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were called first offense or second offense. Because McCarthy's two prior convictions clearly satisfy this requirement and because she makes no other challenge to the use of these convictions for purposes of enhancement, we affirm the judgment of the district court.

AFFIRMED.

RONALD "TIM" BACON, APPELLANT, V. DBI/SALA, ALSO KNOWN AS DB INDUSTRIES, INC., APPELLEE, AND DAVIS ERECTION CO., INC., EMPLOYER, AND LIBERTY MUTUAL GROUP, ITS WORKERS' COMPENSATION CARRIER, SUBROGEES, APPELLEES.

822 N.W.2d 14

Filed November 2, 2012. No. S-11-194.

1. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.
2. **Workers' Compensation: Subrogation.** The employer's right to a future credit does not depend upon who brought the action which led to the employee's recovery or who happens to "recover" first.
3. ____: ____. Neb. Rev. Stat. § 48-118 (Reissue 2010) was enacted for the benefit of the employer.
4. **Statutes: Intent.** In construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served, and then must place on the statute a reasonable or liberal construction that best achieves the statute's purpose, rather than a construction that defeats the statutory purpose.
5. **Statutes: Appeal and Error.** When possible, an appellate court will try to avoid a statutory construction that would lead to an absurd result.
6. **Statutes: Judicial Construction: Legislature: Presumptions.** It is presumed that when a statute has been construed by the Nebraska Supreme Court and the same statute is substantially reenacted, the Legislature gave to the language the significance previously accorded to it by the Supreme Court.
7. **Workers' Compensation: Subrogation: Words and Phrases.** "Third person" under the Nebraska Workers' Compensation Act includes any person other than the employer or those whom the act makes an employer.
8. **Corporations: Stock.** Two separate corporations are generally regarded as distinct legal entities even if the stock of one is owned wholly by the other.
9. **Corporations: Presumptions.** There is a strong presumption that a parent company is not the employer of its subsidiary's employees.
10. **Insurance: Subrogation.** Under the antisubrogation rule, an insurer has no right of subrogation against its own insured or coinsured for a claim arising from the very risk for which the insured was covered.

11. ____: ____. The antisubrogation rule does not prohibit subrogation against any third party who is neither a named nor an implied coinsured, but who has some kind of duty relationship with the insured.
12. ____: ____. The prohibition of insurers' subrogation against their own insureds applies only to claims arising from the very risk for which the insured was covered by that insurer.
13. **Workers' Compensation: Subrogation.** An employer may waive its subrogation protections under applicable workers' compensation laws.
14. **Subrogation: Waiver.** Waivers of subrogation are strictly construed.
15. **Workers' Compensation: Subrogation.** A claimant is entitled to deduct the reasonable expenses incurred in reaching settlement from the portion of the settlement subject to subrogation claims.
16. **Workers' Compensation.** The portion of a settlement which is not actually recovered by the employee—because of a prior apportionment agreement—should not be treated as advance payment by the employer on account of any future installments of compensation.
17. **Rules of the Supreme Court: Appeal and Error.** A cross-appeal must be properly designated under Neb. Ct. R. App. P. § 2-109(D)(4) (rev. 2008) if affirmative relief is to be obtained.
18. **Appeal and Error.** Errors argued but not assigned will not be considered on appeal.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Affirmed in part, and in part reversed and remanded.

James E. Harris and Britany S. Shotkoski, of Harris Kuhn Law Firm, L.L.P., and Robert G. Pahlke, of Robert Pahlke Law Group, for appellant.

Julie A. Martin, of Nolan, Olson & Stryker, P.C., L.L.O., for appellees Davis Erection Co., Inc., and Liberty Mutual Group.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, and MCCORMACK, JJ., and INBODY, Chief Judge, and SIEVERS, Judge.

MCCORMACK, J.

NATURE OF CASE

Ronald "Tim" Bacon was severely injured while working on a construction project as an employee of Davis Erection Co., Inc. (Davis). Davis and its insurer, Liberty Mutual Group (Liberty), began paying lifetime workers' compensation benefits. Bacon brought a separate negligence action against Davis' parent company, Ridgetop Holdings, Inc. (Ridgetop),

and joined Davis and Liberty for workers' compensation subrogation purposes. Ridgetop's safety director had worked on the project under the supervision of Davis' project manager, and Bacon alleged Ridgetop was independently liable for the safety director's negligent acts which contributed to his injury. Bacon reached a settlement agreement with Ridgetop, after which the trial court granted Davis and Liberty's motion, pursuant to Neb. Rev. Stat. § 48-118 (Reissue 2010), for a future credit in the amount of Bacon's settlement with Ridgetop against its continuing workers' compensation obligations. Bacon appeals the order granting the future credit. At issue is whether Ridgetop is a "third person" under § 48-118 and whether Liberty waived its right to a future credit through a waiver clause in the policy or statements during settlement negotiations.

BACKGROUND

Metropolitan Entertainment & Convention Authority (MECA) contracted with Kiewit Construction Co. (Kiewit) to build the Omaha Convention Center and Arena (the Arena). Pursuant to their agreement, MECA was required to purchase, maintain, and administer an "Owner Controlled Insurance Program" (OCIP), which would provide comprehensive builder's liability insurance, including workers' compensation coverage, for all the contractors working on the Arena. The agreement stated that the OCIP was to fully insure the risk of Kiewit, as construction manager, and those subcontractors and suppliers performing "the Work." Kiewit was specifically required to name itself, its subcontractors, and its suppliers as "additional insureds." The agreement also specified that the insurance coverage was to contain waivers of subrogation.

Kiewit contracted with Liberty to provide the OCIP. The policies to the various subcontractors apparently bore separate policy numbers.[1] However, the senior technical claims specialist for Liberty described an OCIP as a single policy written for a given construction contract, insuring all of the subcontractors under that program. In this manner, Kiewit was insured by

[1] See *RSUI Indemnity Co. v. Bacon*, 282 Neb. 436, 810 N.W.2d 666 (2011).

Liberty under a commercial liability and workers' compensation policy for the duration of its work on the Arena. Kiewit had additional liability coverage through a policy with RSUI Indemnity Company (RSUI). The specific policy between Kiewit and Liberty is not in the record.

