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clause excludes ignition interlock permitholders from the coverage of § 60-6,197.06.

CONCLUSION

We agree with the district court's interpretation of the statute. Section 60-6,197.06 does not provide the penalty for a driver who has a valid ignition interlock permit but operates a vehicle not equipped with such a device. That conduct is a Class II misdemeanor under § 60-6,211.05(5). We overrule the State's exception.

EXCEPTION OVERRULED.

GERRARD, J., not participating in the decision.
WRIGHT, J., not participating.

WILLIAM A. FITZGERALD ET AL., ON BEHALF OF KELLOM HEIGHTS ASSOCIATES LIMITED PARTNERSHIP, A NEBRASKA LIMITED PARTNERSHIP, AND CUMING STREET CORPORATION, A NEBRASKA CORPORATION, APPELLEES AND CROSS-APPELLANTS, V. COMMUNITY REDEVELOPMENT CORPORATION, A NEBRASKA CORPORATION, AND OMAHA ECONOMIC DEVELOPMENT CORPORATION, A NEBRASKA NONPROFIT CORPORATION, APPELLANTS AND CROSS-APPELLEES.

811 N.W.2d 178

Filed March 9, 2012. No. S-10-624.

1. **Limitations of Actions.** Which statute of limitations applies is a question of law.
2. **Judgments: Appeal and Error.** An appellate court reaches a conclusion regarding questions of law independently of the trial court's conclusion.
3. **Limitations of Actions: Appeal and Error.** The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong.
4. **Contracts: Appeal and Error.** The interpretation of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.
5. **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.
6. **Statutes.** Statutory interpretation presents a question of law.
7. **Prejudgment Interest: Appeal and Error.** Whether prejudgment interest should be awarded is reviewed de novo on appeal.

8. **Limitations of Actions: Fraud.** An action for fraud does not accrue until there has been a discovery of the facts constituting the fraud, or facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which, if pursued, would lead to such discovery.
9. **Estoppel.** The doctrine of equitable estoppel is frequently applied to transactions in which it is found that it would be unconscionable to permit a person to maintain a position inconsistent with one in which he or she has acquiesced or of which he or she has accepted any benefit.
10. **Appeal and Error.** An issue not passed on by the trial court is not appropriate for consideration on appeal.
11. **Judgments: Final Orders: Words and Phrases.** A "judgment" is a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist.
12. **Judgments: Final Orders.** Orders purporting to be final judgments, but that are dependent upon the occurrence of uncertain future events, do not operate as "judgments" and are wholly ineffective and void as such. These "conditional judgments" are not final determinations of the rights and obligations of the parties as they presently exist, but, rather, look to the future in an attempt to judge the unknown.
13. ____: ____. A conditional judgment is wholly void because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect may be.
14. **Appeal and Error.** An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.
15. **Judgments: Attorney Fees: Derivative Actions: Partnerships.** Under Neb. Rev. Stat. § 67-291 (Reissue 2009), the court may award expenses, including attorney fees, as a separate component of the judgment. The statute then requires that in a derivative action, the plaintiff may retain the portion of the judgment awarded as expenses, but any additional proceeds of the judgment that the plaintiff receives must be remitted to the partnership.
16. **Prejudgment Interest: Claims.** Prejudgment interest under Neb. Rev. Stat. § 45-103.02 (Reissue 2010) 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: PETER C. BATAILLON, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Donald J. Buresh, of Stalnaker, Becker & Buresh, P.C., for appellant Community Redevelopment Corporation.

Lyman L. Larsen, Sean W. Colligan, and Geoffrey L. Gross, of Stinson, Morrison & Hecker, L.L.P., for appellant Omaha Economic Development Corporation.

Andrew T. Schlosser, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., and Matthew F. Heffron, of Brown & Brown, P.C., L.L.O., for appellees.

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

MILLER-LERMAN, J.

NATURE OF CASE

The dispute in this case revolves around Kellom Heights Associates Limited Partnership (Kellom Heights), a limited partnership formed to provide financing for the redevelopment of property in Omaha, Nebraska. The appellees are Kellom Heights, Cuming Street Corporation (Cuming Street), and "Class A" limited partners in Kellom Heights. The appellants are Community Redevelopment Corporation (CRC), the general partner, and Omaha Economic Development Corporation (OEDC), a "Class B" limited partner. CRC is a subsidiary of OEDC. The appellees became dissatisfied with the operation of Kellom Heights and filed this complaint asserting various causes of action. The district court for Douglas County found for the appellees on certain causes of action and entered a judgment in their favor in the amount of $918,228 plus costs and interest. In addition to the judgment, the court awarded attorney fees of $336,614. The court denied the appellees' request for prejudgment interest.

OEDC and CRC, the appellants, appeal various orders of the district court and make various assignments of error, including that the district court erred when it rejected their statute of limitations defenses to certain claims. The appellees cross-appeal and claim that the district court erred when it denied their request for prejudgment interest. We affirm in part, and in part reverse and remand for further proceedings.

STATEMENT OF FACTS

Kellom Heights was formed in 1981 for the purposes of providing financing for and carrying out a redevelopment plan north of Cuming Street between 25th and 27th Streets in Omaha, near the Creighton University campus. OEDC was in charge of the redevelopment, which included construction of

a 132-unit apartment complex with 20 percent of the apartment units set aside for U.S. Department of Housing and Urban Development Section 8 subsidized housing. Government financing and grants were obtained to cover much of the cost of the project, but additional funds of approximately $600,000 were needed. OEDC considered forming a limited partnership that would provide investors income tax savings based on expected losses that would be allocated to the limited partners for approximately the first 15 years of the project.

OEDC and CRC executed a partnership agreement for Kellom Heights on June 4, 1981. CRC was designated the general partner, and OEDC was designated a Class B limited partner with no voting rights. OEDC and CRC executed amendments to the agreement on May 1, 1982, and September 29, 2003. The validity of the May 1, 1982, amendment is among the issues in this case. A private placement memorandum (PPM) was provided to potential investors in 1981 and 1982. In the PPM, 60 Class A limited partnership interests were offered. Each investor was offered a minimum and maximum of two partnership interest units for an investment of $20,200. The partnership agreement provided that the Class A limited partners would have a 99-percent interest in the net income or losses and a one-third interest in the net cashflow of Kellom Heights. Thirty individuals, including the appellees in this case, subscribed to become Class A limited partners. A certificate of limited partnership was filed with the Nebraska Secretary of State on May 6, 1982, and with the Douglas County clerk in June 1982.

After approximately 20 years with no cashflow from Kellom Heights, some limited partners became dissatisfied with its operation. The appellees in this case include William A. Fitzgerald, Jerome F. Sherman, Norman Veitzer, and Loyal Borman, who are Class A limited partners who filed this action as a derivative action on behalf of Kellom Heights and on behalf of Cuming Street, a corporation they sought to have admitted as a general partner. The appellees filed the original complaint in this action on January 20, 2006. In the operative second amended complaint, the appellees set forth six causes of action, including actions for the following: (1) an accounting, (2) injunctive

and declaratory relief to appoint Cuming Street as an additional general partner, (3) injunctive and declaratory relief and a temporary restraining order to set aside a $350,000 note payable to OEDC and to halt a $12,000 increase in annual supervisory fees paid to CRC, (4) unjust enrichment to recover interest paid to OEDC on the $350,000 note, (5) injunctive relief and a temporary restraining order to prevent OEDC and CRC from paying their own attorney fees from Kellom Heights funds, and (6) injunctive and declaratory relief to declare that the May 1, 1982, amendment to the partnership agreement (hereinafter Amendment 1) is unenforceable and to prohibit OEDC and CRC from carrying out the provisions of Amendment 1. In their answer, OEDC and CRC raised affirmative defenses, including assertions that the appellees' claims were barred by the statute of limitations and the doctrine of laches and that certain claims were not claims of Kellom Heights and therefore were not properly asserted in a derivative action.

