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hearing, the GAL's assignment of error on cross-appeal is without merit.

AFFIRMED.

KENNETH NORDHUES, APPELLANT, V. STEVE MAULSBY, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE AND CROSS-APPELLANT, B & W, INC., THIRD-PARTY DEFENDANT AND FOURTH-PARTY PLAINTIFF, APPELLEE, CROSS-APPELLEE, AND CROSS-APPELLANT, AND MAX HARGROVE, FOURTH-PARTY DEFENDANT, APPELLEE AND CROSS-APPELLEE.

815 N.W.2d 175

Filed March 20, 2012. No. A-11-420.

1. **Contracts.** The determination of rights under a contract is a law action.
2. **Breach of Contract: Damages.** A suit for damages arising from breach of a contract presents an action at law.
3. **Trial: Witnesses.** In a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony.
4. **Witnesses: Evidence: Appeal and Error.** An appellate court will not reevaluate the credibility of witnesses or reweigh testimony but will review the evidence for clear error.
5. **Judgments: Appeal and Error.** The trial court's factual findings in a bench trial of an action at law have the effect of a jury verdict and will not be set aside unless clearly erroneous.
6. ____: ____. In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
7. **Appeal and Error.** An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal.
8. **Res Judicata.** Res judicata is an affirmative defense which must ordinarily be pleaded to be available; and while an appellate court may raise the issue of res judicata sua sponte, it is infrequently done.
9. **Appeal and Error.** An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.
10. ____. Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error.

11. ____. Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
12. **Jurisdiction: States.** The first step in a conflict-of-law analysis is to determine whether there is an actual conflict between the legal rules of different states.
13. ____: ____. An actual conflict exists when a legal issue is resolved differently under the law of two states.
14. **Uniform Commercial Code: Contracts: Sales.** The Uniform Commercial Code applies when the principal purpose of a transaction is the sale of goods, but does not apply when the contract is principally for services.
15. **Uniform Commercial Code: Words and Phrases.** Merchant means a person who deals in goods of the kind or otherwise by his or her occupation holds himself or herself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his or her employment of an agent or broker or other intermediary who by his or her occupation holds himself or herself out as having such knowledge or skill.
16. ____: ____. Entrusting includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.
17. **Jurisdiction: States.** When there is an actual conflict between the laws of different states, the rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties.
18. **Jurisdiction: States: Presumptions.** In the absence of pleading and proof to the contrary, Nebraska courts presume that the law of the foreign jurisdiction which should be applied is the same as the Nebraska law, as to Constitution, statutes, and case law.
19. **Uniform Commercial Code: Words and Phrases.** A buyer in the ordinary course of business is a person that buys goods in good faith and without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind.
20. ____: ____. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices.
21. ____: ____. Good faith in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.
22. **Vendor and Vendee: Consideration: Notice: Words and Phrases.** A bona fide purchaser is one who pays a valuable consideration, has no notice of outstanding rights of others, and acts in good faith.
23. **Vendor and Vendee: Notice: Title.** Necessary notice may be imparted to a prospective purchaser by actual or constructive notice of facts which would place a reasonably prudent person upon inquiry as to the title he or she is about to purchase.

Appeal from the District Court for Blaine County: MARK D. KOZISEK, Judge. Affirmed.

Rodney J. Palmer, of Palmer & Flynn, P.C., L.L.O., for appellant.

Barry D. Geweke, of Stowell, Kruml & Geweke, P.C., L.L.O., for appellee Steve Maulsby.

John A. Selzer, of Simmons Olsen Law Firm, P.C., for appellee B & W, Inc.

Bradley D. Holbrook and Justin R. Herrmann, of Jacobsen, Orr, Nelson, Lindstrom & Holbrook, P.C., L.L.O., for appellee Max Hargrove.

IRWIN, SIEVERS, and MOORE, Judges.

SIEVERS, Judge.

I. INTRODUCTION

Kenneth Nordhues appeals from the decision of the district court for Blaine County which dismissed his claim for damages regarding cattle that were previously taken from him in a replevin action.

II. OVERVIEW

James Norwood bought 190 heifers in Valentine, Nebraska, and then delivered them to Kevin Asbury in Missouri to care for them. While in Asbury's care, 150 of the heifers were sold/given to Max Hargrove. Hargrove in turn sold the heifers to B & W, Inc. B & W sold 115 of the heifers to Steve Maulsby, who in turn sold the heifers to Nordhues. The chain of sales from Asbury to Nordhues occurred within a span of approximately 2 weeks.

This matter arises out of a companion case, *Norwood v. Nordhue*, No. A-09-1025, 2010 WL 2902345 (Neb. App. July 13, 2010) (selected for posting to court Web site). In the companion case, Norwood, the first owner in the chain, sought to replevin 115 heifers from Nordhues, the last "owner" in the chain. Using Nebraska law, we determined that Nordhues did not acquire any title or right to the heifers, and thus, Nordhues

was ordered to deliver the heifers to Norwood. This case was then filed, in which Nordhues sued Maulsby for the amount he had paid for the cattle, alleging that Maulsby did not have good title to the heifers in order to sell them to him. In turn, each previous seller in this chain was brought into the case as a party defendant with the exception of Asbury, who has taken bankruptcy. Thus, all those through whose hands passed the cattle purchased by Norwood at Valentine are parties to the suit, except Asbury.