Contract and Policy With Davis

Kiewit hired Davis as a subcontractor to perform work on the Arena. The agreement is not in the record. Bacon instead entered into evidence two pages of what appears to be a subcontract agreement between Kiewit and another subcontractor for the Arena project. Liberty does not contest that the agreement is representative of Kiewit's other subcontractor agreements. The agreement contained the following waiver of subrogation:

> *Subcontractor hereby waives all rights of recovery under subrogation because of deductible clauses, inadequacy of limits of any insurance policy, limitations or exclusions of coverage, or any other reason against Owner, Contractor, the OCIP Administrator, its or their officers, agents, or employees, and any other contractor or sub-subcontractor performing Work or rendering services on behalf of Owner or Contractor in connection with the planning, development and construction of the Project*. Subcontractor shall also require that all Subcontractor maintained insurance coverage related to the Work include clauses providing that each insurer shall waive all of its rights of recovery by subrogation against Owner and Contractor together with the same parties referenced immediately above in this Section. Subcontractor shall require similar written express waivers and insurance clauses from each of its sub-subcontractors. A waiver of subrogation shall be effective as to any individual or entity even if such individual or entity (a) would otherwise have a duty of indemnification, contractual or otherwise, (b) did not pay the insurance premium directly or indirectly, and (c) whether or not such individual or entity has an insurable interest in the property damaged.

(Emphasis supplied.)

Davis was an enrollee in the OCIP, pursuant to which Liberty issued a workers' compensation and employers' liability policy. A four-page excerpt of the policy between Davis and Liberty is in evidence. It contains a "Waiver of Our Right to Recover From Others Endorsement," which provides:

> We have the right to recover our payments from anyone liable for an injury covered by this policy. We will not enforce our right against the person or organization named in the Schedule. (This agreement applies only to the extent that you perform work under a written contract that requires you to obtain this agreement from us.)
>
> This agreement shall not operate directly or indirectly to benefit any one not named in the Schedule.

Under the title "Schedule," on the same page of the waiver, the policy states, "Where required by written contract."

Parent Company Ridgetop

Davis is a wholly owned subsidiary of Ridgetop. Ridgetop was not a named enrollee of the OCIP. It does not appear from the record that there was any contract between Ridgetop and MECA or between Ridgetop and Kiewit to perform work on the Arena. Ridgetop has several wholly owned subsidiary companies, including Davis Rebar, Inc.; Northwest Steel Erection; Crane Sales & Service; and Crane Rental & Rigging Co.

Ridgetop's employee David Sowl is a safety director. Sowl is regularly loaned out to work as the safety director for each of Ridgetop's subsidiaries, under the supervision and control of their division managers. In accordance with this custom, Sowl provided certain safety services for the Arena project, and he worked under the direction of Davis' project manager.

Workers' Compensation and Bacon's Lawsuit

Bacon was an employee of Davis and was injured in an accident while working on the Arena. Liberty, on behalf of Davis, promptly began paying lifetime workers' compensation benefits pursuant to the OCIP policy.

Bacon sued Ridgetop and Kiewit for negligence. He joined Davis and Liberty for "workers' compensation subrogation

purposes only." Bacon asserted that under the doctrine of respondeat superior, Ridgetop was liable for the negligence of Sowl. Bacon asserted that Kiewit's negligent planning, supervising, and sequencing of the construction project also contributed to his injury. Bacon joined DBI/SALA, also known as DB Industries, Inc. (DBI), as a codefendant under various theories of liability. DBI is the manufacturer of the "Self-Retracting Lifeline" Bacon was wearing at the time of the work-related accident. DBI is the subject of the companion appeal, case No. S-11-541, and is not a party to the present appeal.

Settlement With Kiewit and Ridgetop

Prior to trial, Bacon entered into settlement negotiations with Kiewit and Ridgetop. In correspondence with Bacon's counsel, Liberty agreed that it had no "'recovery' rights as to any settlement monies from Kiewit or Ridgetop." But Liberty explained that it "would still have a claim to Statutory Credit/offset against any net to . . . Bacon from those entities."

Bacon settled with Kiewit for $2.25 million, and Liberty paid $2 million of the settlement pursuant to its general liability coverage of Kiewit under the OCIP. RSUI paid the remainder. Under the terms of the settlement, Bacon agreed that if he later settled with Ridgetop, he would pay Kiewit and/or its insurer a percentage of the Ridgetop settlement.[2] Thereafter, Bacon settled with Ridgetop for $1.25 million, from which Bacon paid $437,500 to Liberty and RSUI pursuant to the agreement with Kiewit. In a prior appeal brought by Bacon, we affirmed his obligation to pay Liberty and RSUI $437,500 from the Ridgetop settlement.[3]

Liberty consented to the settlement with Ridgetop, stipulating that it made no claim against the settlement proceeds and "forever and completely releases, discharges, and waives any and all claims it may have for subrogation or otherwise against Ridgetop . . . and its insurors and subsidiaries." Liberty

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[2] See *id.*

[3] *Id.*

also stated in the stipulation that it "specifically and expressly preserves and reserves any claim it may have to a statutory credit for the funds netted by [Bacon] through the settlement agreement."

Davis/Liberty Motion for Future Credit

Davis and Liberty moved for a credit against the proceeds of the settlements with Kiewit and Ridgetop pursuant to § 48-118. The trial court granted the motion as to the Ridgetop settlement proceeds, but denied it as to the Kiewit settlement proceeds. The trial court stated that the future credit issue depended on whether Kiewit and Ridgetop were "employers" or "third persons." Section 48-118 allows a future credit for any recovery by the employer against a "third person." The court found that Kiewit, as a contractor, had failed to sustain its burden to demonstrate it was not a statutory employer by virtue of Neb. Rev. Stat. § 48-116 (Reissue 2010). The court found, however, that Ridgetop was a "third person," because Bacon failed to overcome the presumption that a parent company is not the employer of its subsidiary's employees. The court ordered that the entirety of the $1.25 million settlement with Ridgetop be credited toward Davis' and Liberty's future obligations to make workers' compensation payments.