Following a bench trial, the district court entered orders on August 10, 2009, and February 12 and March 11, 2010, determining various issues in this action. OEDC and CRC appealed these orders to the Nebraska Court of Appeals. The Court of Appeals dismissed the appeal in a decision without opinion on May 25, 2010, case No. A-10-247, after it concluded that the district court had explicitly reserved certain matters for determination and therefore had not disposed of all claims. On remand, the district court entered an order on June 17, in which it determined additional matters and stated that all issues in the action had been resolved and that any outstanding motions or issues that may not have been resolved were overruled. A summary of each claim, the court's resolution of each claim, and the court's resolution of other matters follow.

Statutes of Limitations and Other Affirmative Defenses.

In their answer, OEDC and CRC asserted affirmative defenses, including an assertion that the action was barred by the statute of limitations. In the August 10, 2009, order, the district court noted that for a 4-year statute of limitations to apply, the appellees must have known or should have known they had

a cause of action. With regard to the increased supervisory fees, the court noted that the increase occurred within 4 years prior to the filing of this action. With regard to the appointment of Cuming Street as a general partner, the court noted that it was an ongoing process and that therefore, the statute of limitations did not apply. With regard to the remaining claims, including those involving Amendment 1 and interest charged on the $350,000 note, the court found that the appellees were never given adequate notice of the facts giving rise to the existence of the claims and that the appellees filed their action within the 4-year statute of limitations after they learned of the claims. The court found against OEDC and CRC with respect to the statute of limitations defense and also found against OEDC and CRC with respect to their other affirmative defenses.

Accounting.

The appellees asserted that as general partner, CRC had control over the books and records of Kellom Heights and that for the duration of Kellom Heights, CRC had not provided a full and complete accounting of Kellom Heights' assets, income, and expenditures, particularly expenditures the appellees believed to be irregular and improper. The appellees sought an order requiring CRC to account to them "for all assets, income and expenditures" of Kellom Heights, "particularly for all profits and monies received, disbursed and retained by" Kellom Heights since its formation and to make available to the appellees "all books and records" of Kellom Heights since its formation. The appellees also sought, after the accounting was completed, a judgment against OEDC and CRC "for the balance found due" to the appellees.

In the August 10, 2009, order, the district court granted the appellees' request for an accounting and required OEDC and CRC "to make available to the Plaintiffs all books and records of [Kellom Heights] since [its] formation." The court stated that once the accounting was completed, the court would make a decision as to fees and costs. The court also found that from 1986 through 2001, Kellom Heights had earned interest on funds that it held in various bank accounts but that OEDC had taken for itself the interest earned on the accounts. Beginning

in 1986, financial statements for Kellom Heights referred to the interest earned on the bank accounts as "incentive income" payable to OEDC. The court concluded that the partnership agreement did not grant OEDC authority to take the interest. The court concluded that the interest taken from Kellom Heights from 1986 through 2001, which totaled $88,228, should be returned to Kellom Heights with additional interest.

Appointment of Cuming Street as General Partner.

The appellees asserted that under the partnership agreement, the Class A limited partners had a right to approve an entity to become an additional general partner. They asserted that the Class A limited partners had approved by a majority vote the admission of Cuming Street as a general partner but that CRC had unreasonably refused to perform the actions necessary under the agreement to allow the admission of Cuming Street as a general partner. The appellees sought a declaration that admission of Cuming Street as a general partner was in conformity with the law and with the partnership agreement. They also sought to enjoin CRC from refusing to complete additional steps required by the agreement and by law to admit Cuming Street as a general partner and to enjoin CRC from interfering with Cuming Street's exercise of its full rights and power as a general partner.

In the August 10, 2009, order, the district court addressed OEDC and CRC's argument that the appellees had not yet complied with all the requirements to make Cuming Street a general partner. The court found that one of the requirements was an opinion from Kellom Heights' legal counsel that admission of the general partner was in conformity with the applicable statutes and would not cause the termination or dissolution of Kellom Heights or affect its federal tax status. The court noted that on October 17, 2006, counsel had opined that there was authority for Cuming Street to become a general partner and that admission of Cuming Street as a general partner would not cause termination or dissolution of Kellom Heights or affect its tax status. The court noted, however, that counsel opined that there had not yet been compliance with the partnership

agreement's requirements that (1) Cuming Street accept the partnership agreement and (2) admission of Cuming Street as a general partner be approved by the Department of Housing and Urban Development. The court concluded that once these two requirements were met, Cuming Street would become a general partner. The court therefore denied, "at this time," the appellees' claims for declaratory and injunctive relief which would have appointed Cuming Street as a general partner.

Increase in Annual Supervisory Fee.

The appellees asserted that pursuant to the PPM, Kellom Heights was authorized to pay CRC $24,000 annually as a supervisory fee but that, without notice to the Class A limited partners, CRC began paying itself an additional $12,000 per year from Kellom Heights funds. The appellees sought an order declaring that the $12,000 increase in the supervisory fee was invalid and unenforceable and an order enjoining CRC from paying itself more than $24,000 in supervisory fees annually.

In the August 10, 2009, order, the district court found that pursuant to the PPM, CRC was allowed a fee of $12,000 per year for supervisory duties it performed as general partner and an additional fee of $12,000 per year after it took over the duties of manager of Kellom Heights. The court noted that in 2001, CRC began receiving an additional $12,000 per year for a total annual fee of $36,000 for management and supervision. The court rejected CRC's argument to the effect that although the PPM may have limited Kellom Heights' manager fee to $12,000 per year, it did not limit the supervisory fee that CRC received as general partner. The court reasoned that the language of the PPM, although not necessarily the language of the partnership agreement, limited fees to the amounts specified and concluded that the procedures required by the partnership agreement to approve an increase in fees were not followed and that proper notice of the increased fee was not provided to the partners. Having found a violation of the partnership agreement, the court concluded that CRC must return to Kellom Heights the sum of $60,000, representing the additional $12,000 fee for the 5 years it was taken, plus interest.

Note Payable and Interest on Note Payable.

The appellees asserted that in 1982, the city of Omaha gave OEDC a grant of $350,000 with the requirement that OEDC in turn grant, rather than loan, the $350,000 to Kellom Heights. The appellees asserted that OEDC mischaracterized the transfer of $350,000 to Kellom Heights as a loan with interest payable and that OEDC memorialized such characterization in a promissory note. They asserted that CRC paid OEDC $35,000 in interest on the note annually despite the fact that the partnership agreement prohibited the payment of interest from Kellom Heights to OEDC. The appellees sought a declaration that the $350,000 note payable was invalid and unenforceable, and they sought to enjoin CRC from making further payments on the note. The appellees further asserted that OEDC had been unjustly enriched by receiving $35,000 in interest annually on the $350,000 note, and they sought a judgment in the amount of the interest paid.

In the August 10, 2009, order, the district court found that § 6.9 of the partnership agreement allowed Kellom Heights to borrow funds from any person, including the general partner, but required that any loan from the general partner or an affiliate must be without interest. The court rejected OEDC and CRC's argument that other sections of the partnership agreement implied that interest could be charged on a loan from an affiliate; the court concluded that such sections did not negate the clear requirement of § 6.9 that no interest be paid. The court also rejected OEDC and CRC's argument that the appellees knew or should have known that interest was being charged on the note, because Kellom Heights' financial statements for the years 1982 through 1984 disclosed that the note bore interest. The court concluded that OEDC and CRC had a fiduciary duty to advise the other partners of any act that violated the partnership agreement and that OEDC and CRC failed to disclose to the other partners that interest was being paid on the note in violation of the partnership agreement. The court found that the annual interest paid on the note was $35,000, calculated as 10 percent of $350,000, and that a total of $770,000 had been paid over 22 years. The court concluded that the $770,000, with additional interest, should be repaid to

Kellom Heights. The court, however, rejected the appellees' claim that the loan itself was improper, after it found nothing that would have prevented the loan.