III. FACTUAL BACKGROUND

Norwood, who resides in Weston, Missouri, purchased 190 heifers at the Valentine livestock auction on March 27, 2008. Norwood shipped the heifers to Asbury in Armstrong, Missouri, on March 28. According to Norwood, the initial agreement was that he was to provide bulls to breed the heifers, pay half of the mineral costs, pay all veterinarian bills for the heifers, and pay half of the veterinarian expenses for the resulting calves. Asbury was to provide feed and care for the heifers and calves. The calves would then be sold at weaning time, with Norwood and Asbury dividing the proceeds equally. At some point, Norwood and Asbury discussed breeding the heifers by means of artificial insemination. According to Norwood, Asbury was to bear the costs related to the artificial insemination of the heifers. After the insemination process was completed, the heifers were placed in pastures with bulls provided by Asbury. At some point, Asbury informed Norwood that he did not have room to pasture all of the heifers until calving time and that Norwood would have to sell about half of them as bred heifers. According to Norwood, he and Asbury did not discuss or have any agreement about when or where that half of the heifers would be marketed.

Norwood learned the heifers were no longer in Missouri in October 2008, when law enforcement personnel informed him that Asbury had been foreclosed on by the bank and that there were not "very many cattle left there." According to Norwood, he confronted Asbury, who informed him that because of the foreclosure, he had moved the heifers "to a

safe place." Asbury would not tell Norwood where the heifers were located.

According to Asbury, when the heifers left his property, they were delivered to Hargrove, but Asbury confirmed that Norwood did not agree to this. Specifically, Asbury testified that he did not have any directive from Norwood that the heifers leave his place. When asked whether Norwood and Hargrove had any agreement about the heifers being taken from Asbury's place, Asbury replied, "It was a favor for me." Asbury indicated that Hargrove was going to take care of the heifers for Asbury. According to Asbury, there was no understanding that Norwood would pay Hargrove for keeping Norwood's heifers, and Asbury was unsure as to whether Hargrove knew that the heifers were Norwood's. Asbury agreed that he received some money from Hargrove, but he testified that this money was not for Norwood's heifers. Asbury thought that all 190 head of Norwood's heifers went to Hargrove on the same date. Asbury testified that when the heifers left his farm and went into Hargrove's custody, he was not in any way trying to sell the heifers and that he did not have any authorization or intent to sell them. As far as Asbury was concerned, the heifers remained Norwood's property at that point.

On the other hand, according to Hargrove, he purchased 140 head of bred heifers from Asbury (and received an additional 10 head at no charge). Hargrove testified that Asbury represented that he owned these heifers. Hargrove denied that Asbury sent the heifers to him to take care of them for him, and Hargrove testified that he did not have any relationship with Norwood. According to Hargrove, the 140 heifers he purchased from Asbury (plus the additional 10 head) were sorted from approximately 190 head of heifers at Asbury's place. Hargrove did not know what happened to the 40 remaining heifers.

Hargrove then sold 140 of the Norwood heifers to B & W—Hargrove also gave B & W, at no charge, the extra 10 head that he had received from Asbury. B & W then sold 115 of the Norwood heifers to Maulsby, who, in turn, sold the 115 heifers to Nordhues.

IV. PROCEDURAL BACKGROUND

1. Companion Case—Replevin

Norwood filed a petition in replevin in the district court for Blaine County, Nebraska, on November 12, 2008. Norwood alleged that he was the owner of 190 heifers, which he purchased at the Valentine livestock auction on March 27, 2008, and that some of these heifers were currently in Nordhues' possession in Blaine County. Norwood alleged that he was entitled to immediate possession of the heifers and that Nordhues had wrongfully detained and refused to deliver them to Norwood or to allow Norwood to take possession of them. Norwood sought judgment against Nordhues for return of the heifers, or for their value if not returned, and for his damages and costs.

Norwood filed a motion for summary judgment on March 31, 2009, which was heard by the district court on April 21. The court received exhibits into evidence, including the depositions of Norwood, Asbury, an employee of Asbury, Hargrove, a representative of B & W, a person affiliated with B & W, and Maulsby. The information contained in these depositions is summarized above. The district court entered an order on August 5, granting Norwood's motion for summary judgment. Applying Nebraska law, the district court concluded that either Asbury or Hargrove was a thief who stole Norwood's heifers and that any title Hargrove received from Asbury was void. The court further concluded that because neither Asbury nor Hargrove had the ability to convey any title or rights to the heifers, neither B & W, Maulsby, nor Nordhues acquired any title to or ownership rights in the heifers. The court ordered Nordhues to deliver possession of the 113 heifers to Norwood. (At the time of the replevin proceedings, Nordhues had only 113 of the 115 Norwood heifers he purchased from Maulsby in his possession. The other two apparently either died or were lost.) Nordhues appealed to this court, and we affirmed the district court's decision. See *Norwood v. Nordhue*, No. A-09-1025, 2010 WL 2902345 (Neb. App. July 13, 2010) (selected for posting to court Web site).