Bacon's claims against DBI went to trial and ultimately resulted in a jury verdict of $21,131,633, minus the $3.5 million representing the settlements with Kiewit and Ridgetop and $8,718.89 in attorney fees and costs in obtaining the verdict. That verdict is the subject of the appeal in case No. S-11-541.

ASSIGNMENTS OF ERROR

Bacon asserts, summarized and restated, that the trial court erred in (1) granting the motion for credit against the settlement proceeds Bacon received from Ridgetop; (2) failing to deduct from the credit Bacon's attorney fees and costs in obtaining the settlement; and (3) failing to deduct from the credit the $437,500 previously granted Liberty, as subrogee to Kiewit, against the settlement with Ridgetop.

STANDARD OF REVIEW

[1] Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.[4]

ANALYSIS

Bacon asserts that the trial court erred in allowing the settlement proceeds from Ridgetop to be treated as a future credit for purposes of Davis' ongoing workers' compensation obligations. He argues that under a plain reading of § 48-118, future credit rights exist only when the underlying action is brought by the employer. He also argues that the term "third person" should be interpreted in light of common-law antisubrogation principles and that such principles prevent Ridgetop from being a "third person" with respect to Davis. Alternatively, Bacon argues that Liberty expressly waived any rights to a future credit through the waiver provisions of the OCIP policies, through communications during the settlement negotiations, and through Liberty's stipulation to the Ridgetop settlement. Finally, Bacon argues that if the credit must stand, the trial court erred in including in the credit the attorney fees and costs associated with obtaining the settlement and the $437,500 paid to Liberty and RSUI out of the settlement. For the following reasons, we affirm the judgment that Ridgetop is a "third person" and that Liberty did not waive its right to a future credit as to Ridgetop. But we remand the matter for further proceedings to determine attorney fees and costs associated with obtaining the Ridgetop settlement and for a deduction of $437,500 from the future credit amount.

Who Must Bring Action

We first address whether the future credit pursuant to § 48-118 is limited to recovery in actions instituted by employers, as opposed to actions instituted by employees. Section 48-118 states in full:

> When a third person is liable to the employee or to the dependents for the injury or death of the employee, the employer shall be subrogated to the right of the employee

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[4] *In re Application of City of Minden*, 282 Neb. 926, 811 N.W.2d 659 (2011).

> or to the dependents against such third person. The recovery by such employer shall not be limited to the amount payable as compensation to such employee or dependents, but such employer may recover any amount which such employee or his or her dependents should have been entitled to recover.
>
> Any recovery by the employer against such third person, in excess of the compensation paid by the employer after deducting the expenses of making such recovery, shall be paid forthwith to the employee or to the dependents and shall be treated as an advance payment by the employer on account of any future installments of compensation.
>
> Nothing in the Nebraska Workers' Compensation Act shall be construed to deny the right of an injured employee or of his or her personal representative to bring suit against such third person in his or her own name or in the name of the personal representative based upon such liability, but in such event an employer having paid or paying compensation to such employee or his or her dependents shall be made a party to the suit for the purpose of reimbursement, under the right of subrogation, of any compensation paid.

Bacon relies on the fact that the sentence which refers to the future credit mentions only "[a]ny recovery *by the employer*." (Emphasis supplied.)

In *Turner v. Metro Area Transit*,[5] a dissenting justice argued that § 48-118 distinguishes between recovery by the employer and recovery by the employee. The majority opinion implicitly rejected that viewpoint. The action had been brought by the injured employee against a negligent third party. And we affirmed the judgment allowing the employer a future credit in the amount of the worker's settlement with the third-party tort-feasor.

In *Nekuda v. Waspi Trucking, Inc.*,[6] we again affirmed a judgment of future credit representing the amount obtained

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[5] *Turner v. Metro Area Transit*, 220 Neb. 189, 368 N.W.2d 809 (1985).

[6] *Nekuda v. Waspi Trucking, Inc.*, 222 Neb. 806, 388 N.W.2d 438 (1986).

in settlement in an action brought by the employee's widow against a third-party tort-feasor. No case has denied the right to a future credit based on the identity of the originator of the underlying suit.

[2] We decline to revisit the *Turner* decision, which has stood as good law for more than two decades. The employer's right to a future credit does not depend upon who brought the action which led to the employee's recovery or who happens to "recover" first. This is not a race to the courthouse.

Bacon argues we are to construe the Nebraska Workers' Compensation Act (the Act) in light of its beneficent purposes. But those beneficent purposes are to provide an injured worker with prompt relief from the adverse economic effects caused by a work-related injury or occupational disease.[7] In other words, the beneficent purposes of the Act concern the employee's ability to promptly obtain workers' compensation benefits—not the employee's ability to additionally retain recovery against negligent third parties in tort actions. We find no reason to conclude that the beneficent purposes of the Act require us to narrowly interpret the employer's statutory subrogation rights.

To the contrary, the policies behind the Act favor a liberal construction in favor of the employer's statutory right to subrogate against culpable third parties. Workers' compensation acts generally seek to balance the rights of injured workers against the costs to the businesses that provide employment.[8] To reach this balance, most acts liberally allow employers to shift liability onto third parties whenever possible.[9]

[3] We have specifically said that § 48-118 was enacted "for the benefit of the employer."[10] We have explained that "[i]nnocent employers who are required to compensate employees for injuries are intentionally granted a measure of relief equivalent to the compensation paid and the expenses incurred, where a

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[7] See *Risor v. Nebraska Boiler*, 274 Neb. 906, 744 N.W.2d 693 (2008).

[8] See 28 Causes of Action 2d 523 § 2 (2005).