Payment of OEDC and CRC's Attorney Fees and Costs From Kellom Heights' Funds.

The appellees asserted that OEDC's and CRC's actions in connection with the other claims asserted in the complaint constituted bad faith or reckless disregard of their duties to Kellom Heights and that, therefore, pursuant to the partnership agreement, OEDC and CRC were not entitled to indemnification or payment from Kellom Heights of their costs and attorney fees to defend this action. The appellees sought to enjoin OEDC and CRC from paying attorney fees or other defense costs from Kellom Heights' funds.

In the August 10, 2009, order, the court ordered that "any costs or fees or judgments" that were awarded to Kellom Heights and against OEDC and CRC were to be paid from the appellants' own funds and not from Kellom Heights' funds. The court stated that the purpose of the order was so that Kellom Heights would not be damaged by this action and that "[t]o do otherwise would defeat the purpose and integrity of this judgment."

In the February 12, 2010, order, the court rejected the appellants' argument that Neb. Rev. Stat. § 67-291 (Reissue 2009) of the Nebraska Uniform Limited Partnership Act required that attorney fees and expenses were to come out of the judgment rather than being awarded in addition to the judgment. The appellants argued that the statute required the appellees to take their attorney fees and costs out of the judgment awarded on their claims and remit the remainder of the judgment to Kellom Heights. The court disagreed with the appellants' interpretation of § 67-291 and concluded that, consistent with § 67-291, attorney fees and expenses awarded to the appellees were to be paid by the appellants in addition to the judgment.

Amendment 1.

The appellees asserted that by executing Amendment 1 to the partnership agreement in 1982, OEDC and CRC sought

to (1) double the percentage of net cashflow to which CRC was entitled; (2) give OEDC and CRC a much greater portion of the proceeds from a sale, refinancing, or liquidation; and (3) allow repayment to OEDC of the $350,000 note. The appellees asserted that provisions of the partnership agreement regarding amendments were not followed with respect to Amendment 1, including requirements for notice to and consent from the limited partners. The appellees sought a declaration that Amendment 1 was not adopted in compliance with the partnership agreement and was therefore unenforceable. The appellees further sought to enjoin OEDC and CRC from enforcing or acting in accordance with the provisions of Amendment 1.

In the August 10, 2009, order, the district court found that § 12.1 of the partnership agreement required that for an amendment to be accepted, "'it shall have been consented to by a Majority Vote of the Class A Limited Partners'" and that there was no vote on Amendment 1 by the Class A limited partners. The court rejected OEDC and CRC's argument that Amendment 1 was adopted before Kellom Heights commenced, which occurred when the certificate of limited partnership was filed with the county clerk in June 1982. The court found that letters sent to the limited partners "never fully informed the partners what the terms [of Amendment 1] were" and that the text of Amendment 1 stated it was to be adopted pursuant to § 12.1. The court reasoned that regardless of when Amendment 1 was adopted, by its own terms, its adoption required a majority vote of the limited partners. The court concluded that Amendment 1 was never adopted and that it was unenforceable.

Attorney Fees and Costs.

With respect to each cause of action, the appellees asked the district court to award them the costs of the action, including attorney fees pursuant to § 67-291 regarding derivative actions.

In the February 12, 2010, order, the court noted that OEDC and CRC asserted that certain of the appellees' causes of action were direct actions for the benefit of the individual

appellees rather than derivative actions for the benefit of Kellom Heights and that the appellants contended an award of attorney fees for such claims was inappropriate under § 67-291. The appellants also asserted that the actions for an accounting, for the challenge to Amendment 1, and for the appointment of Cuming Street as a general partner were not derivative actions but direct claims to benefit the appellees. The court rejected the appellants' arguments with respect to each of the specified claims.

With regard to the accounting, the court noted that under Nebraska law, partners may bring an action for an accounting as a derivative action when the purpose is to obtain the return of money to the partnership. The court concluded that the action for an accounting in this case was a derivative action, because the appellees sought an accounting in order to determine what moneys should be returned to Kellom Heights and that the appellees did not have an injury separate and distinct from the injury to Kellom Heights as a whole.

With regard to Amendment 1, the court concluded that the action was a derivative action because the purpose was to enjoin the appellants from acting in contravention of the partnership agreement by adopting the amendment in a manner not in compliance with the agreement.

With regard to the action to appoint Cuming Street as a general partner, the court concluded that the appellees sought to enforce the requirements of the partnership agreement with respect to admitting a general partner and that therefore, the action was a derivative action. The court further noted that classification of the Cuming Street claim might have been unnecessary because it had denied relief on the claim.

The district court rejected OEDC and CRC's argument that attorney fees were inappropriate because they were relying on the advice of counsel when they took the actions at issue in the appellees' claims. OEDC and CRC cited a case from Missouri for the proposition that in a derivative action, a party relying on the advice of counsel cannot be held liable for attorney fees. The court found that the Missouri case was not applicable because it involved a provision of the specific partnership agreement in that case, and the court found

no law from Nebraska or federal law to support the appellants' proposition.

The court concluded that the reasonable amount of attorney fees to be awarded the appellees was $336,614. Such amount reflected the time spent multiplied by a reasonable hourly rate.

Prejudgment Interest.

The appellees asserted that they were entitled to prejudgment interest under Neb. Rev. Stat. §§ 45-103.02(2) and 45-104 (Reissue 2010). In the February 12, 2010, order, the district court concluded that prejudgment interest was not recoverable under § 45-104. The court further noted that in order to recover prejudgment interest under § 45-103.02, it must be shown that there is no dispute as to (1) the amount due and (2) the plaintiff's right to recover. The court noted that in this case, a trial was required to determine both liability and damages. The court concluded that because neither requirement had been met, prejudgment interest should not be awarded under § 45-103.02.

Later Orders.

On March 11, 2010, the district court entered an order on the appellants' motion to confirm the final judgment and to fix a supersedeas bond. The court found that the total amount of the judgment was $1,254,842, which consisted of $770,000 for interest charged on the loan from OEDC, $60,000 for the additional supervisory fee paid to CRC, $88,228 for the interest from Kellom Heights' bank accounts paid to OEDC, and the $336,614 award of attorney fees to the appellees. The court also estimated additional costs, including approximately $7,015 of court costs and interest accruing on the judgment of approximately $41,256, and $200 of costs awarded on appeal. The court fixed a supersedeas bond at $1,303,313.

As noted above, the appellants filed an appeal following the March 11, 2010, order. The Court of Appeals dismissed the appeal because the district court had not yet ruled on fees and costs for the accounting and thus had not disposed of the entire case. On remand, the district court entered an order on

June 17 in which it stated that the accounting action and all issues in the case had been resolved and that any outstanding motions or issues that may not have been specifically resolved were overruled.

Current Appeal.

OEDC and CRC appealed the August 10, 2009, and February 12, March 11, and June 17, 2010, orders to the Court of Appeals. The appellees filed a cross-appeal. We granted the appellees' petition to bypass the Court of Appeals and moved the appeal to our docket.

ASSIGNMENTS OF ERROR

In their appeal, OEDC and CRC claim, renumbered and restated, that the district court erred when it (1) rejected their estoppel and statute of limitations defenses with regard to interest charged on the $350,000 note and adoption of Amendment 1, (2) found that Amendment 1 was invalid and unenforceable, (3) found that the additional supervisory fee required approval of the partners and was not valid, (4) rejected their estoppel and statute of limitations arguments with regard to the interest income from bank accounts paid to OEDC, (5) ordered an accounting, (6) issued an advisory opinion regarding the steps necessary for Cuming Street to become a general partner, and (7) awarded attorney fees to the appellees and required that such attorney fees be paid out of OEDC's and CRC's own funds rather than out of the judgment.