2. Current Proceedings

On October 1, 2009, Nordhues filed a complaint against Maulsby and Midwestern Cattle Marketing, LLC (Midwestern Cattle), seeking damages in the amount of $117,300 for Maulsby and Midwestern Cattle's failure to convey clear title to 115 head of bred heifers.

Maulsby filed an answer and third-party complaint on November 16, 2009. In his third-party complaint, Maulsby alleged the following: He purchased 115 bred heifers from B & W, which he resold to Nordhues; B & W breached its contract with Maulsby to deliver clean title to the 115 bred heifers; and B & W should be required to pay any judgment entered against Maulsby or Midwestern Cattle in Nordhues' action against them. Maulsby asked that the district court award him judgment against B & W for damages "in an amount to be proven at trial including but not limited to the amount of any judgment and costs awarded against Maulsby for Plaintiff, . . . Nordhues, in this litigation."

B & W filed an answer and third-party complaint on January 1, 2010. In its third-party complaint, B & W alleged the following: B & W purchased 140 heifers from Hargrove, and it resold 115 of the bred heifers to Maulsby; B & W purchased the bred heifers from Hargrove in good faith and for value; and B & W is a "buyer in the ordinary course of business" with regard to the bred heifers as that term is defined in the applicable Uniform Commercial Code (U.C.C.). However, B & W also alleged that if it is determined that B & W is liable to Maulsby on the basis of Maulsby's third-party complaint, then Hargrove breached the provisions of his agreement with B & W which required Hargrove to deliver clear title to the bred heifers to B & W and Hargrove should be held liable to B & W for any damages sustained by B & W because of the breach, including any amount that B & W is held to be liable to Maulsby for. In its answer and third-party complaint, B & W alleged that Missouri law should determine the outcome of the proceedings.

In his answer filed on February 12, 2010, Hargrove denied breaching the provisions of his agreement with B & W which

required Hargrove to deliver clear title to the bred heifers to B & W.

In an order filed on February 18, 2010, the district court dismissed Nordhues' complaint against Midwestern Cattle after finding that it was Maulsby, not Midwestern Cattle, who was involved in the livestock transactions. The district court found that, according to the evidence, Maulsby, who was employed by Midwestern Cattle, had mistakenly used a Midwestern Cattle receipt for what was his personal livestock transaction. Midwestern Cattle had no further involvement in this case.

Apparently, all parties filed motions for summary judgment and a hearing on such motions was held on June 8, 2010 (neither the motions nor the proceedings thereupon are in our record). On September 10, the district court filed its order denying the motions for summary judgment. The district court found that Norwood, Asbury, Hargrove, and B & W are all merchants regarding cattle. The district court then conducted a "[c]hoice of laws" analysis, ultimately finding that Missouri law should be applied to the transactions between Norwood/Asbury, Asbury/Hargrove, and Hargrove/B & W. The district court then found that, under Missouri law, Norwood gave Asbury the power to transfer all of Norwood's rights (the rights of an owner) in the heifers to a buyer in the ordinary course of business. The district court then found that Asbury's rights could be transferred only to a buyer in the ordinary course of business, as defined by Missouri law. Because the district court found that the circumstances of the case created a question of fact as to whether Hargrove was a buyer in the ordinary course of business and a good faith purchaser, the district court denied all parties' motions for summary judgment.

A pretrial conference was held on October 19, 2010. As a result of discussion had at the pretrial conference, the parties filed a stipulation on December 15. Nordhues, Maulsby, B & W, and Hargrove stipulated as follows:

> 1. In August 2008, Nordhues, purchased 115 head of heifers (the "Heifers") from Maulsby for $117,300.00.

2. Maulsby had purchased the Heifers from B&W for $110,400.00.

3. B&W had purchased the Heifers from Hargrove.

4. All evidence presented to the court at the hearing on the Motion for Summary Judgment held on June 8, 2010 may be submitted as evidence in the trial of this action without objection.

5. If the court determines that Hargrove did not convey good title to the Heifers to B&W, then the court may enter judgment in favor of the parties as follows:

A. Nordhues shall be entitled to a judgment against Maulsby in the sum of $117,300.00 plus Nordhues' costs.

B. Maulsby shall be awarded judgment against B&W for the amount of the judgment awarded to Nordhues against Maulsby plus Maulsby's costs.

C. B&W shall be awarded judgment against Hargrove for the amount of the judgment awarded to Maulsby against B&W plus B&W's costs.

In its pretrial order filed on December 17, the district court stated: "After discussion between the court and counsel, the sole issue to be determined by the court is whether Harg[ro]ve was a buyer in the ordinary course of business and a good faith purchaser." This would be the only issue left for resolution as a result of the parties' stipulation.