[9] *Id.*

[10] *Oliver v. Nelson*, 128 Neb. 160, 162, 258 N.W. 69, 70 (1934).

third person negligently causes the loss and responds in damages to that extent."[11] It would not be "wise public policy" to bar an employer from asserting its subrogation interest under the Act.[12] This, we have explained, might discourage the prompt payment of benefits to the employee, which, again, is the underlying beneficent purpose of the Act.[13]

Section 48-118, which retains much of the original language from its original enactment in 1913, is admittedly not the most carefully crafted provision of the Act. The first paragraph of § 48-118 refers generally to the fact that the employer "shall" be "subrogated to the right of the employee . . . against [a] third person." But the second paragraph specifies only that recovery "by the employer against such third person, in excess of the compensation paid by the employer . . . , shall be paid . . . to the employee . . . and shall be treated as an advance payment by the employer on account of any future installments of compensation." Then the last paragraph mandates that "[n]othing in the . . . Act shall be construed to deny the right of an injured employee . . . to bring suit," provided the employer "be made a party to the suit for the purpose of reimbursement, under the right of subrogation, of any compensation paid."

It has been said that a right of subrogation includes recovery for both past and future benefits for which the insurer is liable.[14] "Future benefits are a part of the carrier's subrogation interest because they act as an advance against future payments."[15] Thus, the focus on the "recovery by the employer" in the sentence at issue seems inconsistent with the statute's more general mandate that the employer "shall" be subrogated to the rights of the employee against third parties.

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[11] *Bronder v. Otis Elevator Co.*, 121 Neb. 581, 586, 237 N.W. 671, 673 (1931).

[12] *Burns v. Nielsen*, 273 Neb. 724, 733, 732 N.W.2d 640, 649 (2007).

[13] *Id.*

[14] See 16 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 225:203 (2005).

[15] *Hartford Acc. & Indem. Co. v. Buckland*, 882 S.W.2d 440, 445 (Tex. App. 1994).

[4,5] In construing a statute, a court must look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served, and then must place on the statute a reasonable or liberal construction that best achieves the statute's purpose, rather than a construction that defeats the statutory purpose.[16] And when possible, an appellate court will try to avoid a statutory construction that would lead to an absurd result.[17]

Reading § 48-118 as a whole, we affirm that it was not intended to draw a distinction which would grant the right to a future credit in recovery from actions brought by the employer, but deny that right in actions brought by the employee. Such a distinction would be arbitrary insofar as it would depend on who first brought suit. It would also be arbitrary insofar as the timing of the suit would change the amount of recovery. Even under Bacon's reading of the statute, an employer in an action brought by the employee would retain the right to be reimbursed for payments made up to the time of the employee's recovery in the employee's action.

There is, in fact, a simple explanation for the focus on "recovery by the employer." When this language was originally enacted, the right to an action against the third party rested almost exclusively with the employer, until such time as the employee could allege and prove that his employer had neglected or refused to institute the action.[18] It was only later that the last paragraph was added, which was intended to expand the rights of the employee to bring an action against third parties.[19] That amendment was careful not to diminish the employer's subrogation rights, however, and thus stated that the employee bringing his or her own action must join the employer as a party to the suit "for the purpose of reimbursement, under the right of subrogation, of any compensation paid."

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[16] *Martensen v. Rejda Bros.*, 283 Neb. 279, 808 N.W.2d 855 (2012).

[17] *City of North Platte v. Tilgner*, 282 Neb. 328, 803 N.W.2d 469 (2011).

[18] See *Oliver v. Nelson, supra* note 10.

[19] *Id.*

[6] In many cases before and since *Turner*,[20] we have held that § 48-118 was enacted for the benefit of the employer and that there are policy reasons favoring broad subrogation rights for a statutorily liable employer against negligent third parties. And while § 48-118 has been amended several times since *Turner*, the relevant language pertaining to the right to a future credit has remained substantially the same. It is presumed that when a statute has been construed by the Nebraska Supreme Court and the same statute is substantially reenacted, the Legislature gave to the language the significance previously accorded to it by the Supreme Court.[21] We find no merit to Bacon's argument that Liberty cannot pursue future credit against Ridgetop, because it was Bacon who brought the underlying action and who obtained recovery from Ridgetop.

Who Is Third Person

[7] Bacon next argues that Davis/Liberty cannot have a future credit for the amount of the Ridgetop settlement, because Ridgetop is not a "third person" under § 48-118. "Third person" is not defined by the Act. However, we have said that "third person" includes "any person other than the employer or those whom the Workmen's Compensation Act makes an employer."[22] It is an entity with which there is no employer-employee relationship.[23] A third person is "'"any person other than the master, or those whom the act makes master, and the employee who is seeking compensation under their [workers' compensation] agreement."'"[24]

We have noted that "'"[t]he act is careful to preserve the status of a third person by not defining the term; so the presumption must be that the law as to third persons in every respect stands as it was before the act."'"[25] As to any entity the Act

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[20] *Turner v. Metro Area Transit, supra* note 5.

[21] *Brown v. Kindred*, 259 Neb. 95, 608 N.W.2d 577 (2000).

[22] *Rehn v. Bingaman*, 151 Neb. 196, 197, 36 N.W.2d 856, 857 (1949) (syllabus of court).

[23] See *id.*

[24] *Id.* at 202, 36 N.W.2d at 860.

[25] *Id.*

does not confer a contractual relation upon, the common-law rights of action are preserved.[26]

[8,9] Bacon does not assert that the Act conferred a contractual relation upon Ridgetop as a statutory "employer." To the contrary, two separate corporations are generally regarded as distinct legal entities even if the stock of one is owned wholly by the other.[27] Accordingly, as the trial court noted, there is a strong presumption that a parent company is not the employer of its subsidiary's employees.[28]

Bacon does not appeal to concepts of alter ego or piercing the corporate veil which might overcome this presumption. Indeed, to pierce the corporate veil between a parent and a subsidiary, a plaintiff must show more than the mere sharing of services between two corporations.[29] Moreover, the types of equity rationales for piercing the corporate veil or treating one corporation as the alter ego of another generally do not arise in the workers' compensation context.[30] And, if Ridgetop and Davis were to be treated as the same entity, then Ridgetop would have been entitled to protection under the exclusivity provisions of the Act and Bacon would not have been able to obtain the settlement from which Liberty now seeks its future credit.[31] Bacon instead sued Ridgetop under the theory that Ridgetop was an independent entity not governed by the

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[26] See *id*.

[27] See *Roos v. KFS BD, Inc.*, 280 Neb. 930, 799 N.W.2d 43 (2010).