In their cross-appeal, the appellees claim that the district court erred when it denied their request for prejudgment interest.

STANDARDS OF REVIEW

[1,2] Which statute of limitations applies is a question of law. *Mandolfo v. Mandolfo*, 281 Neb. 443, 796 N.W.2d 603 (2011). We reach a conclusion regarding questions of law independently of the trial court's conclusion. *Id.*

[3] The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless

clearly wrong. *Bellino v. McGrath North*, 274 Neb. 130, 738 N.W.2d 434 (2007).

[4] The interpretation of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below. *Brook Valley Ltd. Part. v. Mutual of Omaha Bank*, 281 Neb. 455, 797 N.W.2d 748 (2011).

[5] On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion. *Armstrong v. County of Dixon*, 282 Neb. 623, 808 N.W.2d 37 (2011).

[6] Statutory interpretation presents a question of law. *Downey v. Western Comm. College Area*, 282 Neb. 970, 808 N.W.2d 839 (2012). An appellate court resolves questions of law independently of the trial court. *Id.*

[7] Whether prejudgment interest should be awarded is reviewed de novo on appeal. *RSUI Indemnity Co. v. Bacon*, 282 Neb. 436, 810 N.W.2d 666 (2011).

ANALYSIS

Statute of Limitations.

We first address the appellants' arguments that certain claims were barred by the statute of limitations. If such claims were barred, then we need not consider other assignments of error with regard to such claims. Because there are certain common issues regarding the application of the statute of limitations to each of the claims, we discuss such common issues in this section, and in later sections, we discuss whether each of the specified claims is barred by the applicable statute of limitations.

The district court rejected the appellants' affirmative defenses regarding the statute of limitations with regard to all claims. On appeal, the appellants claim that the court erred when it rejected the statute of limitations defenses with regard to three specific claims—the claim that the $350,000 note payable and the interest paid thereon were improper, the claim that Amendment 1 was adopted in contravention of the partnership agreement, and the claim that the interest on bank accounts held by Kellom Heights was improperly taken by OEDC as

"incentive income." The appellants do not assert on appeal that any of the other claims were barred by the statute of limitations, and therefore, we consider statute of limitations issues only in connection with the specified claims.

With regard to each of the three claims that the appellants argue are barred by the statute of limitations, the appellees on appeal characterize the entire action as an action for an equitable accounting between partners. As such, they note that an action for an equitable accounting is subject to a 4-year statute of limitations, and they argue that they filed their action within such 4-year period. The appellees assert that there is no Nebraska precedent for when the statute of limitations period begins to run in an action for an accounting among the partners in a limited partnership, but they argue that the statute begins to run either at the dissolution of the partnership or at the time of a demand for an accounting. Because Kellom Heights, the partnership in this case, is not being dissolved, they argue that the statute of limitations did not begin to run until they filed this action for an accounting.

The appellees' reliance on law related to an accounting action is misplaced. We note first that Kellom Heights is not being dissolved and that therefore, this action is not one for an accounting in connection with the dissolution of a partnership. Although on appeal, the appellees characterize the entire action as one for an equitable accounting, the appellees brought the action as a derivative action on behalf of Kellom Heights against the appellants.

Neb. Rev. Stat. § 67-288 (Reissue 2009), of the Nebraska Uniform Limited Partnership Act, provides:

> A limited partner or an assignee of a limited partner may bring an action in the name of a limited partnership to recover a judgment in its favor if general partners with authority to do so have refused to bring the action or if an effort to cause those general partners to bring the action is not likely to succeed.

Pursuant to Neb. Rev. Stat. § 67-290 (Reissue 2009), "In a derivative action, the complaint shall set forth with particularity the effort of the plaintiff to secure initiation of the action by a general partner or the reasons for not making the effort."

In the operative second amended complaint in this case, the appellees alleged, "This is a derivative action brought by various Class A Limited Partners of Kellom Heights . . . on behalf of [Kellom Heights]." The appellees further alleged in the second amended complaint:

> Plaintiffs have not made a demand upon General Partner, Defendant CRC, to bring this derivative action on behalf of [Kellom Heights], as such a demand would be futile, since Defendant CRC is a named defendant in this action, has participated in or has benefited from the actions alleged in this Amended Complaint and previously has refused the reasonable demands of the Class A Limited Partners.

It is therefore clear that the appellees fashioned this action as a derivative action on behalf of Kellom Heights rather than an action they brought as individual partners against the partnership or against other partners. Therefore, this is not an action under Neb. Rev. Stat. § 67-425(2) (Reissue 2009), which provides, "A partner may maintain an action against the partnership or another partner for legal or equitable relief, with or without an accounting as to partnership business . . . ."

Instead, this is an action brought by the appellees under § 67-425(1), which provides, "A partnership may maintain an action against a partner for a breach of the partnership agreement, or for the violation of a duty to the partnership, causing harm to the partnership." The appellees brought the action as a derivative action under the authority of § 67-288. In each claim, the appellees assert that CRC, the general partner, and OEDC, a limited partner, breached the partnership agreement or violated a duty to Kellom Heights and caused harm to Kellom Heights in some respect. Although one of the claims set forth by the appellees is characterized as "an accounting," see § 67-425(2), in substance, the appellees asserted that as general partner, CRC violated its fiduciary duty to provide a full and complete accounting of Kellom Heights' financial transactions. This is an action "against a partner." See § 67-425(1).

We note the appellants raise no statute of limitations issue with regard to the claim that CRC violated its duty to provide an accounting, and we need not determine the applicable

statute of limitations for that claim. But the claims for which the appellants raised statute of limitations issues are also claims brought under § 67-425(1) asserting breaches of the partnership agreement or fiduciary duties. As the appellants note, § 67-425(3) provides in part, "The accrual of, and any time limitation on, a right of action for a remedy under this section is governed by other law." We read this to mean that the accrual of and time limitation for an action brought under § 67-425(1) is not set by the statute itself but instead is to be determined by reference to other law, depending on the type of claim made by the partnership against the partner. With this understanding, we can analyze the proper statute of limitations applicable to each claim at issue.

Statute of Limitations: Note Payable and Interest Thereon.

OEDC and CRC first claim that the district court erred when it rejected their statute of limitations defense as to the claims regarding the $350,000 promissory note and interest paid thereon. We conclude that the limited partners had notice of the claims and that therefore, the statute of limitations ran before they filed this action. The district court's ruling to the contrary was error, and in particular, its award of $770,000 plus interest to the appellees is reversed and set aside.

The appellees' claims with respect to the note payable were, inter alia, that OEDC mischaracterized the 1982 transfer of $350,000 from OEDC to Kellom Heights as a loan rather than a grant and that the partnership agreement prohibited the payment of interest from Kellom Heights to OEDC. Which statute of limitations applies is a question of law. *Mandolfo v. Mandolfo*, 281 Neb. 443, 796 N.W.2d 603 (2011). We read these claims as claims for fraud to which the 4-year statute of limitations under Neb. Rev. Stat. § 25-207(4) (Reissue 2008) applies.

