 181 Ariz. 449, 891 P.2d 916 (Ariz. App. 1994); *Campbell & Co. v. Utica Mut. Ins. Co.*, 36 Ark. App. 143, 820 S.W.2d 284 (1991). See, also, 13 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 186:13 (2005).

[28] *Lexington Ins. Co. v. St. Louis University, supra* note 27, 88 F.3d at 634.

[29] *Esmailzadeh v. Johnson and Speakman, supra* note 24, 869 F.2d at 425.

[30] *Simundson v. United Coastal Ins. Co., supra* note 27, 951 F. Supp. at 167.

[31] *Gulf Ins. Co. v. Dolan, Fertig and Curtis, supra* note 27, 433 So. 2d at 514.

[32] *CMC v. Executive Risk Indem., Inc., supra* note 27, 151 N.H. at 704, 867 A.2d at 458.

effect, rewrite the contract between the parties."[33] Other courts have reached similar conclusions.[34]

[17] We agree with the reasoning of these cases and hold that where an insurance policy requires that a claim be made and reported during the policy period or an extended reporting period in order for the loss to be treated as falling within the coverage of the policy, failure to comply with the reporting requirement is sufficient to defeat coverage without a showing of prejudice to the insurer in the absence of a specific policy provision to the contrary. The district court did not err in concluding as a matter of law that Koch's failure to timely report the Boden claim was the sole reason that the claim was not covered under the American International policy.

(c) Other Defenses

(i) Exhaustion of Remedies

[18] Koch makes a general exhaustion of remedies argument, contending that the claims against it were barred by the fact that Countryside and Michigan Millers did not first sue American International in order to obtain a judicial determination of American International's liability under the claims-made policy. We are not persuaded by this argument. As noted, Countryside and Michigan Millers proved *in this action* that American International acted with justification in denying coverage for the Boden claim because of Koch's failure to report the claim as required by the policy. Koch does not contend that the settlement of the Boden claim was unreasonable, and it stipulated that if called, appropriate witnesses would testify in the form of opinion that the amount paid to Boden, as well as the amount of attorney fees and costs paid by Countryside and Michigan Millers, was fair, reasonable, and necessary. Everything necessary to establish Koch's liability and the amount of resulting damages was alleged and proved in this action. As a general principle, "[i]t is not necessary for [an]

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[33] *Campbell & Co. v. Utica Mut. Ins. Co., supra* note 27, 36 Ark. App. at 150, 820 S.W.2d at 288.

[34] *Simundson v. United Coastal Ins. Co., supra* note 27; *Gulf Ins. Co. v. Dolan, Fertig and Curtis, supra* note 27.

insured, in order to recover from the broker or agent, to show that he or she has sued the insurance company."[35] We see no reason to depart from this principle here.

(ii) Laches and Equitable Estoppel

[19-21] Koch also argues that the claim asserted by Countryside and Michigan Millers in this action is barred by the doctrines of laches and equitable estoppel. In Nebraska, both laches and equitable estoppel are affirmative defenses.[36] An affirmative defense must be specifically pled to be considered.[37] Koch did not specifically plead laches or equitable estoppel in its answer, nor did it allege facts upon which the defenses could reasonably be based. And the district court did not address these issues. An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal.[38] We therefore do not address Koch's argument with respect to these issues.

(iii) Failure of Michigan Millers to Pursue American International's Denial of Claim Pursuant to Equitable Subrogation

Koch makes a rather confusing argument that because Michigan Millers was aware of the American International policy but did not pursue a subrogation claim against American International, it should be barred from recovery against Koch. We find no merit in this argument. Neither Countryside nor Michigan Millers could have recovered from American

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[35] 44 C.J.S. *Insurance* § 312 at 431 (2007). See, *Long Is. Lighting v. Steel Derrick Barge FSC 99*, 725 F.2d 839 (2d Cir. 1984); *Wolfswinkel v. Gesink*, 180 N.W.2d 452 (Iowa 1970).

[36] See, *Appleby v. Andreasen*, 276 Neb. 926, 758 N.W.2d 615 (2008) (laches); *Vanice v. Oehm*, 255 Neb. 166, 582 N.W.2d 615 (1998) (laches); *Hughes Co. v. Farmers Union Produce Co.*, 110 Neb. 736, 194 N.W. 872 (1923) (equitable estoppel); *Victory Lake Marine v. Velduis*, 9 Neb. App. 815, 621 N.W.2d 306 (2000) (equitable estoppel).

[37] *Rosberg v. Lingenfelter*, 246 Neb. 85, 516 N.W.2d 625 (1994); *Diefenbaugh v. Rachow*, 244 Neb. 631, 508 N.W.2d 575 (1993).

[38] *Tolliver v. Visiting Nurse Assn.*, 278 Neb. 532, 771 N.W.2d 908 (2009); *Houston v. Metrovision, Inc.*, 267 Neb. 730, 677 N.W.2d 139 (2004).

International, because coverage under its policy was negated by the failure of Koch to report the Boden claim in the time periods required by the policy. Having paid amounts which should have been paid by American International but for Koch's negligence, Michigan Millers was entitled to assert its subrogation claim in this action, as explained more fully above.

(d) Summary

For the reasons discussed, we find no merit in any of Koch's assignments of error.

2. Cross-Appeal

(a) Total Policy Insuring Intent Rule

In their complaint, Countryside and Michigan Millers sought the full amount of the Boden settlement and related defense costs paid by Michigan Millers as damages in their claim against Koch. In their cross-appeal, they argue that the district court erred in awarding only 50 percent of this amount.

Some additional background on this issue is necessary. Both the Michigan Millers policy and the American International policy contain similar "other insurance" clauses. The clause in Michigan Millers' policy provided that the insurance was primary, except in limited circumstances not applicable to this case. It further provided that if another applicable policy was also primary, it would contribute by equal shares. The clause in American International's policy also provided that the insurance was primary, and that if another policy was also primary, it would contribute by equal shares.

In its order awarding damages, the district court noted the similarity of the "other insurance" clauses of both policies, and determined that both policies were primary, thus obligating each insurer for an equal amount of the claim. The court concluded: "While the 'total policy insuring intent' theory advocated by [Countryside and Michigan Millers], which has been applied by the Minnesota courts, has some logic, this court will defer to the appellate courts of this state if such a theory is to be adopted here."

The "total policy insuring intent rule" originated in a circumstance where two insurance policies applicable to a

claim contained conflicting "other insurance" clauses.[39] In that circumstance, the Minnesota Supreme Court concluded that instead of attempting to reconcile the policies, a better approach is "to allocate respective policy coverages in the light of the total policy insuring intent, as determined by the primary policy risks upon which each policy's premiums were based and as determined by the primary function of each policy."[40] Under the total policy insuring intent rule, if two applicable insurance policies have conflicting "other insurance" clauses, the court will disregard both clauses entirely, and instead attempt to ascertain which policy was meant to cover the risk at issue by looking at the primary function and intent of each policy.[41] Under the total policy insuring intent test, "a policy designed to cover the risk in question takes precedence over a policy which only incidentally covers that risk."[42]

While they do not contend that the "other insurance" clauses found in the Michigan Millers and American International policies are in conflict, Countryside and Michigan Millers argue that this should not preclude application of the "total policy insuring intent rule" under more recent cases which arguably apply the rule in the absence of conflicting policy provisions.[43] They argue that because the American International policy specifically insured against injury caused by pollution and the Michigan Millers policy insured only against general liability, the American International policy would have provided primary coverage for the Boden claim but for Koch's negligence, and that therefore the full amount which would

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[39] *Federal Insurance Co. v. Prestemon*, 278 Minn. 218, 153 N.W.2d 429 (1967).

[40] *Id.* at 231, 153 N.W.2d at 437.

[41] See, *Bettenburg v. Employers Liability Assurance Corp., Ltd.*, 350 F. Supp. 873 (D. Minn. 1972); *Federal Insurance Co. v. Prestemon, supra* note 39; *Redeemer Covenant Church v. Church Mut.*, 567 N.W.2d 71 (Minn. App. 1997).

[42] 15 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 219:44 at 219-52 to 219-53 (2005).

[43] See *Redeemer Covenant Church v. Church Mut., supra* note 41.

have been paid under that policy should be the measure of damages for which Koch is liable.

Koch argues that in the absence of conflicting "other insurance" clauses, Michigan Millers would have been responsible for 50 percent of the Boden claim under the principle, well established in our jurisprudence, that where the terms of an insurance policy are clear, they are to be accorded their plain and ordinary meaning.[44] We agree with this argument and the observation of one commentator that "[it] is unnecessary to apply the total policy insuring intent test . . . where the 'other insurance' clauses in overlapping insurance policies provide a clear and consistent answer as to allocation of primary and excess coverage."[45] Michigan Millers' policy clearly provides that if it and another policy are both primary, it will be obligated for an equal share of a covered loss. That is precisely how the district court computed the damage award, and it did not err in doing so.

(b) Prejudgment Interest

[22] Countryside and Michigan Millers also contend in their cross-appeal that the district court erred in not awarding prejudgment interest. Prejudgment interest may be awarded only as provided in Neb. Rev. Stat. § 45-103.02 (Reissue 2004),[46] and whether prejudgment interest should be awarded is reviewed de novo on appeal.[47]

[23] 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.[48] A two-pronged inquiry is

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[44] See, *Rickerl v. Farmers Ins. Exch., supra* note 3; *Steffensmeier v. Le Mars Mut. Ins. Co., supra* note 22.

[45] 15 Russ & Segalla, *supra* note 42, § 219.44 at 219-53.

[46] *Travelers Indemnity Co. v. International Nutrition*, 273 Neb. 943, 734 N.W.2d 719 (2007); *IBP, Inc. v. Sands*, 252 Neb. 573, 563 N.W.2d 353 (1997).

[47] *Travelers Indemnity Co. v. International Nutrition, supra* note 46; *Ferer v. Aaron Ferer & Sons*, 272 Neb. 770, 725 N.W.2d 168 (2006).

[48] *Id.*

required. There must be no dispute either as to the amount due or as to the plaintiff's right to recover, or both.[49] We conclude that there was a reasonable controversy with respect to both Koch's liability and the amount of potential damages, and accordingly, the district court did not err in refusing to award prejudgment interest under § 45-103.02.

V. CONCLUSION

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

AFFIRMED.

WRIGHT, J., not participating.

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[49] *Id.*

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. WILLIAM L. SWITZER, JR., RESPONDENT.

790 N.W.2d 433

Filed November 12, 2010. No. S-09-1095.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.
2. **Disciplinary Proceedings: Proof.** To sustain a charge in a disciplinary proceeding against an attorney, the Counsel for Discipline must establish a charge by clear and convincing evidence.
3. **Disciplinary Proceedings: Appeal and Error.** When no exceptions to the referee's findings of fact are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive.
4. **Disciplinary Proceedings.** The basic issues in a disciplinary proceeding against an attorney are whether the Nebraska Supreme Court should impose discipline and, if so, the appropriate discipline under the circumstances.
5. ____. To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
6. ____. In imposing attorney discipline, the Nebraska Supreme Court evaluates each case in the light of its particular facts and circumstances.