[28] See, e.g., *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773 (5th Cir. 1997); *Laird v. Capital Cities/ABC, Inc.*, 68 Cal. App. 4th 727, 80 Cal. Rptr. 2d 454 (1998); *Croxton v. Crowley Maritime Corp.*, 817 P.2d 460 (Alaska 1991).

[29] *Global Credit Servs. v. AMISUB*, 244 Neb. 681, 508 N.W.2d 836 (1993).

[30] See *Kranich v. TCAC, LLC*, No. CV065000476S, 2009 WL 941973 (Conn. Super. Mar. 16, 2009) (unpublished opinion). See, also, e.g., 1 William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations § 43.80 (perm. ed., rev. vol. 2006).

[31] See, Neb. Rev. Stat. §§ 48-111 and 48-112 (Reissue 2010); *Hofferber v. City of Hastings*, 275 Neb. 503, 747 N.W.2d 389 (2008); 1 John P. Ludington et al., Modern Workers Compensation § 103:14 (Matthew J. Canavan & Donna T. Rogers eds., 1993).

workers' compensation statutes, independently liable for its direct participation in the wrong complained of.[32]

[10] Bacon's theory is that the common-law antisubrogation rule precludes Ridgetop from being a "third person" under the Act. Under the antisubrogation rule, an insurer has no right of subrogation against its own insured or coinsured for a claim arising from the very risk for which the insured was covered.[33] Bacon claims that the question of whether an entity is a "third person" versus an "employer" for purposes of § 48-118 must be strictly construed in light of this rule.

We find several flaws in Bacon's argument. First, it is undisputed that Ridgetop is neither an insured nor coinsured under the closely related policies issued by Liberty pursuant to the OCIP. While "implied coinsureds"[34] are sometimes found with regard to integrally related policies[35] or intended beneficiaries,[36] Liberty has no policy with Ridgetop, closely related or otherwise.

Nevertheless, Bacon attempts to piece together several general concepts of insurance law to make Ridgetop a "coinsured" under the antisubrogation rule. Bacon asserts "Ridgetop is not a 'third person' to whom no duty is owed . . . ."[37] It has often been explained that subrogation exists only with respect to rights of the insurer against "'third persons to whom the insurer owes no duty.'"[38]

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[32] See, e.g., *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 864 N.E.2d 227, 309 Ill. Dec. 361 (2007).

[33] See 46A C.J.S. *Insurance* § 1997 (2007). See, also, *Hans v. Lucas*, 270 Neb. 421, 703 N.W.2d 880 (2005); *Tri-Par Investments v. Sousa*, 268 Neb. 119, 680 N.W.2d 190 (2004).

[34] *Tri-Par Investments v. Sousa, supra* note 33, 268 Neb. at 130, 680 N.W.2d at 199.

[35] See, e.g., *North Star Reinsurance v. Continental Ins.*, 82 N.Y.2d 281, 624 N.E.2d 647, 604 N.Y.S.2d 510 (1993).

[36] See *Hans v. Lucas, supra* note 33.

[37] Brief for appellant at 22.

[38] *Stetina v. State Farm Mut. Auto. Ins. Co.*, 196 Neb. 441, 451, 243 N.W.2d 341, 346 (1976). See, also, e.g., 16 Russ & Segalla, *supra* note 14, § 224:1.

Bacon asserts, without citation to pertinent case law, that Davis, as a wholly owned subsidiary, owed "a duty" to its parent company, Ridgetop. And since Liberty, as the insurer of Davis, "steps into the shoes"[39] of its insured for subrogation purposes,[40] Bacon surmises that Liberty owed a duty to Ridgetop. Therefore, according to Bacon, Liberty cannot subrogate against Bacon's recovery from Ridgetop.

[11] Directors of a wholly owned subsidiary may be obligated to manage the affairs of the subsidiary in the best interests of the parent and its shareholders.[41] But we can find no support for the idea that it thus follows that the subsidiary's insurer can never subrogate against the parent's insurer. In fact, we find little support for Bacon's overarching premise concerning the interplay between the antisubrogation rule and the concept of insurers "stepping into the shoes" of their insureds for purposes of subrogation. An insurer "steps into the shoes" of its insured insofar as the insurer's subrogation rights can be no greater than the rights of an insured against a third party.[42] The antisubrogation rule states that an insurer may not "step into the shoes" of its insured to sue a third-party tort-feasor who also qualifies as an insured under the same policy for damages arising from the same risk covered by the policy.[43] But we can find no support for the conclusion that the insurer "steps into the shoes" of its insured for purposes of the antisubrogation rule. In other words, we have found no law which states that the antisubrogation rule prohibits subrogation against third parties who are neither named nor implied coinsureds, but who have some kind of duty relationship with the insured.

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[39] Brief for appellant at 10.

[40] See, e.g., *First American Title Ins. v. Western Sur.*, 283 Va. 389, 722 S.E.2d 637 (2012); *Jones v. Nationwide Property and Cas. Ins.*, 32 A.3d 1261 (Pa. 2011).

[41] See *Anadarko Petro. v. Panhandle Eastern*, 545 A.2d 1171 (Del. 1988).

[42] See *Thrower v. Anson*, 276 Neb. 102, 752 N.W.2d 555 (2008).

[43] *ELRAC, Inc. v. Ward*, 96 N.Y.2d 58, 748 N.E.2d 1, 724 N.Y.S.2d 692 (2001).