[8] In *Bowling Assocs. Ltd. v. Kerrey*, 252 Neb. 458, 562 N.W.2d 714 (1997), limited partners in 1993 brought a derivative action on behalf of the partnership against the general partners alleging that in 1983, the general partners had received a $25,000 payment from the partnership that was

not authorized by the partnership agreement. We concluded that the claim was an action for relief on the ground of fraud subject to § 25-207(4), which provides that such action "can only be brought within four years" but that "the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud." We described the time of accrual of such action to be when "there has been a discovery of the facts constituting the fraud, or facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which, if pursued, would lead to such discovery." *Bowling Assocs. Ltd.*, 252 Neb. at 461, 562 N.W.2d at 717. We concluded in *Bowling Assocs. Ltd.* that copies of the 1983 financial statements that were received by the limited partners in 1984 and that clearly indicated the payment of the $25,000 "would have put a person of ordinary intelligence and prudence on inquiry notice which, if pursued, would lead to discovery of a potential cause of action." *Id.* We further noted that the "appellants received no new information with regard to the payment since receiving the financial statements for 1983" and that the appellants "failed to demonstrate why what was sufficient to put them on notice in 1992 was insufficient to put them on notice in 1984." *Id.*

Similarly, in the present case, we conclude that the claims related to the note payable and the interest thereon were time barred. The note and interest were reported in the annual financial statements provided to the limited partners between 1982 and 1984. The district court noted in the August 10, 2009, order that the financial statements for those years disclosed that OEDC was a limited partner and that the note payable bore interest at 10 percent. As discussed below, the district court erred in assessing the legal significance of these facts.

The district court did not find that the limited partners did not have knowledge of the note payable and the fact that it bore interest. Instead, the court stated that OEDC and CRC had a fiduciary duty to advise the other partners that the act of charging interest on the note violated the partnership agreement. We disagree that such notification was necessary in order for these claims to accrue. Instead, a cause of action

for fraud accrues under § 25-207(4) when "there has been a discovery of the facts constituting the fraud, or facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which, if pursued, would lead to such discovery." *Bowling Assocs. Ltd*, 252 Neb. at 461, 562 N.W.2d at 717. The necessary facts in this instance were that a note payable to OEDC had been issued, that OEDC was a partner, and that the note bore interest. Such facts would be enough to lead to a discovery that the note was in violation of a prohibition on interest-bearing notes; the limited partners did not need to be specifically advised that these facts constituted a violation, as long as pursuit of such facts would lead to the discovery of fraud.

The appellees argue that there was not notice because the appellants could not prove that all the limited partners received the financial statements from 1982 through 1984. Because this action was brought as a derivative action on behalf of Kellom Heights, the relevant issue is whether it had notice of the transactions. And because this action asserts fraud committed by OEDC and CRC, their knowledge is not relevant as knowledge of Kellom Heights.

The question before us is whether knowledge by some, but not necessarily all, limited partners is knowledge by the partnership. We look to the Nebraska Uniform Limited Partnership Act, Neb. Rev. Stat. § 67-233 et seq. (Reissue 2009), as enacted, and we note that the uniform act has been revised since Nebraska's version was enacted but that such revisions, not having been enacted in Nebraska, do not control our analysis. The Nebraska Uniform Limited Partnership Act does not contain a provision regarding whether notice to limited partners is notice to the partnership. This differs from the Uniform Limited Partnership Act (2001), not adopted by Nebraska, which provides that a general partner's knowledge, notice, or receipt of a notification of a fact is effective as to the limited partnership, but that a limited partner's notice is not. See Unif. Limited Partnership Act (2001) § 103(h), 6A U.L.A. 363-64 (2008). We note that § 67-294 of the Nebraska Uniform Limited Partnership Act as enacted in Nebraska provides, "In any case not provided for in the Nebraska Uniform Limited Partnership Act, the Uniform

Partnership Act of 1998 shall govern." We therefore rely on the Uniform Partnership Act of 1998, Neb. Rev. Stat. § 67-401 et seq. (Reissue 2009), for our analysis.

With regard to notice and knowledge of a partnership, § 67-403(6) of the Uniform Partnership Act of 1998 provides:

> A partner's knowledge, notice, or receipt of a notification of a fact relating to the partnership is effective immediately as knowledge by, notice to, or receipt of a notification by the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner.

Because the Nebraska Uniform Limited Partnership Act does not specifically address whether notice to a general or limited partner is effective as to the partnership, pursuant to § 67-294, we look to § 67-403(6) of the Uniform Partnership Act of 1998 and conclude that it applies to this limited partnership issue. Under § 67-403(6), notice to any partner is effective as notice to the partnership. Whether this principle is applicable in other contexts, given the statutes adopted by the Legislature, we conclude that it applies to this notice issue in a derivative action brought by limited partners on behalf of the partnership against a general partner. Although the appellees point out that some limited partners claim to have not seen the 1982 through 1984 financial statements, the appellants demonstrated that at least some of the limited partners had received the financial statements, and thus, applying § 67-403(6) of the Uniform Partnership Act of 1998 as we must, the appellants established that there was notice on some limited partners, and notice to any partner was effectively notice to Kellom Heights.

We conclude that the facts known to some of the limited partners in 1982 through 1984 would have put them on inquiry to a potential fraud. The district court therefore should have found in favor of the appellants on their affirmative defense based on the statute of limitations regarding payment of interest on the note payable. The district court should have dismissed these claims as time barred. We therefore reverse that portion of the August 10, 2009, order in which the court concluded that payment of interest on the note payable was in violation of the partnership agreement and that therefore, the

$770,000 OEDC or CRC received from Kellom Heights as interest should be repaid with additional interest. We set aside this award.

In view of our disposition of this issue, we need not consider the appellants' other assignments of error and arguments with regard to the note payable and the interest paid thereon.

Statute of Limitations: Validity and Enforceability of Amendment 1.

OEDC and CRC next claim that the district court erred when it rejected their statute of limitations defense to the appellees' claim that Amendment 1 was adopted in contravention of the partnership agreement. We conclude that this claim was time barred and that the district court's ruling to the contrary was error.

Like the claims related to the note payable and interest thereon just discussed, these are essentially claims of fraud to which the 4-year statute of limitations under § 25-207(4) applies. See *Bowling Assocs. Ltd. v. Kerrey*, 252 Neb. 458, 562 N.W.2d 714 (1997). As explained below, the limited partners learned of the purported adoption of Amendment 1 and the changes made thereby at the latest in 1982. The appellees therefore filed their claim relative to Amendment 1 long after the statute had run on it.

In its August 10, 2009, order, the court noted that the limited partners were advised of Amendment 1 in letters sent October 7, 1981, and April 28, 1982. The April 28, 1982, letter indicated that Amendment 1 was enclosed with the letter and was sent to all limited partners. The appellants argue that the court erred when it determined that the October 1981 letter did not provide sufficient notice of the proposed changes to Class A limited partner subscribers and when it further found that a letter to subscribers enclosing the entire text of Amendment 1 in April 1982 "advised less [about Amendment 1] than the letter of October 7, 1981." Finally, with respect to Amendment 1, the appellants contend that the court erred in failing to properly consider the appellants' proof of yet a third notice to Class A limited partners of the changes made by Amendment 1 in May 1982, when a copy of

the certificate of limited partnership reflecting those changes was mailed to the limited partners.

Similar to the claims regarding the note payable, the appellants showed that in 1982, the limited partners as a group were informed that Amendment 1 had been adopted and of the contents of Amendment 1. Upon receipt of Amendment 1 as adopted, the limited partners would have known whether or not they voted on Amendment 1. Therefore, to the extent the appellees claim that Amendment 1 could not be adopted without their approval, they had notice of the facts necessary which with due inquiry would have advised them of a cause of action.

We conclude that the cause of action with regard to Amendment 1 was time barred. The district court should have dismissed the cause of action related to the adoption of Amendment 1 as time barred. We therefore reverse that portion of the August 10, 2009, order in which the district court found that Amendment 1 was not adopted and concluded that it was unenforceable. In view of our disposition of this issue, we need not consider the other arguments with regard to Amendment 1.