A bench trial was held on January 5, 2011. The district court filed its judgment of dismissal on April 21. In its judgment, the district court said, "In the Order Denying Motions for Summary Judgment . . . the court made certain findings which are confirmed and recited again herein." Then the district court recited, nearly verbatim, its "choice of laws" analysis from its September 10, 2010, order denying the motions for summary judgment, which found that Missouri law should be applied to the transactions between Norwood/Asbury, Asbury/Hargrove, and Hargrove/B & W. The district court then addressed the Asbury/Hargrove transaction to determine whether Hargrove was a buyer in the ordinary course of business and a good faith purchaser. The district court determined that he was.

The district court found that Hargrove bought the heifers from Asbury without actual knowledge that the heifers were

owned by someone other than Asbury. The district court also found that Hargrove was a good faith purchaser for value, despite receiving an additional 10 heifers from Asbury free of charge. The district court noted that there were any number of reasons for the free extra 10 head: The heifers were not as represented and had lost weight; some heifers were "open" (i.e., not bred); Asbury knew he was short on the cow-calf pairs and bred heifers he was to have delivered—as part of other transactions between Asbury/Hargrove, Asbury/B & W, and Hargrove/B & W which occurred at the same time Asbury sold the Norwood heifers to Hargrove; and Asbury was to haul one load of heifers which he did not haul. The district court also found that Hargrove's purchase price was not an indication that Hargrove did not pay fair market value. The district court found that Hargrove made "no more than each subsequent seller" and that the transactions seem to "reflect capitalism at its best" because each party was able to make a profit. The district court concluded that the price at which Hargrove purchased the heifers "would not put one on inquiry as to the title he was about to purchase."

The district court acknowledged the discrepancy between its decision and the decision in the companion replevin case which we decided on appeal and which we earlier referenced. The district court stated:

> The court is acutely aware of the seemingly inconsistent results between the two cases. The court decides the cases upon the issues raised by the pleadings and the evidence adduced. The evidence adduced herein leads the court to conclude that Hargrove was a buyer in the ordinary course of business. The facts available to Hargrove were not such that they would have put a reasonably prudent person upon inquiry as to the title he is about to purchase.

The district court dismissed Nordhues' complaint with prejudice. Nordhues now appeals.

V. ASSIGNMENTS OF ERROR

Nordhues assigns that the district court erred by (1) dismissing Nordhues' complaint with prejudice; (2) finding that

Hargrove was a buyer in the ordinary course of business, contrary to its prior finding; (3) finding that Hargrove was a good faith purchaser, contrary to its prior finding; (4) failing to follow the pretrial order and limit the issues; and (5) failing to find that Nordhues was a bona fide purchaser for value without notice and a buyer in the ordinary course of business.

On cross-appeal, Maulsby assigns that (1) in the event it is determined that the trial court erred in dismissing Nordhues' complaint, then the trial court also erred in denying Maulsby's third-party complaint against B & W, and (2) in the event it is determined that the trial court erred by not entering judgment for Nordhues against Maulsby, then the trial court also erred by not entering judgment for Maulsby against B & W in a like amount.

On cross-appeal, B & W assigns that (1) in the event it is determined that the trial court erred in dismissing Nordhues' complaint against Maulsby and in denying Maulsby's third-party complaint against B & W, then the trial court also erred in denying B & W's third-party complaint against Hargrove, and (2) in the event it is determined that the trial court erred by not entering judgment for Nordhues against Maulsby and by not entering judgment for Maulsby against B & W, then the trial court also erred by not entering judgment for B & W against Hargrove pursuant to the stipulation of the parties. In short, the appeal and cross-appeals determine who will end up holding "an empty bag" after the various transactions involving the heifers that Norwood bought at the Valentine auction.

VI. STANDARD OF REVIEW

[1] The determination of rights under a contract is a law action. *Davenport Ltd. Partnership v. 75th & Dodge I, L.P.*, 279 Neb. 615, 780 N.W.2d 416 (2010).

[2] A suit for damages arising from breach of a contract presents an action at law. *Dutton-Lainson Co. v. Continental Ins. Co.*, 279 Neb. 365, 778 N.W.2d 433 (2010).

[3-6] In a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Hooper v. Freedom Fin. Group*, 280 Neb. 111, 784 N.W.2d 437 (2010). An appellate court will not

reevaluate the credibility of witnesses or reweigh testimony but will review the evidence for clear error. *Id*. Similarly, the trial court's factual findings in a bench trial of an action at law have the effect of a jury verdict and will not be set aside unless clearly erroneous. *Id*. In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Id.*

VII. ANALYSIS

1. Res Judicata

Nordhues assigns that the district court erred in finding Hargrove was a buyer in the ordinary course of business and a good faith purchaser, contrary to the prior findings in the replevin case, and that these two issues are res judicata. Insofar as our record reveals, Nordhues raised the issue of res judicata for the first time at the appellate level, unless it was raised during summary judgment. But we do not have the motions for summary judgment, nor do we have the bill of exceptions of the summary judgment hearing—neither of which did Nordhues request be made part of our record. Even though Nordhues' argument is so sketchy that it is questionable that he has complied with our requirement that an error be assigned and argued, we briefly address the issue.