[12] We have, in fact, repeatedly rejected attempts by litigants to expand the traditional scope of the antisubrogation rule through broad "duty" arguments. In *Allstate Ins. Co. v. LaRandeau*,[44] we rejected the insured arsonist's argument that his insurer could not subrogate against him, because he was a person to whom the insurer owed a duty. Despite the fact that the arsonist was a named insured, we explained: "The problem with this argument is that [his] intentional act of arson was not covered under the homeowner's insurance policy. Therefore, [the insurer] owed him no duty *under the policy*."[45] And in *Control Specialists v. State Farm Mut. Auto. Ins. Co.*,[46] we held that the antisubrogation rule did not preclude an insurance company from subrogating its payment on behalf of one of its named insureds against another named insured under a different policy. Despite the fact that the insured, whom the insurer sought to subrogate against, was one to whom the insurer owed a duty, it was a duty under a different contract from the one under which it asserted its subrogation rights.[47] As noted by Couch on Insurance 3d, broad statements of the antisubrogation rule "tend to leave out a crucial boundary of the rule: the prohibition of insurers' subrogation against their own insureds applies to claims arising from the very risk for which the insured was covered by that insurer."[48]

Bacon also discusses the fact that Ridgetop's employee, Sowl, is regularly loaned out to work on jobsites for Ridgetop's subsidiary companies. His argument on this point is unclear. Bacon emphasizes that Sowl regularly acts under the direction of the subsidiary companies' division managers when he is on loan to them and that Sowl, accordingly, acted as the safety director for the Arena, under the direction of Davis' division manager. Bacon asserts that Sowl's negligence is really Davis'

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[44] *Allstate Ins. Co. v. LaRandeau*, 261 Neb. 242, 622 N.W.2d 646 (2001).

[45] *Id.* at 246, 622 N.W.2d at 650 (emphasis supplied).

[46] *Control Specialists v. State Farm Mut. Auto. Ins. Co.*, 228 Neb. 642, 423 N.W.2d 775 (1988).

[47] See *id.*

[48] 16 Russ & Segalla, *supra* note 14, § 224:1 at 224-15.

negligence and that, therefore, Ridgetop's negligence is really Davis' negligence. Bacon then concludes, again without citation to pertinent case law, that "[s]ubrogation does not lie against an agent of an employer performing work under the employer's direction and control."[49] Bacon overlooks that the settlement in question was not with the "agent," Sowl, but with Ridgetop. But regardless, we find that Sowl's involvement in the work makes no difference to Davis/Liberty's right to subrogation.

As much as Bacon tries to make the antisubrogation rule fit, the reasons for the rule fundamentally do not apply to Davis/Liberty's relationship with Ridgetop. There are two public policy considerations behind the antisubrogation rule.[50] First, the insurer should not be able to pass the incidence of the loss, either partially or totally, from itself to its own insured and thus avoid the coverage which its insured purchased.[51] Second, the insurer should not be placed in a situation where there exists a potential conflict of interest, thereby possibly affecting the insurer's incentive to provide a vigorous defense for one of its insureds.[52]

Liberty would not be avoiding coverage which its insureds purchased, and it would not be placed in a conflict of interest. Whatever duty there may be between Ridgetop and Davis, Liberty does not have that same duty to Ridgetop, making it a "coinsured"—let alone a "coinsured" under the same policy for the same covered risk. There is no policy of insurance between Ridgetop and Liberty, and Ridgetop did not contribute to the premiums for the workers' compensation insurance coverage which Liberty paid on Davis' behalf. The Ridgetop settlement with Bacon was paid under general liability coverage through another insurer.

Finally, while it is not necessary to decide the question here, we note that it is questionable whether the common-law

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[49] Brief for appellant at 22.

[50] *Allstate Ins. Co. v. LaRandeau, supra* note 44.

[51] *Id.*

[52] *Id.*

remedy of antisubrogation can ever be pertinent to subrogation rights granted employers through § 48-118. It has been suggested that common-law subrogation principles, including the antisubrogation rule, are inapplicable to claims made under the workers' compensation scheme.[53] And in *Jackson v. Branick Indus.*,[54] we pointed out that "we have never employed a hybrid of statutory and equitable subrogation without direction from the Legislature to do so." More specifically, we explained that the employer's statutory right to subrogation has never been modified or diminished by equitable subrogation.[55] We have repeatedly rejected attempts by litigants to interject equitable doctrines to prevent insurers from exercising their statutory rights to subrogation under the Act.[56] In doing so, we have reasoned that subrogation in workers' compensation is based on statute, not equity.[57] The antisubrogation rule is fundamentally an equitable concept.[58]

For all the preceding reasons, we find no merit to Bacon's assertion that Ridgetop is not a "third person" within the meaning of § 48-118.

Waiver of Subrogation Rights

[13] However, most jurisdictions permit an employer to waive its subrogation protections under applicable workers' compensation laws.[59] Bacon argues that even if Liberty is a "third person" under § 48-118, Liberty explicitly waived its rights under that section.

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[53] See 16 Russ & Segalla, *supra* note 14, § 225:230. See, also, *Threshermens Mut. Ins. Co. v. Page*, 217 Wis. 2d 451, 577 N.W.2d 335 (1998); *Dahlbeck v. New London Concrete*, 400 N.W.2d 736 (Minn. 1987).

[54] *Jackson v. Branick Indus.*, 254 Neb. 950, 960, 581 N.W.2d 53, 59 (1998).

[55] *Id.*

[56] See, *Burns v. Nielsen, supra* note 12; *Turco v. Schuning*, 271 Neb. 770, 716 N.W.2d 415 (2006).

[57] See *Burns v. Nielsen, supra* note 12.

[58] *Petta v. ABC Ins. Co.*, 278 Wis. 2d 251, 692 N.W.2d 639 (2005). See, also, e.g., *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004).

[59] 3 Philip L. Bruner & Patrick J. O'Connor, Jr., Bruner and O'Connor on Construction Law § 10:55 (2002).

Bacon first argues that Liberty waived the right to future credit through communications with Bacon's counsel during the settlement negotiations and through Liberty's stipulation to the settlement with Ridgetop. The carrier's right to have the excess of a third-party recovery credited against future compensation liability is a right that can be waived as part of a settlement.[60]

In correspondence with Bacon's counsel, Liberty agreed that it had no "'recovery' rights as to any settlement monies from Kiewit or Ridgetop." And Liberty stated in its stipulation to the Ridgetop settlement that it "hereby forever and completely releases, discharges, and waives any and all claims it may have for subrogation or otherwise against Ridgetop." Standing alone, those statements provide support for Bacon's argument.

But Liberty points out that in both instances, and within the same documents, it also expressly reserved its right to a future credit from any waiver of subrogation. Liberty stated in its correspondence pertaining to the imminent settlement with Ridgetop, that it "would still have a claim to Statutory Credit/offset against any net to . . . Bacon from those entities." Liberty stated in the stipulation that it "specifically and expressly preserves and reserves any claim it may have to a statutory credit for the funds netted by [Bacon] through the settlement agreement."