Statute of Limitations: Award of Interest From Bank Accounts.

OEDC and CRC next claim that the district court erred when it rejected their statute of limitations and estoppel defenses to the appellees' claim regarding interest on reserves that was taken by OEDC as "incentive income." We conclude that the district court did not err when it rejected these defenses and directed the appellants to return such interest.

We reject the appellants' argument that this claim was time barred. Similar to the claims regarding the note payable and Amendment 1, these claims are essentially claims that the appellants committed a fraud. The claim was therefore subject to the 4-year statute of limitations. See *Bowling Assocs. Ltd., supra*. The statute does not begin until the fraud was discovered or should have been discovered. *Id.*

The appellants argue that the decision to pay account interest to OEDC occurred over 20 years prior to trial and ceased

in 2001, well before this dispute arose. We conclude, however, that because the limited partners did not receive financial information during the period the payments were made, they did not have notice of the claim until they received financial information in connection with this action. Therefore, the statute of limitations did not run before they filed this action and the district court did not err in so ruling.

The district court found that from 1986 through 2001, OEDC took interest that had been earned on funds held by Kellom Heights in various bank accounts. The court concluded that the partnership agreement did not authorize OEDC to take the interest, and the court therefore ordered OEDC to return the $88,228 that had been taken from 1986 through 2001 with additional interest. In contrast to the appellees' claims regarding the $350,000 note payable and the interest paid thereon, for which the limited partners received financial statements from 1982 through 1984 that gave them notice of the note and the interest being charged thereon, the appellants provided no evidence to support their defense that the limited partners were given financial statements between 1986 and 2001 that would have informed them that OEDC was taking the interest paid on accounts as "incentive income." The record indicates that the limited partners did not learn of the payments until after the present action had begun and the court had ordered OEDC and CRC to provide financial information to the limited partners. Because the limited partners did not have knowledge of the transactions and OEDC and CRC's knowledge is not effective as to Kellom Heights because they are alleged to have been defrauding Kellom Heights, the claim did not accrue until the limited partners learned of the transactions in connection with this action. The claim therefore was not time barred.

[9] We also reject the appellants' assertion that this claim was barred by equitable estoppel. The appellants cite *Baye v. Airlite Plastics*, 260 Neb. 385, 390, 618 N.W.2d 145, 150 (2000), in which we stated:

> Under Nebraska law, the doctrine of equitable estoppel is frequently applied to transactions in which it is found that it would be unconscionable to permit a person to

> maintain a position inconsistent with one in which he or she has acquiesced or of which he or she has accepted any benefit. . . .
>
> The acceptance of any benefit from a transaction or contract, with knowledge or notice of the facts and rights, will create an estoppel.

(Citations omitted.) Equitable estoppel is not applicable in this case, because as noted above, the limited partners did not have knowledge of the transactions and therefore could not have acquiesced, nor did the limited partners benefit from the appellants' taking interest from Kellom Heights.

The appellants make no other assignments of error with regard to this claim. We therefore affirm that portion of the August 10, 2009, order in which the court concluded that interest taken from Kellom Heights from 1986 through 2001 totaling $88,228 should be returned to Kellom Heights with additional interest.

Validity of Additional Supervisory Fee.

OEDC and CRC next claim that the district court erred when it concluded that CRC improperly increased its annual supervisory fee by $12,000 to a total of $36,000. They argue that the partnership agreement did not prohibit the increase, that the disclosure in the PPM of initial fees totaling $24,000 per year was not a contractual limitation of fees, and that the increase was not a breach of CRC's fiduciary duty because the increase was fair. We conclude that the court erred when it concluded that the increased fee breached the partnership agreement and awarded $60,000. We reverse and set aside this award; however, we remand the cause to the district court to determine whether the increase breached a fiduciary duty that CRC owed to Kellom Heights.

As the court noted, § 5.2 of the PPM stated that the general partner would receive a fee of $12,000 per year for providing "overall supervision services" and that to the extent the general partner began performing the function of Kellom Heights' manager in future years, the general partner would be entitled to compensation for those services in an amount not to exceed the amount then being paid for such services. Section 5.3 of the

PPM stated that the manager of Kellom Heights would be paid a fee of $12,000 per year. As general partner, CRC received the $12,000 annual supervisory fee; after the first year of the formation of Kellom Heights, CRC took over the duties of the individual who had originally served as Kellom Heights' manager and began receiving the $12,000 annual management fee. The court did not find, and the appellees did not assert, that it was improper for CRC to receive $24,000 per year for management and supervision.

The court noted, however, that Kellom Heights' financial statements show that beginning in 2001, Kellom Heights paid CRC a "Partnership management fee" of $36,000 per year. The court concluded that § 5.2 of the PPM limited the management fee to the amount being paid at the time of the PPM and that the fee was increased by $12,000 in 2001 without following proper procedures under the partnership agreement and without proper notice sent to the partners.

OEDC and CRC argue that the partnership agreement does not bar an increase in the supervisory fees. They note that § 6.1 of the partnership agreement provides that except to the extent that the consent of the limited partners is required under the agreement, the general partner has "full, complete and exclusive discretion to manage and control the business of [Kellom Heights]." They note further that § 67-239 of the Nebraska Uniform Limited Partnership Act provides that a partner may "transact other business with the limited partnership and, subject to other applicable law, has the same rights and obligations with respect thereto as a person who is not a partner." OEDC and CRC argue that the PPM is not a contractual obligation and therefore does not limit the amount of supervisory fees that can be paid. The appellants note that the PPM itself provides and warns that statements in the PPM "in no way modify or amend the Partnership Agreement." The appellants further argue that the partnership agreement does not require the consent of limited partners to determine a management fee and that pursuant to § 67-239, Kellom Heights could determine a management fee to be paid to CRC as it would to any other person who was not a partner. They further argue that the increased fee was reasonable and not a breach

of fiduciary duty because the increase came after 20 years and was not in excess of inflation.

The appellees argue in response that because the partnership agreement does not specifically address the payment of supervisory or management fees, the PPM controls the issue and limits such fees to the total of $24,000. They also assert that the increased fee was a self-dealing transaction and that pursuant to § 67-404(2)(c)(ii) of the Uniform Partnership Act of 1998, "a specific act or transaction that otherwise would violate the duty of loyalty" may be authorized by the partners "after full disclosure of all material facts." They argue that the self-dealing transaction was not authorized or ratified by the partners after full disclosure.

Interpretation of a contract is a question of law. *Brook Valley Ltd. Part. v. Mutual of Omaha Bank*, 281 Neb. 455, 797 N.W.2d 748 (2011). We conclude that the district court erred when it concluded by reference to the PPM that the increase in supervisory fees was prohibited by the partnership agreement. By its terms, the PPM was not part of the partnership agreement; instead, it provided disclosures to potential investors regarding the future operation of Kellom Heights and referred potential investors to the partnership agreement. In any event, the quoted sections of the PPM disclosed the payment of supervisory fees to the general partner and the possibility that management fees would be paid to the general partner at the rate currently paid to another individual if the general partner subsequently took over such duties. The court and the appellees do not cite any provision of the actual partnership agreement that either limited the fees that could be paid or required the approval of the limited partners before the fees paid to the general partner could be increased.

[10] Although we conclude that the court erred when it found the increase violated the partnership agreement, we note that because of such resolution, the district court did not consider whether the amount of the increase nevertheless violated a fiduciary duty that CRC had to Kellom Heights. OEDC and CRC argue to this court that the increase did not breach a fiduciary duty because it was fair in light of inflation. However, because the district court did not reach such issue, we will not

determine this fairness issue on appeal. An issue not passed on by the trial court is not appropriate for consideration on appeal. See *Robinson v. Dustrol, Inc.*, 281 Neb. 45, 793 N.W.2d 338 (2011). Therefore, we determine that the district court's conclusion that the fee increase was improper under the partnership agreement by reference to the PPM was error and reverse the $60,000 award. We remand the cause to the district court to determine whether the fee increase breached a fiduciary duty to Kellom Heights.