[7,8] It is well known that an issue not presented to or passed on by the trial court is not appropriate for consideration on appeal. *Robinson v. Dustrol, Inc.*, 281 Neb. 45, 793 N.W.2d 338 (2011). See, also, *Ballard v. Union Pacific RR. Co.*, 279 Neb. 638, 781 N.W.2d 47 (2010) (res judicata is affirmative defense which must ordinarily be pleaded to be available; and while appellate court may raise issue of res judicata sua sponte, it is infrequently done). We decline to consider the res judicata issues in the present appeal.

2. Expansion of Issues From Pretrial Order

[9] Nordhues assigns, but does not specifically argue, that the trial court erred by failing to follow the pretrial order which

identified only two issues: whether Nordhues was (1) a buyer in the ordinary course of business and (2) a good faith buyer. He further assigns, but does not specifically argue, that the trial court

> erroneously injected additional issues of: A) whether Missouri law should be applied; B) whether the parties were merchants regarding the buying and selling of cattle; C) whether there is a conflict in the laws of Missouri and Nebraska; D) whether this action is one of tort or contract; and E) whether the Restatement Second Conflict of Laws should be applied to resolve conflict rather than the two limited issues which were agreed upon by the parties and which were contained in the Pretrial Order.

An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court. *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010). Moreover, we note that the district court did not "inject additional issues" at trial; rather, it merely reiterated, nearly verbatim, its findings and holdings from its order denying summary judgment.

3. Conflict of Law

The district court in the instant case applied Missouri law, whereas in the companion replevin case, the district court applied Nebraska law. Given that Nordhues does not specifically argue his claim that the trial court wrongfully injected the issue of whether Missouri law should apply, we could consider the issue only under the plain error doctrine.

[10,11] Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error. *Deterding v. Deterding*, 18 Neb. App. 922, 797 N.W.2d 33 (2011). See, also, *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010). Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *Deterding v. Deterding, supra*.

It is clear that Nordhues can recover damages only if he did not receive "good title" to the livestock from Maulsby. The

question of "good title" to the heifers begins with Asbury and Hargrove and whether each had the power to transfer title to the livestock—Asbury by entrustment and Hargrove as a good faith buyer in the ordinary course of business. All parties agree that if Hargrove had good title, then all subsequent purchasers, including Nordhues, also had good title.

Both Nebraska and Missouri have ties to this case. The cattle were purchased in Nebraska by Norwood, a Missouri resident. The cattle were delivered to Asbury's ranch in Missouri for care, and Asbury is a Missouri resident. Asbury sold the cattle to Hargrove, also a Missouri resident. Hargrove then sold the cattle to B & W, a Nebraska corporation. B & W had the cattle moved to Nebraska. The cattle were subsequently sold to Maulsby and then to Nordhues, both Nebraska residents. Thus, the question becomes: Does Nebraska or Missouri law apply? Accordingly, a conflict-of-law analysis must be performed.

(a) Is There Actual Conflict in Law?

[12,13] The first step in a conflict-of-law analysis is to determine whether there is an actual conflict between the legal rules of different states. *Christian v. Smith*, 276 Neb. 867, 759 N.W.2d 447 (2008). An actual conflict exists when a legal issue is resolved differently under the law of two states. *Heinze v. Heinze*, 274 Neb. 595, 742 N.W.2d 465 (2007).

[14] The beginning point is Asbury and whether he had the power to transfer good title to Hargrove. This case is controlled by the U.C.C. The U.C.C. applies when the principal purpose of a transaction is the sale of goods, but does not apply when the contract is principally for services. *MBH, Inc. v. John Otte Oil & Propane*, 15 Neb. App. 341, 727 N.W.2d 238 (2007). Animals are goods under the U.C.C. See Neb. U.C.C. § 2-105(1) (Reissue 2001) ("goods" means all things which are movable at time of identification to contract for sale and also includes unborn young of animals). Accord Mo. Ann. Stat. § 400.2-105(1) (West 1994).

[15] Both Nebraska and Missouri have statutes regarding the entrustment of goods to a merchant. Initially, we note that there is no question that all persons involved in these livestock

transactions—from Norwood to Nordhues—were merchants under Nebraska and Missouri law. The term "merchant" is defined basically the same by both states. Merchant means a person who deals in goods of the kind or otherwise by his or her occupation holds himself or herself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his or her employment of an agent or broker or other intermediary who by his or her occupation holds himself or herself out as having such knowledge or skill. Neb. U.C.C. § 2-104(1) (Cum. Supp. 2010). Accord Mo. Ann. Stat. § 400.2-104(1) (West 1994). All persons involved in these livestock transactions were merchants because all are in the business of buying and selling cattle.

[16] The evidence is that Norwood entrusted 190 heifers to Asbury for care. Both Nebraska and Missouri use the same definition of entrusting:

> "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

Neb. U.C.C. § 2-403(3) (Reissue 2001). Accord Mo. Ann. Stat. § 400.2-403(3) (West 1994). Regarding entrustment of goods to a merchant, Nebraska provides: "Any entrusting of possession of goods to a merchant *for purposes of sale* who deals in goods of that kind gives him or her power to transfer all rights of the entruster to a buyer in ordinary course of business." Neb. U.C.C. § 2-403(2) (emphasis supplied). Missouri provides: "Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business." Mo. Ann. Stat. § 400.2-403(2).