Bacon believes these reservations of rights to a future credit were ineffective because they were "incongruous" with Liberty's waiver of its claims for subrogation.[61] Bacon argues that without a "subrogation interest," there can be no basis for a future credit.[62] He claims that the reservations of the right to future credit were attempts to make a "back door claim" when Liberty waived subrogation through the "front door."[63]

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[60] See *Turner v. Metro Area Transit, supra* note 5. See, also, 6 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 117.01[7] (2011).

[61] Brief for appellant at 17.

[62] *Id.*

[63] *Id.*

Whether or not it is theoretically congruous to retain a right to a future credit when "subrogation" has been waived is of no consequence. The "back door" and the "front door" were always clearly visible to the parties. There was no ambiguity in Liberty's repeated expression that it reserved its rights to a future credit under § 48-118. We will not engage in semantics to conclude otherwise. Liberty "specifically and expressly preserve[d] and reserve[d] any claim it may have to statutory credit for the funds netted by [Bacon] through the settlement agreement."

Bacon next argues that Liberty waived its right to future credit through a waiver provision in its policy with Davis. According to Bacon, the waiver encompassed rights to recover against all who performed work or rendered services on the Arena. We find this argument equally without merit.

We note at the outset that as evidence of this waiver, Bacon presents to us a four-page excerpt from the policy between Davis and Liberty; a two-page excerpt purportedly of Davis' construction contract, but which lists only Kiewit and another subcontractor for the project; a two-page excerpt from a policy between Liberty and MECA; and a five-page excerpt of a "Standard Form of Agreement Between Owner and Construction Manager where the Construction Manager is also the Constructor," between MECA and Kiewit. We hesitate to construe the terms of the policy upon such a sparse record. However, because Liberty does not contest this point, we will address what is before us.

Bacon's focus is the four-page excerpt from the Davis/Liberty policy and the five-page excerpt of the "Standard Form of Agreement Between Owner and Construction Manager where the Construction Manager is also the Constructor." The policy between Davis and Liberty contained a "Waiver of Our Right to Recover From Others Endorsement," stating:

> We have the right to recover our payments from anyone liable for an injury covered by this policy. We will not enforce our right against the person or organization named in the Schedule. (This agreement applies only to the extent that you perform work under a written contract that requires you to obtain this agreement from us.)

> This agreement shall not operate directly or indirectly to benefit any one not named in the Schedule.

Under "Schedule," the policy states, "Where required by written contract."

Thus, Bacon ties in the "written contract" between MECA and Kiewit and the waiver of subrogation contained in Kiewit's subcontract or agreement:

> Subcontractor hereby waives all rights of recovery under subrogation because of deductible clauses, inadequacy of limits of any insurance policy, limitations or exclusions of coverage, *or any other reason* against Owner, Contractor, the OCIP Administrator, its or their officers, agents, or employees, *and any other contractor or sub-subcontractor performing Work or rendering services on behalf of Owner or Contractor in connection with the planning, development and construction of the Project*. Subcontractor shall also require that all Subcontractor maintained insurance coverage related to the Work include clauses providing that each insurer shall waive all of its rights of recovery by subrogation against Owner and Contractor together with the same parties referenced immediately above in this Section. Subcontractor shall require similar written express waivers and insurance clauses from each of its sub-subcontractors. A waiver of subrogation shall be effective as to any individual or entity even if such individual or entity (a) would otherwise have a duty of indemnification, contractual or otherwise, (b) did not pay the insurance premium directly or indirectly, and (c) whether or not such individual or entity has an insurable interest in the property damaged.

(Emphasis supplied.) Bacon concludes that, reading together the excerpts from the Davis/Liberty policy and the MECA/Kiewit contract, Liberty waived its right "to recover [its] payments from anyone liable for an injury covered by this policy," for "any . . . reason" against "any . . . contractor or sub-subcontractor performing Work or rendering services on behalf of Owner or Contractor in connection with the planning, development and construction of the [Arena] Project."

As mentioned, the policy in question is part of an owner-controlled "wrap-up" insurance program.[64] Wrap-up insurance programs are designed to prevent the plethora of third-party claims usually associated with lawsuits in large construction projects, wherein various parties associated with the project seek indemnification or contribution from each other.[65] Such claims interfere with construction and result in higher costs.[66] So, pursuant to a waiver of subrogation clause, the contractors and subcontractors, all in relatively equal bargaining positions, exculpate each other and shift the ultimate risk of losses pertaining to the project to the owner.[67] That risk is then transferred to the owner's insurer for valuable consideration.[68]

[14] Courts have found these waivers operative as to the right to statutory credit against future workers' compensation obligations, when the employee obtains recovery from a named insured under the OCIP.[69] But the waivers are generally

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[64] 4 Steven G.M. Stein, Construction Law ¶ 13.08 (2009).

[65] *Id.* See, also, e.g., *Tokio Marine & Fire v. Employers Ins. of Wausau*, 786 F.2d 101 (2d Cir. 1986); *Behr v. Hook*, 173 Vt. 122, 787 A.2d 499 (2001); *IRMA v. O'Donnell, Wicklund, Pigozzi*, 295 Ill. App. 3d 784, 692 N.E.2d 739, 229 Ill. Dec. 750 (1998); *Industrial Risk v. Garlock Equipment*, 576 So. 2d 652 (Ala. 1991); *U.S. Fid. & Guar. v. Farrar's Plumbing*, 158 Ariz. 354, 762 P.2d 641 (Ariz. App. 1988); *Tuxedo Plumbing &c. Co. v. Lie-Nielsen*, 245 Ga. 27, 262 S.E.2d 794 (1980).

[66] See, *Tokio Marine & Fire v. Employers Ins. of Wausau, supra* note 65; *Behr v. Hook, supra* note 65; *IRMA v. O'Donnell, Wicklund, Pigozzi, supra* note 65; *Industrial Risk v. Garlock Equipment, supra* note 65; *U.S. Fid. & Guar. v. Farrar's Plumbing, supra* note 65; *Tuxedo Plumbing &c. Co. v. Lie-Nielsen, supra* note 65; *Home Ins. Co. v. Pinski Brothers*, 160 Mont. 219, 500 P.2d 945 (1972).