Accounting.

OEDC and CRC next claim that the district court erred when it granted the appellees' request for an accounting because OEDC and CRC had met such demand and had produced audited financial statements for every year of Kellom Heights' existence, as well as other detailed financial information of Kellom Heights, and therefore had satisfied the appellees' demand for an accounting. We conclude that the court did not err when it ordered the appellants to comply with their duty to provide financial information to the partners.

The appellees claimed that CRC had a fiduciary duty to provide financial information regarding Kellom Heights to the limited partners and that it had failed to provide such information. They requested an accounting for "all assets, income and expenditures of [Kellom Heights], and particularly for all profits and monies received, disbursed and retained by [Kellom Heights] since [its] formation." The district court granted the request and ordered the appellants to "make available to the Plaintiffs all books and records of [Kellom Heights] since [its] formation."

OEDC and CRC claim that it was improper for the court to order an accounting. CRC asserts that it had provided all the information the appellees demanded and that the appellees did not meet the requirements for an additional accounting.

We conclude that it was proper for the court to order the appellants to provide financial information to the appellees. As discussed earlier, this action was not in essence an action for an accounting in the sense such term is understood in connection with the dissolution of a partnership.

Instead, the appellees brought a derivative action on behalf of Kellom Heights in which they asserted that the appellants had breached certain fiduciary duties. Among those was a duty to provide financial information regarding Kellom Heights. The court found that CRC had failed to provide such information over the years and therefore ordered the appellants to comply with their duties and make the information available to the limited partners. OEDC and CRC make no argument that the limited partners were not entitled to the information. Furthermore, to the extent the appellants assert that they have already provided the information, there is no prejudice to the appellants and there would be nothing to be gained from reversing the order.

We conclude that the district court did not err when it ordered the appellants to make financial information regarding Kellom Heights available to the limited partners, and we therefore affirm such portion of the order.

Steps for Cuming Street to Become a General Partner.

OEDC and CRC next claim that the district court erred when it issued an advisory opinion concerning the status of Cuming Street's efforts to become an additional general partner. We conclude that because the court denied the appellees' claims seeking an order directing Cuming Street to be appointed as a general partner and that CRC be enjoined from interfering with Cuming Street's exercise of general partner powers, the court should not have opined on what further steps Cuming Street needed to take, and we therefore vacate that portion of the order addressing such additional steps.

The appellees sought a declaration that admission of Cuming Street as a general partner was in conformity with law and with the partnership agreement. They also sought to enjoin CRC from refusing to complete additional steps necessary to admit Cuming Street as a general partner and to enjoin CRC from interfering with Cuming Street's exercise of its rights and powers as a general partner. The district court ultimately denied the appellees' claims for declaratory and injunctive relief "at this time," because it concluded that although there

had been compliance with most of the requirements, there were additional steps that needed to be completed for Cuming Street to become a general partner.

We conclude that portions of the court's order with respect to Cuming Street were conditional orders. The record indicates that steps were being taken to make Cuming Street a general partner but that not all steps had been completed. For that reason, the court denied the appellees' claims for declaratory and injunctive relief. However, the court went further by stating that when certain additional steps were taken, Cuming Street would become a general partner.

[11-13] A "judgment" is a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist. *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006). Thus, we have held that orders purporting to be final judgments, but that are dependent upon the occurrence of uncertain future events, do not operate as "judgments" and are wholly ineffective and void as such. *Id*. These "conditional judgments" are not final determinations of the rights and obligations of the parties as they presently exist, but, rather, look to the future in an attempt to judge the unknown. *Id*. We have held that a conditional judgment is wholly void because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect may be. See *id*. While conditional orders will not automatically become final judgments upon the occurrence of the specified conditions, they can operate in conjunction with a further consideration of the court as to whether the conditions have been met, at which time a final judgment may be made. *Id*.

In the present case, the district court's denial of declaratory and injunctive relief was the judgment based on conditions as they then existed. The court's statement that Cuming Street would become a general partner upon the completion of outlined additional steps was a conditional judgment because it was not based on conditions that presently existed but looked to future events. To the extent the court's order judged future events, it is void. The court cannot make such determination until the steps have been completed.

We therefore affirm the portion of the August 10, 2009, order in which the court denied the appellees' claims for declaratory and injunctive relief regarding Cuming Street's becoming a general partner, but we strike that portion of the August 10 order in which the court opined that Cuming Street would become an additional general partner when the specified steps were taken.

Attorney Fees.

OEDC and CRC finally claim that the district court erred when it granted the appellees' requests for attorney fees. They argue that

> (1) under the statute by which Appellees claimed a right to fees, the fees should have been paid from the common fund and not by Appellants as a separate award; (2) the court failed to reduce the fee award for claims on which Appellees did not prevail, for claims that were individual rather than derivative, and for claims challenging actions the General Partner took on advice of counsel and for which it is entitled to immunity under the Partnership Agreement.

Brief for appellants at 22. Because of our disposition of other assignments of error on appeal, we reverse the district court's award of attorney fees and remand the cause for a new award of attorney fees. However, we comment on certain issues raised by OEDC and CRC.

[14] Because we reverse the district court's rulings on certain claims and are remanding for further proceedings on certain claims, we reverse the award of attorney fees and remand the cause to the district court to determine appropriate attorney fees considering the claims on which the appellees are ultimately successful. However, we address certain issues with regard to attorney fees, because such issues will likely recur on remand. An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings. *In re Interest of A.M.*, 281 Neb. 482, 797 N.W.2d 233 (2011).

The present action was a derivative action brought by the appellees on behalf of Kellom Heights. Section 67-291 provides:

> If a derivative action is successful, in whole or in part, or if anything is received by the plaintiff as a result of a judgment, compromise, or settlement of an action or claim, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, and shall direct him or her to remit to the limited partnership the remainder of those proceeds received by him or her.

The statute authorizes an award of reasonable attorney fees when the derivative action is successful in whole or in part. The appellees' derivative action has been successful at least in part, and therefore reasonable attorney fees may be awarded to the appellees reasonably commensurate with their success.

OEDC and CRC argue that certain claims were not derivative and that therefore, no fees should be awarded with respect to such claims. They specifically argue that the claims regarding Amendment 1, the appointment of Cuming Street, and the request for an accounting were not derivative claims and that therefore, fees should not be awarded in connection with such claims. We note, however, that whether or not the claims with regard to Amendment 1 or Cuming Street were derivative, the appellees were not ultimately successful on either claim. As we decided above, the Amendment 1 claim was time barred. Also, the appellees' claims with regard to the appointment of Cuming Street were denied by the district court. Therefore, the court should not on remand award attorney fees with respect to those claims. With regard to the accounting, as noted above, this request was in fact a claim that CRC failed in its fiduciary duty to report financial information to the limited partners. This was a proper derivative claim, and the appellees were successful; therefore, they should be awarded attorney fees associated with this claim.

OEDC and CRC also argue that no attorney fees should be awarded with regard to three claims: Amendment 1, interest on the note payable, and admission of Cuming Street, because they took the disputed actions with respect to those claims on the advice of counsel. As noted above, the appellees were not ultimately successful on Amendment 1 because we found it time barred. The same is true with regard to interest on the note payable. In addition, as noted above, the district court denied

the relief the appellees requested with regard to the appointment of Cuming Street. Therefore, regardless of whether OEDC and CRC relied on the advice of counsel and regardless of whether an advice of counsel exception would apply, the appellees should not be awarded attorney fees relative to those claims, because they were not successful.