Clearly, there is an actual conflict between the legal rules of Nebraska and Missouri. Nebraska's statute limits the circumstances in which an entrustee merchant has the power to transfer rights to a buyer in the ordinary course of business,

and Missouri's statute does not have the same limitations. In Nebraska, the entrustee merchant has the power to transfer rights only if the goods were delivered to the entrustee merchant "for purposes of sale." It is undisputed that Norwood did not entrust the livestock to Asbury "for purposes of sale." Therefore, the legal issue involved herein—whether Asbury could transfer good title to the heifers—would be resolved differently depending upon which state's law is applied. Under Nebraska law, Asbury could not transfer good title to the heifers, but under Missouri law, he could.

(b) Should Nebraska or Missouri Law Control?

[17] Nebraska has adopted the Restatement (Second) of Conflict of Laws § 188 (1971). *Mertz v. Pharmacists Mut. Ins. Co.*, 261 Neb. 704, 625 N.W.2d 197 (2001). The Restatement, *supra* at 575, provides, in relevant part:

> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the [general choice-of-law] principles stated in § 6.
>
> (2) In the absence of an effective choice of law by the parties . . . the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place of contracting,
>
> (b) the place of negotiation of the contract,
>
> (c) the place of performance,
>
> (d) the location of the subject matter of the contract, and
>
> (e) the domicil[e], residence, nationality, place of incorporation and place of business of the parties.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

And the Restatement, *supra*, § 6 at 10, referenced in § 188 above, pertains to choice-of-law principles and provides:

> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

We now consider the contacts in the instant case. Although Norwood purchased the cattle in Nebraska, they were delivered to Asbury's ranch in Missouri for care. Asbury subsequently sold Norwood's cattle to Hargrove, who in turn sold them to B & W—the transfers of cattle between Asbury/Hargrove and Hargrove/B & W were virtually simultaneous. It is undisputed that the place of contracting between Norwood/Asbury, Asbury/Hargrove, and Hargrove/B & W was in Missouri. At the time of these transactions, the cattle were in Missouri, and thus, these contracts were all performed in Missouri. Furthermore, Norwood, Asbury, and Hargrove were all residents of Missouri. Thus, Missouri had the most significant relationship to the transactions and the parties mentioned above. And there is nothing in the general principles of the Restatement's § 6 that indicates Nebraska law should be applied to the Missouri transactions. Accordingly, the district court did not commit plain error in determining that Missouri has the most significant relationship to the transactions and the parties mentioned above and that Missouri law should be applied to those transactions. We recognize that B & W was a Nebraska corporation and that Maulsby and Nordhues were Nebraska residents, and the cattle eventually were returned to Nebraska. Nonetheless, it is the first two transactions, Norwood/Asbury and then Asbury/Hargrove, which are determinative for our conflict-of-law analysis.

[18] We recognize that applying Missouri law to the instant case is seemingly inconsistent with what occurred in the companion replevin case. In that case, the district court applied Nebraska law and concluded that because neither Asbury nor Hargrove acquired valid title to the heifers, neither one had power to transfer valid title to the subsequent purchasers, including Nordhues. On appeal to this court, Nordhues argued that Missouri law should have controlled. In our memorandum opinion deciding that appeal, we noted that the conflict-of-law issue was not raised to the district court, either in pleadings or in arguments at hearings. In fact, our memorandum opinion recites that

> the arguments at the hearings on the summary judgment and motion to alter or amend the summary judgment did not raise the issue of the applicability of Missouri law; rather, the arguments clearly referred to the Nebraska version of [U.C.C] § 2-403 and whether the cattle were delivered "for purposes of sale."

Norwood v. Nordhue, No. A-09-1025, 2010 WL 2902345 at *5 (Neb. App. July 13, 2010) (selected for posting to court Web site). That fact is significant because "[t]he rule is that, in the absence of pleading and proof to the contrary, Nebraska courts presume that the law of the foreign jurisdiction which should be applied is the same as the Nebraska law, as to Constitution, statutes, and case law." *Forshay v. Johnston*, 144 Neb. 525, 13 N.W.2d 873 (1944) (syllabus of the court). We further noted that in his appellate brief, Nordhues did not specifically assign error to any alleged failure by the district court to apply Missouri law, and we declined to apply the plain error doctrine to the conflict-of-law issue.

In the instant case, however, the conflict-of-law issue was pled and subsequently addressed by the district court. Nordhues did not properly assign and argue the conflict-of-law issue in his brief to this court. Nonetheless, in the instant case, the district court was asked to apply Missouri law and did so, and as explained above, Missouri law was the applicable law. The appeal in *Norwood v. Nordhue, supra*, was decided on the issues properly presented for appellate review. In the present case, no party has properly assigned and argued error to

the application of Missouri law, which, in any event, was the applicable law.