[67] See *Behr v. Hook, supra* note 65. See, also, *IRMA v. O'Donnell, Wicklund, Pigozzi, supra* note 65.

[68] 4 Stein, *supra* note 64, ¶ 13.12[7][c]. See, also, e.g., *Colonial Properties Realty v. Lowder Const.*, 256 Ga. App. 106, 567 S.E.2d 389 (2002); *SAIF v. Fama Const. Co.*, 353 N.J. Super. 1, 801 A.2d 334 (2002); *Behr v. Hook, supra* note 65.

[69] See *Hartford Acc. & Indem. Co. v. Buckland, supra* note 15. See, also, *Allen v. Texaco, Inc.*, 510 F.2d 977 (5th Cir. 1975); *Olivas v. United States*, 506 F.2d 1158 (9th Cir. 1974).

limited and operate only to the extent that each party is covered by the builder's risk policy.[70] Waivers of subrogation are strictly construed,[71] and waivers of statutorily conferred rights under the workers' compensation act must be clear and unequivocal.[72]

Ridgetop was not a "person or organization named" in any schedule or elsewhere in any of the policies under the OCIP. There is no evidence that Ridgetop entered into any contract with Kiewit or MECA to perform work on the Arena as a "contractor" or "subcontractor." But because Ridgetop loaned one of its employees to its subsidiary to work on the Arena, Bacon concludes that Ridgetop was a "sub-subcontractor performing Work or rendering services on behalf of Owner or Contractor in connection with the planning, development and construction of the Project."

We disagree. We will not construe a waiver which was limited to persons or organizations "named in the Schedule," and which "shall not operate directly or indirectly to benefit any one not named in the Schedule," to encompass unnamed persons in a broadly worded contractual waiver between a contractor and subcontractor to which the insurer was not a party. Furthermore, strictly construing such a waiver, we conclude that Ridgetop was not a "contractor" or "sub-subcontractor" for the project. A "contractor" is a party to a contract.[73] A "subcontractor" is one who is awarded a portion of an existing contract by a contractor.[74] As far as the record reflects, Ridgetop was not a party to any contract with a contractor or subcontractor to perform work on the Arena.

Our reading of the waiver is consistent with the purposes behind OCIP's. OCIP waivers shift the risk from those individuals insured by the OCIP to the insurer, and the contractors' and subcontractors' premiums are calculated accordingly.

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[70] See 44A Am. Jur. 2d *Insurance* § 1784 (2003).

[71] 16 Russ & Segalla, *supra* note 14, § 224:90.

[72] See 3 Bruner & O'Connor, *supra* note 59.

[73] See Black's Law Dictionary 375 (9th ed. 2009).

[74] *Id.* at 1560.

OCIP waivers are not generally intended to exculpate those parties who have no contractual relationship to the project and whose acts are not insured under the OCIP.

Liberty did not waive its right to a future credit as to Bacon's recovery against Ridgetop. It did not waive the right during settlement negotiations, and it did not waive it in its OCIP policies. We turn now to Bacon's last assignment of error.

Attorney Fees and Costs

[15,16] We find merit to Bacon's assertion that the trial court erred in granting the credit for the entire amount of the settlement. Even Liberty appears to concede that the case should be remanded for further proceedings to determine the extent of the credit. A claimant is entitled to deduct the reasonable expenses incurred in reaching settlement from the portion of the settlement subject to subrogation claims.[75] And the future credit described in § 48-118 is based on the "recovery." While this precise issue does not seem to have arisen before, it stands to reason that the portion of a settlement which is not actually recovered by the employee—because of a prior apportionment agreement—should not be treated as advance payment by the employer on account of any future installments of compensation. Therefore, the $437,500 of the Ridgetop settlement that Bacon was obliged to pay Liberty and RSUI as part of the Kiewit settlement should be deducted from Davis/Liberty's future credit. Since the amount of attorney fees and costs associated with Bacon's recovery against Ridgetop are not in the record, we remand that matter for further proceedings.

Davis/Liberty's Attempted Cross-Appeal

Finally, we note that Davis and Liberty attempted to cross-appeal the trial court's denial of their motion for future credit

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[75] See *Austin v. Scharp*, 258 Neb. 410, 604 N.W.2d 807 (1999). See, also, *Turney v. Werner Enters.*, 260 Neb. 440, 618 N.W.2d 437 (2000); *Gillotte v. Omaha Public Power Dist.*, 189 Neb. 444, 203 N.W.2d 163 (1973), *disapproved in part on other grounds, Nekuda v. Waspi Trucking, Inc.*, *supra* note 6.

against Bacon's settlement with Kiewit. However, the cross-appeal is not noted on the cover of their brief and it does not contain an assignments of error section. In fact, the only section of the brief on cross-appeal is the argument section.

[17,18] Appellate courts of this state have repeatedly held that a cross-appeal must be properly designated under Neb. Ct. R. App. P. § 2-109(D)(4) (rev. 2008) if affirmative relief is to be obtained.[76] Section 2-109(D)(4) states that the cross-appeal shall be noted on the cover of the brief and shall be set forth in a separate division of the brief, headed "Brief on Cross-Appeal." Section 2-109(D)(4) further states that the "Brief on Cross-Appeal" shall be prepared in the same manner and under the same rules as the brief of appellant. Errors argued but not assigned will not be considered on appeal.[77] We accordingly decline to consider Davis/Liberty's arguments concerning the order as pertained to the amount of the Kiewit settlement.

CONCLUSION

We reverse, and remand the trial court's order of future credit for the limited purpose of deducting $437,500 and for determining the amount of reasonable attorney fees and costs which should additionally be deducted from the amount of the credit. As to all other matters before us from the final judgment entered pursuant to Neb. Rev. Stat. § 25-1315 (Reissue 2008), we affirm.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

STEPHAN, J., participating on briefs.

MILLER-LERMAN and CASSEL, JJ., not participating.

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[76] *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 663 N.W.2d 43 (2003).

[77] *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010).