Finally, we agree with the district court's determination that the attorney fees should be awarded in addition to the judgment rather than being taken out of the judgment. OEDC and CRC argue that the language in § 67-291 stating that "the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, and shall direct him or her to remit to the limited partnership the remainder of those proceeds received by him or her" means that the appellees must take their attorney fees out of the judgment and then remit the remainder to Kellom Heights. We disagree with this interpretation.

[15] Statutory interpretation presents a question of law. *Downey v. Western Comm. College Area*, 282 Neb. 970, 808 N.W.2d 839 (2012). An appellate court resolves questions of law independently of the trial court. *Id*. We read § 67-291 as providing that the court may award expenses, including attorney fees, as a separate component of the judgment. The statute then requires that in a derivative action, the plaintiff may retain the portion of the judgment awarded as expenses, but any additional proceeds of the judgment that the plaintiff receives must be remitted to the partnership.

We therefore agree with the district court's conclusion that attorney fees are properly awarded as a separate item within the overall judgment. However, we reverse and set aside the award of attorney fees in this case and remand the cause for a new order regarding an appropriate amount of fees in light of the action taken on remand pursuant to the remainder of this opinion.

Cross-Appeal: Prejudgment Interest.

The appellees claim in their cross-appeal that the district court erred when it denied their request for prejudgment interest. We conclude that the court did not err when it denied prejudgment interest.

Due to our resolution of the assignments of error on appeal, the only remaining claims on which the appellees could potentially recover prejudgment interest are the judgment of $88,228 for interest taken from Kellom Heights from 1986 through 2001, which judgment we affirmed, and the potential for a judgment of $60,000 for increased supervisory fees in the event that on remand, the court finds that the increased fees were not proper. As noted above, the judgment for $770,000 of interest on the note payable was reversed and set aside because the claim was time barred. Therefore, we consider whether the appellees are entitled to prejudgment interest on the affirmed $88,228 judgment for interest taken by the appellants from Kellom Heights from bank accounts and on the potential judgment of $60,000 for additional supervisory fees.

[16] The appellees argued to the district court that they should be awarded prejudgment interest under both § 45-103.02(2) and § 45-104. Interpretation of a statute is a question of law. *Downey, supra*. Section § 45-103.02(2) provides that prejudgment interest "shall accrue on the unpaid balance of liquidated claims from the date the cause of action arose until the entry of judgment." 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. *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010). 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. *Id*. In denying prejudgment interest under § 45-103.02(2), the district court noted that in this case, a trial was required to determine both liability and damages. The court concluded that neither requirement of § 45-103.02 had been met and that prejudgment interest should not be awarded.

With regard to both the claim for the interest taken and the claim for increased supervisory fee, although there was no serious dispute as to the amount at issue, there was a reasonable controversy with respect to liability, and accordingly, we conclude that the district court did not err in refusing to award prejudgment interest under § 45-103.02.

Section 45-104 provides:

> Unless otherwise agreed, interest shall be allowed at the rate of twelve percent per annum on money due on any instrument in writing, or on settlement of the account from the day the balance shall be agreed upon, on money received to the use of another and retained without the owner's consent, express or implied, from the receipt thereof, and on money loaned or due and withheld by unreasonable delay of payment. Unless otherwise agreed or provided by law, each charge with respect to unsettled accounts between parties shall bear interest from the date of billing unless paid within thirty days from the date of billing.

The district court concluded that prejudgment interest was not recoverable under § 45-104.

Section 45-104 applies to four types of judgments: (1) money due on any instrument in writing; (2) settlement of the account from the day the balance shall be agreed upon; (3) money received to the use of another and retained without the owner's consent, express or implied, from the receipt thereof; and (4) money loaned or due and withheld by unreasonable delay of payment. In this case, the claims for interest taken and for additional supervisory fees are not claims related to an instrument in writing, settlement of an account, or money loaned and due and withheld by unreasonable delay. However, the appellees argue that they are claims related to "money received to the use of another and retained without the owner's consent" under § 45-104.

With regard to the claims of interest taken and of additional supervisory fees, the appellees claimed that OEDC and/or CRC fraudulently took Kellom Heights' money for their own use and retained such money without Kellom Heights' consent. We conclude that these claims are not within the operation of § 45-104. In this case, the appellees did not allege that the appellants received money on behalf of Kellom Heights and diverted it and retained it for themselves; instead, they alleged that the appellants fraudulently took money that was already in the hands of Kellom Heights. We therefore conclude that the

district court did not err when it denied the appellees' request for prejudgment interest under § 45-104.

CONCLUSION

Regarding the appellants' statute of limitations defenses, we conclude that the district court erred when it rejected the appellants' statute of limitations defenses as to the claims regarding the note payable and the interest thereon and the claim regarding Amendment 1. We therefore reverse the court's rulings on these claims and remand the cause with directions to set aside the judgment on these claims and to dismiss these claims. However, we affirm the court's judgment denying the statute of limitations and other defenses to the claim regarding interest on bank accounts and we affirm the court's judgment on that claim.

With regard to the claim concerning additional supervisory fees, we conclude that the court erred when it referred to the PPM in its disposition of this claim and erred when it concluded that the increase was specifically prohibited by the partnership agreement. We therefore reverse its ruling that the additional supervisory fees were not permitted and set aside the judgment on this claim. Because of its disposition of the claim, the court did not consider whether the increase breached a fiduciary duty that CRC had to Kellom Heights, and we therefore remand the cause to the district court to consider that issue.

We affirm the district court's order directing the appellants to make financial information regarding Kellom Heights available to limited partners. We also affirm the portion of the August 10, 2009, order in which the court denied the appellees' claims regarding making Cuming Street a general partner, but we strike that portion of the order in which the court opined that Cuming Street would become an additional general partner when specified steps were taken.

We affirm the district court's determination that attorney fees were properly awarded to the appellees separate from the judgment, but we reverse and set aside the award of attorney fees and remand the cause for a new order regarding an appropriate amount of fees in light of the remainder of this opinion.

Finally, concerning the appellees' cross-appeal, we conclude that the court did not err when it denied the appellees' request for prejudgment interest, and we affirm such denial.

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

GERRARD, J., not participating in the decision.

WRIGHT, J., not participating.

CITY OF WAVERLY, NEBRASKA, APPELLEE, V. RICHARD M. HEDRICK, APPELLANT.

810 N.W.2d 706

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1. **Judgments: Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.
2. **Jurisdiction: Judgments: Appeal and Error.** Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court.
3. **Courts: Eminent Domain.** The powers conferred upon the county court judge by the condemnation statutes are not judicial powers or duties, but are instead purely ministerial in character.
4. **Eminent Domain: Words and Phrases: Appeal and Error.** Only when the appraiser's report is appealed to the district court do condemnation proceedings become judicial.
5. **Eminent Domain: Pleadings: Statutes.** The statutes relating to condemnation proceedings contemplate the filing of pleadings and the framing of any issues—other than damages to the condemnee—for the first time in the judicial proceeding in district court.
6. **Judgments: Evidence.** Determination of questions of fact upon evidence, or the exercise of discretion in ascertaining or fixing an amount to be allowed, generally involves judicial rather than ministerial acts.
7. **Eminent Domain: Liens: Interest.** The existence and amount of a lien, the amount of accrued interest, and whether there should be a setoff from the condemnation award involve judicial, rather than ministerial, determinations.
8. **Eminent Domain: Courts: Jurisdiction.** Because the eminent domain statutes do not confer upon county courts the power to hear motions for setoff, they lack jurisdiction to do so.
9. **Eminent Domain: Courts: Jurisdiction: Appeal and Error.** In condemnation proceedings, the district court has original as well as appellate jurisdiction over