(c) Application of Missouri Law

(i) Norwood/Asbury Transaction

The district court found that Norwood delivered his heifers to Asbury for him to care for them. The evidence in the record supports this finding. See *In re Guardianship of Elizabeth H.*, 17 Neb. App. 752, 771 N.W.2d 185 (2009) (appellate court, in reviewing judgment for errors appearing on record, will not substitute its factual findings for those of lower court where competent evidence supports those findings). It is undisputed that Norwood and Asbury were merchants with regard to cattle. Under Missouri law, by entrusting the heifers to Asbury, Norwood gave Asbury the power to transfer all of Norwood's rights in the heifers to a buyer in the ordinary course of business. See Mo. Ann. Stat. § 400.2-403(2) (any entrusting of possession of goods to merchant who deals in goods of that kind gives him power to transfer all rights of entruster to buyer in ordinary course of business).

(ii) Asbury/Hargrove Transaction

[19-21] Therefore, we now turn to whether Hargrove was a buyer in the ordinary course of business. Missouri defines a "buyer in the ordinary course of business" as

> a person that buys goods in good faith and without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices.

Mo. Ann. Stat. § 400.1-201(9) (West Cum. Supp. 2012). Incidentally, we note that Nebraska law is in accord. See Neb. U.C.C. § 1-201(9) (Cum. Supp. 2010). "Good faith" in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing

in the trade. Mo. Ann. Stat. § 400.2-103(1)(b) (West Cum. Supp. 2012). Accord Neb. U.C.C. § 2-103(1)(b) (Cum. Supp. 2010).

[22,23] "[A] bona fide purchaser [is] one who pays a valuable consideration, has no notice of outstanding rights of others and who acts in good faith." *J.C. Equipment, Inc. v. Sky Aviation, Inc.*, 498 S.W.2d 73, 76 (Mo. App. 1973). "The necessary notice referred to may be imparted to a prospective purchaser by actual or constructive notice of facts which would place a reasonably prudent person upon inquiry as to the title he is about to purchase." *Id.* See, also, Mo. Ann. Stat. § 400.1-201(25) (person has "notice" of fact when person has actual knowledge of it or from all facts and circumstances known to him or her at time in question he or she has reason to know that it exists).

Hargrove gave a deposition in the replevin case that we have mentioned, and that deposition was also received into evidence in the instant case. In his deposition, Hargrove testified that Asbury "represented" that he owned the heifers. And in an affidavit prepared in the instant case, which was also received into evidence, Hargrove stated that he believed Asbury owned the heifers. Furthermore, Hargrove testified that he had known Asbury for 20 years and had done cattle transactions with him on previous occasions. Hargrove testified that he never had a title issue in any of his prior cattle transactions with Asbury. Thus, we find no error in the district court's finding that Hargrove bought the heifers from Asbury without actual knowledge that the heifers were owned by someone other than Asbury. See *In re Guardianship of Elizabeth H.*, 17 Neb. App. 752, 771 N.W.2d 185 (2009) (appellate court, in reviewing judgment for errors appearing on record, will not substitute its factual findings for those of lower court where competent evidence supports those findings). However, we must also look at whether Hargrove had constructive notice, meaning from all the facts and circumstances known to him at the time in question, he had reason to know that there was a problem with Asbury's title to the heifers.

a. Hargrove's Purchase Price

Asbury initially wanted to sell Hargrove 140 head of bred heifers for $900 per head. However, Hargrove ultimately purchased the heifers for $842.85 per head. The district court found that according to the evidence, the final contract entered into was the result of negotiations between the parties. The district court also said: "The evidence does not persuade the court that Hargrove should have been put on notice regarding the title he received because he was able to dicker and buy the heifers at a lower price than first offered by Asbury." We agree.

Testimony from Hargrove disclosed two different reasons for the reduction in price: Asbury's need for money and the condition of the heifers' eyes. In his deposition in the companion replevin case, Hargrove testified that Asbury lowered the price in order to get his money "right now." At trial, Hargrove testified that Asbury needed the money for a separate cattle deal in Iowa. And the evidence discloses that Asbury received payment 2 weeks prior to delivery of the heifers—supporting the notion that Asbury needed money "right now." Additionally, at trial in the instant case, Hargrove testified that when he first looked at the cattle in mid-July, he mentioned to Asbury that he was concerned because some of the heifers had "blue eyes"—Hargrove testified that if left untreated, the heifer can lose one or both of its eyes, which would make the heifer harder to sell or lower its value. Hargrove testified that Asbury assured him that the eyes were being treated. Hargrove testified that he did not have an agreement to purchase the livestock when he left Asbury in mid-July. Hargrove testified that Asbury called him "a few days, maybe a week" later and said he would take less for the heifers. Hargrove testified that based on the quality and condition of the livestock he bought, $842.85 per head was in the "fair market value range." Based on our review of the record, the evidence was insufficient to show that Hargrove should have been put on notice regarding the title to the cattle because the price of the heifers was lowered. We find no error in the district court's determination that the final contract entered into was the result of negotiations between the parties.

b. Extra 10 Head of Heifers

Hargrove contracted to buy 140 bred heifers, each weighing 875 to 900 pounds, from Asbury for $842.85 per head. The evidence shows that at the time the heifers were sorted and loaded, Asbury allowed Hargrove to take another 10 head for no additional charge. We point out the evidence shows that the B & W representative was present and participated in the sorting and loading and that B & W essentially took possession of the heifers, including the extra 10 head, from Hargrove at the same moment that Hargrove took possession of the heifers from Asbury. These facts alone might give rise to a question of good faith concerning the Asbury/Hargrove transaction. However, there were other cattle transactions between Asbury/Hargrove, Asbury/B & W, and Hargrove/B & W all occurring at the same time. We summarize the transactions as follows:

- Asbury/Hargrove: Asbury contracted to sell Hargrove 140 heifers for $842.85 each, for a total of $118,000.
- Hargrove/B & W: Hargrove contracted to sell B & W those same 140 heifers for $900 each, for a total of $126,000.
- Asbury/Hargrove: Asbury contracted to sell Hargrove 70 Angus cow-calf pairs for $1,000 each, for a total of $70,000.
- Hargrove/B & W: Hargrove contracted to sell B & W the same 70 Angus cow-calf pairs for $1,000 each, for a total of $70,000.
- Asbury/B & W: Asbury contracted to sell B & W $75,000 worth of bred heifers at $800 each.

Clearly, these folks were "cattle dealers." The total payments to Asbury were $263,000. All payments were made to Asbury before anyone took possession of any of the cattle. The district court found: "Asbury had to have known he was short on the number of cattle he had contracted to sell and for which he had already received payment on the date of the delivery of the heifers." On August 14, 2008, Asbury delivered 150 heifers. The next day, he delivered 26 cow-calf pairs and 52 dry cows. The total value of the livestock delivered was $179,000. The district court found that Hargrove and B & W were short $84,000 worth of livestock, after including the extra 10 heifers. On September 2, Asbury wrote Hargrove a

check for $84,000, but the check was returned for insufficient funds. Subsequently, on October 2, Asbury gave Hargrove a check for $35,000. Thus, Hargrove and B & W were still short $49,000.

The district court found that there were a number of reasons for the extra 10 head of heifers Hargrove received from Asbury for no charge. In examining the evidence, it reveals that in addition to the fact that Asbury was short on the number of cattle he had contracted to sell, there was evidence that the 140 heifers were not as represented. The heifers had lost weight and therefore were "light," and some of the heifers were "open." Asbury was also not required to haul one load of heifers which he had agreed to haul. Thus, the district court implicitly held that the additional 10 heifers would not have put Hargrove on notice that something was wrong with Asbury's title to the heifers, because there were multiple reasons for Asbury to add an additional 10 head in his deal with Hargrove. Upon our review of the record, the trial court was not clearly wrong in its finding that Hargrove did not have constructive notice of any problem with Asbury's title to the heifers.

c. Resolution

We find no error in the district court's conclusion that Hargrove was a buyer in the ordinary course of business and a good faith purchaser. Thus, the Asbury/Hargrove transaction resulted in Hargrove's receiving Norwood's rights—the rights of an owner—to the heifers. And as owner, Hargrove would have good title to the heifers. See Mo. Ann. Stat. § 400.2-403(2). And as stated previously, all parties agree that if Hargrove had good title, then all subsequent purchasers, including Nordhues, also had good title. Nordhues' complaint against Maulsby sought damages in the amount of $117,300 for Maulsby's failure to convey clear title to 115 head of bred heifers. Because Nordhues received good title to the heifers from Maulsby, his claim for damages is without merit. Accordingly, the district court did not err when it dismissed Nordhues' complaint with prejudice.

VIII. CONCLUSION

Because we find no error with the district court's judgment of dismissal, we need not address the cross-appeals of Maulsby or B & W.

AFFIRMED.

CENTURION STONE OF NEBRASKA, APPELLANT, V.
TONY TROMBINO AND LORI TROMBINO, APPELLEES.
812 N.W.2d 303

Filed March 27, 2012. No. A-11-139.

1. **Courts: Appeal and Error.** The district court and higher appellate courts generally review appeals from the county court for error appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. ____: ____. In instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record.
4. **Motions for Mistrial: Jury Misconduct: Appeal and Error.** Trial counsel's failure to move for a mistrial based on alleged juror misconduct during deliberations precludes counsel from raising the issue on appeal.
5. **Breach of Contract: Damages.** In a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position that the injured party would have occupied if the contract had been performed, that is, to make the injured party whole.
6. **Contracts: Substantial Performance: Damages.** If a construction contract has been substantially performed but there are defects or omissions in the work which are remediable at reasonable expense without taking down and reconstructing any substantial portion of the building or structure, it is generally held that the contractor is entitled to the contract price after deducting therefrom the expense of making the work conform to the contract requirements.
7. **Contracts: Damages.** Where defects cannot be remedied without reconstruction of or material injury to a substantial portion of a building, the measure of damages is the difference between the value as constructed and the value if built according to the contract.
8. **Appeal and Error.** Plain error may be asserted for the first time on appeal or be noted by an appellate court on its own motion.
9. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave