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BRIAN J. WERNER, APPELLEE, V. COUNTY OF PLATTE, NEBRASKA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT.

824 N.W.2d 38

Filed December 21, 2012. No. S-12-202.

1. **Rules of Evidence: Hearsay: Appeal and Error.** Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection.
2. **Trial: Depositions.** Neb. Rev. Stat. § 29-1917(4) (Reissue 2008) restricts a deposition's use at the criminal trial for which the deposition was taken, and not in a separate civil action.
3. **Rules of Evidence: Hearsay.** Excited utterances are admissible because a startling event may produce statements that are reliable, in that they are free of conscious fabrication.
4. ____: ____. For a statement to qualify as an excited utterance, (1) there must have been a startling event, (2) the statement must relate to the event, and (3) the statement must have been made by the declarant while under the stress of the event. The key requirement is spontaneity, which requires a showing the statements were made without time for conscious reflection.
5. ____: ____. Whether a party made his or her statements in response to questioning is relevant to whether those statements were spontaneous. But the focus in determining whether they constitute an excited utterance must be on whether the party made the statements without conscious reflection.
6. ____: ____. For hearsay within hearsay to be admissible, each layer of hearsay must have an applicable exception to the hearsay rule.
7. **Hearsay: Words and Phrases.** Verbal acts are not hearsay, because their significance rests on the simple fact that the words were said, regardless of their truth.
8. **Trial: Evidence: Appeal and Error.** In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party.
9. ____: ____: ____. The erroneous admission of evidence is not reversible error if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact.
10. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought under the Political Subdivisions Tort Claims Act, an appellate court will not disturb the trial court's factual findings on appeal unless they are clearly wrong.
11. **Judgments: Appeal and Error.** When determining the sufficiency of the evidence to sustain the trial court's judgment, it must be considered in the light most favorable to the successful party; every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can be deduced from the evidence.
12. ____: ____. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.

13. **Political Subdivisions Tort Claims Act: Police Officers and Sheriffs: Motor Vehicles: Strict Liability.** Under Neb. Rev. Stat. § 13-911 (Reissue 2012), a political subdivision is strictly liable for injuries to an "innocent third party" during a vehicular pursuit, regardless whether the law enforcement officer's actions were otherwise proper or even necessary.
14. **Police Officers and Sheriffs: Motor Vehicles: Words and Phrases.** An "innocent third party" under Neb. Rev. Stat. § 13-911 (Reissue 2012) is one who has not promoted, provoked, or persuaded the driver to engage in flight from law enforcement personnel and one who is not sought to be apprehended in the fleeing vehicle.
15. **Police Officers and Sheriffs: Motor Vehicles.** Whether law enforcement sought to apprehend an individual under Neb. Rev. Stat. § 13-911 (Reissue 2012) is a mixed question of law and fact.
16. ____: ____. Whether an individual promoted, provoked, or persuaded a driver to flee under Neb. Rev. Stat. § 13-911 (Reissue 2012) is a question of fact.
17. **Trial: Witnesses: Testimony.** Witness credibility and the weight to be given a witness' testimony are questions for the trier of fact.
18. **Political Subdivisions Tort Claims Act: Words and Phrases.** Under Neb. Rev. Stat. § 13-911 (Reissue 2012), the phrase "innocent third party" is a term of art, and the ordinary meaning of "innocent" does not apply.
19. **Political Subdivisions Tort Claims Act: Police Officers and Sheriffs: Motor Vehicles: Legislature: Intent: Words and Phrases.** By its use of the phrase "innocent third party" in Neb. Rev. Stat. § 13-911 (Reissue 2012), the Legislature was concerned with actions of the third party as those actions may relate to the flight of the driver sought to be apprehended. Simply put, a third party is "innocent" if he or she played no role in causing the law enforcement pursuit.
20. **Statutes: Judicial Construction: Legislature: Presumptions: Intent.** When an appellate court has judicially construed a statute and that construction has not evoked an amendment, there is a presumption that the Legislature has acquiesced in the court's determination of the Legislature's intent.
21. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court resolves the questions independently of the conclusions reached by the trial court.
22. **Statutes: Words and Phrases: Appeal and Error.** An appellate court attempts to give effect to each word or phrase in a statute and ordinarily will not read language out of a statute.

Appeal from the District Court for Platte County: ROBERT R. STEINKE, Judge. Affirmed.

Vincent Valentino for appellant.

William M. Lamson, Jr., and Cathy S. Trent-Vilim, of Lamson, Dugan & Murray, L.L.P., and Thomas M. Fehringer, of Fehringer & Mielak, L.L.P., for appellee.

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

CONNOLLY, J.

I. SUMMARY

Brian J. Werner sued the County of Platte (County) under Neb. Rev. Stat. § 13-911 (Reissue 2012) for injuries he sustained during a vehicular pursuit by a law enforcement officer. Werner was a passenger in the car that the officer was pursuing. Section 13-911 authorizes compensation for damages to an "innocent third party" who is injured by such a pursuit. The primary issues are whether the district court properly (1) admitted testimony over the County's hearsay objections, (2) found Werner to be an "innocent third party," and (3) calculated the damages for which the County was liable.

For the most part, we conclude that the court did not err in its evidentiary rulings, either because the testimony qualified under an exception to the hearsay rule or because it was not hearsay. What error we did find, we conclude, did not unfairly prejudice a substantial right of the County. Both the law and the record support the court's finding that Werner was an "innocent third party." And we conclude that the court properly calculated the County's liability under the relevant statutes. We affirm.

II. BACKGROUND

In October 2008, Werner went to a bar in Humphrey, Nebraska. Werner testified that as he was walking home, he saw Joey Korth in his car and Korth asked Werner to get in. The weekend before, Korth had gotten in a fight with one of Werner's friends, and Korth wanted to explain to Werner what had happened. After Werner got in the car, the two of them headed toward Lindsay, Nebraska.

At trial, the parties contested who was driving, Korth or Werner. The court found that Korth was the driver. The admissibility of some of the evidence the court relied on in making that finding is at issue. But as we explain in detail later, either the court properly admitted the evidence it relied upon or its erroneous admission did not unfairly prejudice a substantial

right of the County. Because the record supports the court's factual determination, it was not clearly wrong. So we refer to Korth as "the driver."

1. The Pursuit and Accident

As Korth drove, he and Werner talked and drank some beers. They eventually headed back toward Humphrey on Highway 91. At about 2 a.m., Deputy Sheriff Ed Wemhoff was patrolling Highway 91 and spotted Korth's car traveling well above the posted 60-m.p.h. speed limit. Wemhoff activated his radar and clocked the car at 76 m.p.h. He caught up to the car and saw it weaving in and out of its lane. So in addition to the driver's speeding, Wemhoff also suspected the driver was driving under the influence. He then activated his overhead lights and signaled the car to pull over. At that point, Wemhoff had not seen anyone inside the car because it was dark out.

Korth activated his right-hand turn signal and started to pull over. Korth then turned off the turn signal and proceeded toward a nearby intersection. Wemhoff believed that Korth was going to pull over at the intersection. But then Korth turned at the intersection and sped off. Wemhoff pursued.

About 1½ miles north of Highway 91, the road changed from blacktop to gravel. Wemhoff came across skid marks in the gravel, which led him to believe there had been an accident. Later investigation revealed that when Korth's car hit the gravel road—traveling at about 110 m.p.h.—he lost control and the car flipped end over end into an adjacent cornfield.

Wemhoff notified dispatch of the accident, requested emergency assistance, and got out to search the area. Wemhoff heard someone in the cornfield, followed the sounds, and found Werner lying on the ground. Wemhoff began asking Werner questions, just to keep him talking. Werner answered the questions, but his answers varied and indicated that he was dazed and confused. Wemhoff focused his questions on whether Werner had been alone in the car. By that time, other law enforcement and emergency personnel had arrived. Eventually, another law enforcement officer found Korth's wallet, which led to Korth's discovery in the cornfield. Korth made no

statements at the scene of the accident or during trial; his injuries apparently left him in a coma.

One of the emergency personnel that arrived on scene was Brian Rosno, a volunteer fire and rescue member. Rosno attended to Werner. Rosno described Werner as being in a lot of pain, moaning and screaming, and as somewhat coherent. At one point, Rosno heard Werner make statements that Korth "was going way too fast" and that Werner had asked Korth "to let him out." At trial, the County objected to Rosno's testimony relating these statements on several grounds, including hearsay. The court overruled the objections and admitted Rosno's testimony. In administering aid to Werner, Rosno also found methamphetamine and two drug pipes on his person, and he turned those over to law enforcement.

Trooper William Fitzgerald, of the Nebraska State Patrol, went to the hospital to obtain a blood draw from Werner. Fitzgerald testified that he asked Werner who had been driving the car and that Werner said Korth was the driver. Fitzgerald also testified Werner estimated that the car had been traveling 120 m.p.h. and said that he had asked Korth to let him out of the car. At trial, the County objected to Fitzgerald's testimony as hearsay and on other grounds. The court overruled the objections and admitted Fitzgerald's testimony.

2. The Trial and Judgment

The accident rendered Werner a paraplegic. Werner sued the County under § 13-911. Werner alleged that the County was strictly liable for his injuries because they were caused by law enforcement's pursuit of the car and Werner was an "innocent third party" under the statute.

Several individuals testified at the bench trial. These included, among others, Wemhoff, Rosno, and Fitzgerald. An accident reconstructionist from the Nebraska State Patrol also testified. Werner testified that he did not encourage Korth to flee from law enforcement and that he had asked Korth to let him out of the car. Werner explained that he had "heard" that Korth had previously fled from law enforcement, that "nothing good was going to come" from being in the car, and that "it just was not going to end good." The County

objected on hearsay grounds to Werner's testimony about having "heard" of Korth's prior history of fleeing from law enforcement. The court overruled the objection and admitted Werner's testimony.

The court found for Werner. It found that law enforcement had engaged in a "vehicular pursuit" of Korth's car and that the pursuit was a proximate cause of Werner's injuries. The court also found that under § 13-911, Werner was an "innocent third party." We have defined an "innocent third party" as "one who has not promoted, provoked, or persuaded the driver to engage in flight from law enforcement personnel and one who is not sought to be apprehended in the fleeing vehicle."[1] The court found that Wemhoff sought to apprehend the driver for suspected driving under the influence and speeding. Because the court determined that Werner was the passenger in the fleeing car—rather than the driver—the court concluded that Wemhoff had not sought to apprehend Werner. And the court determined that Werner had not "promoted, provoked or persuaded" Korth to flee. The court found that Werner was an "innocent third party."

The court found that Werner had sustained $3 million in damages. The court reduced those damages by 5 percent under Neb. Rev. Stat. § 60-6,273 (Reissue 2010) because Werner had not been wearing his seatbelt when the car flipped. The court then reduced the overall award to $1 million under the statutory cap on damages under the Political Subdivisions Tort Claims Act (Act) and entered judgment.

The County moved for a new trial and credit against the judgment. The court denied both. Regarding the County's motion for credit against the judgment, the court reasoned that Neb. Rev. Stat. § 13-926 (Reissue 2012) intended to "fully compensate" the "innocent third party." Because Werner's damages far exceeded the statutory cap under the Act, the County was not entitled to any credit against the judgment for the compensation Werner had received from other sources.

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[1] *Henery v. City of Omaha*, 263 Neb. 700, 707, 641 N.W.2d 644, 649 (2002).

III. ASSIGNMENTS OF ERROR

The County assigns, restated and consolidated, that the district court erred as follows:

(1) admitting, and ultimately relying on, evidence which lacked foundation and was inadmissible hearsay;

(2) determining that Werner was an "innocent third party" under § 13-911;

(3) failing to properly calculate statutory credits and deductions of the award under § 13-911; and

(4) failing to properly deduct 5 percent from the judgment (for Werner's failure to wear a seatbelt) *after* applying the statutory cap on damages.

IV. ANALYSIS

1. Evidentiary Issues

As mentioned, the County objected to several witnesses' testimony on (primarily) hearsay grounds. The court overruled these objections. The County argues that this was error because the challenged testimony was inadmissible hearsay. And it argues that because the court relied on the testimony to find Werner was an "innocent third party," its erroneous admission is reversible error.

(a) Standard of Review

[1] Apart from rulings under the residual hearsay exception, we review for clear error the factual findings underpinning a trial court's hearsay ruling and review de novo the court's ultimate determination to admit evidence over a hearsay objection.[2]

(b) Testimony of Fire and Rescue Member Rosno

Rosno testified that while he was attending to Werner immediately after the accident, Werner said that Korth "was going way too fast" and that Werner had told Korth "to let him out." The court admitted this testimony over the County's objections. The County argues that the court erred because Rosno's testimony was inadmissible on several grounds: It violated the

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[2] See *State v. Reinhart*, 283 Neb. 710, 811 N.W.2d 258 (2012).

best evidence rule, lacked foundation, resulted from improperly refreshing Rosno's recollection, and was hearsay.

We reject the County's arguments on the first three grounds. The County did not object to Rosno's testimony as violating the best evidence rule. And on appeal, "a party may not assert a different ground for an objection to the admission of evidence than was offered to the trial court."[3]

We also note that although the County assigned as error the court's admission of Rosno's testimony for lack of foundation, the County did not argue that in its brief. Absent plain error, an assigned error that is not specifically assigned and specifically argued in the brief is waived.[4] We find no plain error.

The County also argues that Werner's counsel improperly refreshed Rosno's recollection about Werner's statements using Rosno's deposition from Werner's related criminal case. The County relies on Neb. Rev. Stat. § 29-1917(4) (Reissue 2008). That section states that "[a] deposition taken pursuant to this section may be used at the trial by any party solely for the purpose of contradicting or impeaching the testimony of the deponent as a witness." Because Werner used the deposition to refresh Rosno's recollection, rather than to contradict or impeach his testimony, the County claims that the court erroneously admitted Rosno's testimony.

[2] But § 29-1917(4) restricts the use of a criminal deposition only at *the* trial rather than at *any* trial. We give statutory language its plain and ordinary meaning.[5] In § 29-1917(4), the reference to "the trial" restricts the deposition's use at the criminal trial for which the deposition was taken, and not in a separate civil action. And this makes sense, as "'[i]t is hornbook law that any writing may be used to refresh the recollection of a witness.'"[6]

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[3] *State v. Williams*, 282 Neb. 182, 194, 802 N.W.2d 421, 431 (2011).

[4] See, e.g., *In re Estate of Cushing*, 283 Neb. 571, 810 N.W.2d 741 (2012); *Miller v. Brunswick*, 253 Neb. 141, 571 N.W.2d 245 (1997).

[5] See, e.g., *Becerra v. United Parcel Service, ante* p. 414, 822 N.W.2d 327 (2012).

[6] *U.S. v. Carey*, 589 F.3d 187, 191 (5th Cir. 2009). See, also, R. Collin Mangrum, Mangrum on Nebraska Evidence 517 (2012).

This leaves the question whether the court properly admitted Rosno's testimony over the County's hearsay objection. Werner argues that Rosno's testimony was admissible because it was not hearsay and that even if it was hearsay, it was otherwise admissible under various exceptions to the hearsay rule. We do not address whether Rosno's testimony was hearsay because we conclude that, even assuming that to be the case, it was admissible as an excited utterance.

[3,4] The general rule is that hearsay evidence is inadmissible unless it fits within a recognized exception to the rule against hearsay.[7] One such exception is for "excited utterances."[8] Excited utterances are admissible because a startling event may produce spontaneous statements that are reliable, in that they are "free of conscious fabrication."[9] We have explained:

> "'For a statement to qualify as an excited utterance, . . . (1) [t]here must have been a startling event, (2) the statement must relate to the event, and (3) the statement must have been made by the declarant while under the stress of the event. . . . The key requirement is spontaneity, which "requires a showing the statements were made without time for conscious reflection."'"[10]

(i) Werner's Statement That Korth "was going way too fast" Was an Excited Utterance

Rosno testified that he heard Werner say that Korth "was going way too fast." We conclude that this statement was an excited utterance. There was a startling event, which was the law enforcement pursuit and resulting accident. The statement that Korth "was going way too fast" related to the startling event. And Werner made the statement while under

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[7] See Neb. Rev. Stat. §§ 27-802 and 27-803 (Reissue 2008).

[8] See § 27-803(1).

[9] See, e.g., *State v. Pullens*, 281 Neb. 828, 840, 800 N.W.2d 202, 217 (2012).

[10] *State v. Jacob*, 242 Neb. 176, 186, 494 N.W.2d 109, 117 (1993).

the stress of the event—the court found that Werner made the statement while he was "lying on his back, paralyzed, in a cornfield fighting for his life." And the record supports that finding.

But the County argues that the statement was not spontaneous, and therefore not an excited utterance, because it was made in response to questions from law enforcement. The court, however, found that Werner made the statement to Rosno "without provocation." We review such factual findings for clear error.[11]

[5] Whether Werner made his statements in response to questioning is relevant to whether those statements were spontaneous. But the focus must be on whether the party made the statements without "conscious reflection."[12] Although some evidence supports the County's position, it is far from definitive. And there is evidence to the contrary. For example, the record shows that while Rosno attended to Werner, Werner made the statement "at the accident scene, confused at times and moaning in pain." Rosno testified that Werner made the statement "several times[,] over and over," which would indicate the statement was spontaneous rather than made after conscious reflection. And although Rosno testified that Werner admitted after direct questioning to having been in the car with Korth, Rosno also testified that Werner's statement about Korth's driving too fast was made before that, while Werner was lying in the cornfield.

Thus, the court's conclusion that Werner made the statement "without provocation" was not clearly wrong. Considering that and other circumstances in the record, we conclude that Werner's statement was spontaneous. And as it has met all the other elements of an excited utterance, we conclude that Rosno's testimony regarding Werner's statement that Korth "was going way too fast," assuming it was hearsay, was admissible.

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[11] See *Reinhart, supra* note 2.

[12] See *Jacob, supra* note 10. See, also, *State v. Hembertt*, 269 Neb. 840, 696 N.W.2d 473 (2005).

(ii) Werner's Statement to Rosno That He Told Korth "to let him out" Was an Excited Utterance

[6] Rosno also testified that he heard Werner say that he told Korth "to let him out." This statement presents hearsay within hearsay. Rosno testified to what Werner said immediately after the accident, and that statement involved what Werner had told Korth during the pursuit. To be admissible, each layer of hearsay must have an applicable exception to the hearsay rule.[13] For the reasons already discussed, we conclude that Rosno's testimony about what Werner said immediately after the accident was an excited utterance. The remaining question is whether Werner's statement to Korth "to let him out" during the pursuit was also an excited utterance. We conclude that it was.

The startling event was the flight from law enforcement, which entailed a high-speed, dangerous pursuit. The statement related to the event because Werner expressed his desire to be let out of the car during the pursuit. And Werner made the statement while under the stress of the event because Werner made the statement while the pursuit was ongoing. Finally, all indications are that the statement was spontaneous. As such, even assuming this statement was hearsay, it was also an excited utterance and was admissible.

(c) Testimony of Trooper Fitzgerald

Fitzgerald testified that he spoke with Werner at the hospital several hours after the accident. Fitzgerald testified Werner said that Korth was the driver, that Korth was driving about 120 m.p.h. during the pursuit, and that during the pursuit, Werner told Korth to let him out. The court admitted this testimony over the County's objections. The County argues that this was error because Fitzgerald's testimony was inadmissible hearsay.

(i) Fitzgerald's Testimony Was Hearsay

Werner argues that Fitzgerald's testimony was not hearsay. Hearsay is defined as "a statement, other than one made by

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[13] See Neb. Rev. Stat. § 27-805 (Reissue 2008).

the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[14]

At first glance, all of Werner's statements to Fitzgerald seem to be hearsay. Fitzgerald testified that Werner identified Korth as the driver—this was obviously offered to prove that Korth, and not Werner, was the driver. So Werner offered the statement to prove the truth of the matter asserted. This was hearsay. Similarly, Werner offered the estimation of the car's speed to prove the truth of the matter asserted—how fast the car was going. This was also hearsay. And finally, Werner's statement that he asked Korth "to let him out" impliedly asserts that Werner wanted out of the car. This was also hearsay because its relevance depended on its truth.[15] If the statement was untrue (i.e., Werner did not want out of the car), then it would have no bearing on whether he promoted, provoked, or persuaded Korth to flee.

Nevertheless, Werner argues that these statements were not hearsay for two reasons. First, regarding all of the statements, Werner argues that the statements were prior consistent statements offered to rebut a charge of fabrication under § 27-801(4)(a)(ii), and so they were not hearsay. We disagree—Fitzgerald testified to these statements *before* the County attacked Werner's credibility during Werner's testimony. Werner could not have offered Fitzgerald's testimony to *rebut* such an attack because it had not yet occurred.

[7] Second, Werner argues that Fitzgerald's testimony regarding Werner's statements was not hearsay because Werner's statements were "verbal acts."[16] Verbal acts are not hearsay, because their significance rests on the simple fact that the words were said, regardless of their truth.[17] From our reading of Werner's brief, Werner makes this argument only about his statement to Fitzgerald that he told Korth "to let him out."

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[14] Neb. Rev. Stat. § 27-801(3) (Reissue 2008).

[15] See, e.g., *State v. Baker*, 280 Neb. 752, 789 N.W.2d 702 (2010).

[16] Brief for appellee at 18.

[17] See *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011).

We do not agree that this statement was a verbal act. Typical examples of verbal acts are "words of a contract, words establishing agency, slanderous words, [and] sexually harassing words."[18] In those cases, all that matters is that the words were said, not whether the words were true. Here, the relevance of Werner's statement is dependent on its truth—the statement impliedly asserts that Werner wanted out of the car. Only by assuming that to be true does it then make it less likely that Werner did not "promote, provoke, or persuade" Korth to flee.[19] Werner's statement was not a verbal act.

(ii) Fitzgerald's Testimony Was Not Admissible Under an Exception to the Hearsay Rule

So all three of Werner's statements to Fitzgerald at the hospital were hearsay. Again, we note that the third statement, about Werner's having told Korth "to let him out," was hearsay within hearsay—Werner made a statement to Fitzgerald about a statement Werner had made to Korth. We already concluded that what Werner told Korth during the pursuit was an excited utterance. So we must decide only whether Werner's statements to Fitzgerald at the hospital fell under an exception to the general rule against hearsay. Werner argues that both the excited utterance exception and the state-of-mind exception applied. We disagree.

As noted, for a statement to be an excited utterance, the statement must have been spontaneously made; that is, the statement must have been made without conscious reflection.[20] The record shows that Werner made his statements to Fitzgerald in direct response to Fitzgerald's questioning, which suggests that Werner had the opportunity to consciously reflect on his answers. Werner's statements to Fitzgerald also occurred several hours after the accident. And although the record shows that Werner was on pain medications and discussing his paralysis with his doctors at the

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[18] Mangrum, *supra* note 6 at 762.

[19] See brief for appellee at 19.

[20] See *Jacob, supra* note 10.

relevant time, Fitzgerald testified that Werner was conscious, alert, and responsive. We conclude that Werner's statements to Fitzgerald were not spontaneous, and therefore, the excited utterance exception did not apply.[21]

The state of mind exception does not apply either. Under that exception, a "statement of the declarant's then existing state-of-mind, emotion, sensation, or physical condition" is admissible unless it is a "statement of memory or belief to prove the fact remembered or believed."[22] Here, Werner's statements identifying Korth as the driver and estimating the speed of the car are statements of memory or belief to prove the fact remembered or believed. And Werner's third statement, that he told Korth "to let him out," is not an expression of his "then existing state of mind"[23] *at the hospital*; instead, it is at best an expression of Werner's state of mind *during the pursuit*. The state-of-mind exception does not apply.

(iii) The Court's Erroneous Admission of Fitzgerald's Testimony Did Not Unfairly Prejudice a Substantial Right of the County

[8] Fitzgerald's testimony regarding Werner's statements at the hospital was hearsay with no applicable exception. So the court's admission of this testimony was error. The question is whether that error is reversible error. In a civil case, the admission or exclusion of evidence is not reversible error unless it "unfairly prejudice[d] a substantial right" of the complaining party.[24] The County argues that the erroneous admission of Fitzgerald's testimony is reversible error because the trial court explicitly relied on that testimony in reaching its conclusions.

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[21] See, e.g., *State v. Sullivan*, 236 Neb. 344, 461 N.W.2d 84 (1990). Cf. *Hembertt, supra* note 12.

[22] § 27-803(2).

[23] See *id*.

[24] See *Martensen v. Rejda Bros.*, 283 Neb. 279, 289, 808 N.W.2d 855, 864 (2012). Accord, Neb. Rev. Stat. § 27-103(1) (Reissue 2008); *Rose v. City of Lincoln*, 234 Neb. 67, 449 N.W.2d 522 (1989).

In its order, the court referred to Rosno's and Fitzgerald's testimony regarding Werner's statements. The court found those statements "credible and significant." The court relied on that evidence, in part, to determine that Werner was not the driver and, therefore, not the person that Wemhoff sought to apprehend. The court also seemingly relied in part on Rosno's and Fitzgerald's testimony to determine that Werner was a credible witness. The court's determination that Werner was a credible witness was important in making its overall conclusions about whether Werner was an "innocent third party."

[9] The erroneous admission of evidence is not reversible error "if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact."[25] Here, the court characterized Rosno's and Fitzgerald's testimony as "similar," and we agree. The court used their testimony for the same purposes—to conclude that Werner was not the driver and to bolster Werner's credibility. Thus, Fitzgerald's testimony was in effect cumulative of Rosno's properly admitted testimony.

Furthermore, Fitzgerald's testimony was a relatively small part of the court's basis for concluding that Werner was not the driver. Wemhoff concluded that Korth was the driver, based on Werner's statements and because the car was registered to Korth's parents. The accident reconstructionist also concluded that Korth was the driver. And Rosno's testimony supported finding that Korth was the driver. The court explicitly relied on and recounted this evidence in concluding that Korth was the driver.

Similarly, Fitzgerald's testimony was a relatively small part of the court's basis for finding Werner credible. Again, Rosno's properly admitted testimony served the same function. The court explicitly stated that it found Werner credible after "having had the opportunity to observe Werner during his testimony." And the court noted other facts which bolstered Werner's credibility. Specifically, the court noted Werner testified that he was not thinking about being arrested during the

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[25] *Worth v. Kolbeck*, 273 Neb. 163, 177, 728 N.W.2d 282, 295 (2007).

pursuit and that he did not instigate the flight to avoid arrest. The court found this testimony credible because Werner had plenty of opportunity to dump the contraband during the flight itself if he had been concerned with being caught with it, but he did not.

We conclude that the court's erroneous admission of Fitzgerald's testimony did not unfairly prejudice a substantial right of the County. Fitzgerald's testimony was essentially cumulative of Rosno's properly admitted testimony because Rosno's testimony was similar and used for the same purposes. Fitzgerald's testimony played a relatively small part in the court's conclusions that Korth was the driver and that Werner was credible.

(d) Werner's Trial Testimony That He Had "heard" About Korth's Previous Flights From Law Enforcement

At one point in his testimony, Werner explained that once Korth "hit the gas," he knew that "it just was not going to end good." Werner explained he felt that way because he had "heard" that Korth had previously been convicted for fleeing from law enforcement and that on another occasion, Korth had fled from law enforcement and avoided arrest. The court admitted this testimony over the County's objection. The County argues that the court erred in doing so because the testimony was inadmissible hearsay.

Werner testified about an out-of-court statement because Werner said he had "heard" about Korth's earlier flights from law enforcement. The question is whether Werner offered that statement to prove the truth of the matter asserted; that is, whether Werner offered that statement to prove that Korth had previously fled from law enforcement. He did not.

The record shows that Werner's counsel offered the statement to show what Werner was thinking during the pursuit and to prove that Werner would not have promoted, provoked, or persuaded Korth to flee. In other words, because Werner had heard about Korth's prior incidents (which had not ended "good"), he knew fleeing from law enforcement would be a bad idea, and so he did not instigate the flight. For that

purpose, it did not matter whether what Werner had "heard" was true or false—that Werner heard the statement was what was important. So it was not hearsay because Werner did not offer the statement to prove the truth of the matter asserted.

The County also argues that Werner's testimony was inadmissible under Neb. Rev. Stat. §§ 27-404(2), 27-405, 27-608, and 27-609 (Reissue 2008). But the County did not make those arguments to the court, and it cannot assert "a different ground for an objection to the admission of evidence than was offered to the trial court."[26]

(e) Summary of Evidentiary Issues

Werner's testimony that he had "heard" Korth had been involved in other flights from law enforcement was not hearsay, and so the court properly admitted his testimony. Rosno's testimony recounting Werner's statements that Korth "was going way too fast" and that Werner had told Korth "to let him out" was admissible hearsay under the excited utterance exception. However, Fitzgerald's testimony about similar statements from Werner at the hospital was hearsay and was not admissible under any exception to the hearsay rule. The court erred in admitting Fitzgerald's testimony. But because it was essentially cumulative evidence that played a small part in the court's overall reasoning, the error did not unfairly prejudice a substantial right of the County.

2. "Innocent Third Party"

The County argues that under § 13-911, the court erred in finding Werner was an "innocent third party." Specifically, the County argues the court erred in finding that law enforcement did not seek to apprehend Werner and that Werner did not promote, provoke, or persuade Korth to flee. The County also argues that Werner was not an "innocent third party" as a matter of law because he was subject to arrest during and after the pursuit and because he was later charged with and convicted of a crime. We conclude, however, that both the law and the record support the court's finding.

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[26] *Williams, supra* note 3, 282 Neb. at 194, 802 N.W.2d at 431.

(a) Standard of Review

[10-12] In actions brought under the Act, we will not disturb the trial court's factual findings on appeal unless they are clearly wrong.[27] When determining the sufficiency of the evidence to sustain the trial court's judgment, it must be considered in the light most favorable to the successful party; every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can be deduced from the evidence.[28] But when reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[29]

(b) Analysis

[13,14] Section 13-911 provides a remedy to an "innocent third party" for damages caused by a law enforcement officer's "vehicular pursuit." Section 13-911(1) provides: "In case of death, injury, or property damage to any innocent third party proximately caused by the action of a law enforcement officer employed by a political subdivision during vehicular pursuit, damages shall be paid to such third party by the political subdivision employing the officer." Under this section, a political subdivision is strictly liable for injuries to an "innocent third party" during a vehicular pursuit, regardless whether the law enforcement officer's actions were otherwise proper or even necessary.[30] As mentioned, an "innocent third party" is "one who has not promoted, provoked, or persuaded the driver to engage in flight from law enforcement personnel and one who is not sought to be apprehended in the fleeing vehicle."[31]

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[27] See *Ginapp v. City of Bellevue*, 282 Neb. 1027, 809 N.W.2d 487 (2012).

[28] See *id*.

[29] See *id*.

[30] See *Stewart v. City of Omaha*, 242 Neb. 240, 494 N.W.2d 130 (1993), *disapproved on other grounds, Henery, supra* note 1.

[31] *Henery, supra* note 1, 263 Neb. at 707, 641 N.W.2d at 649.

(i) Law Enforcement Did Not Seek to Apprehend Werner

The court found that law enforcement did not seek to apprehend Werner. The court found that Korth was the driver of the fleeing car. The court noted that law enforcement attempted to pull over Korth's car for suspected driving under the influence and speeding. The court concluded that Wemhoff intended to apprehend only the driver and that he did not even know there was a passenger in the car. Therefore, the court concluded that law enforcement never sought to apprehend Werner, who was the passenger.

But, the County argues that Wemhoff's not having seen Werner does not mean that he did not seek to apprehend him. The County also argues that Werner was subject to arrest during and after the pursuit and that Wemhoff initially thought that Werner was the driver. The County argues that under the totality of the circumstances, the court erred in finding that law enforcement did not seek to apprehend Werner.

[15] Whether law enforcement sought to apprehend Werner is a mixed question of law and fact.[32] Here, the record supports the pertinent factual underpinnings of the court's conclusion, and thus, they are not clearly wrong. Substantial evidence supports the court's conclusion that Korth was the driver and that Wemhoff sought to pull over the car for suspected driving under the influence and speeding.

And the court's legal conclusion based on those facts is sound. Wemhoff sought to pull over the car for suspected driving under the influence and speeding—only the driver could have been guilty of those crimes.[33] So the court found that because Werner was the passenger, law enforcement could not have sought to apprehend him.

Nevertheless, the County takes issue with the court's conclusion. The County argues that whether a pursuing officer knew there were passengers in a fleeing vehicle is irrelevant to determining whether the officer sought to apprehend them.

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[32] See *Jura v. City of Omaha*, 15 Neb. App. 390, 727 N.W.2d 735 (2007).

[33] See Neb. Rev. Stat. §§ 60-6,196 and 60-682.01 (Reissue 2010).

The County argues that "such a rule [would place] an unfair burden on police officers and would in theory allow any hiding or unseen passenger to . . . automatically be afforded 'innocent third party' status, no matter what wrongdoing he had engaged in."[34]

We agree with the County. But we do not read the court's order as creating such a rule. Yes, the court noted that Wemhoff did not know there was a passenger in the car during the pursuit. But as we read the court's order, this was done more for emphasis than as a foundational basis for the court's conclusion. Instead, the court's order properly focused on Wemhoff's reasons for pulling over the car in determining whether he sought to apprehend Werner. Specifically, the court recognized that Wemhoff's intent was to stop the driver for suspected driving under the influence and speeding. And the court stated that "[u]nless Werner was driving the vehicle, he was never the target" of Wemhoff's pursuit.

That Werner, as the passenger, was never the target of Wemhoff's pursuit is supported by *Henery v. City of Omaha*,[35] which dealt with a similar factual scenario. In *Henery*, a police officer initiated a traffic stop of a car with two known occupants because he suspected driving under the influence, in addition to speeding. The car fled, the officer pursued, and the car crashed. The passenger sustained serious injuries and died as a result of the accident, and her estate sued the City of Omaha under § 13-911.

We determined that the passenger in *Henery* was an "innocent third party" under the statute. We noted that "there [was] no evidence that law enforcement attempted to apprehend [her]" and that "[a]lthough [she] may have exhibited poor judgment in riding with [the driver], she did not lose her 'innocent third party' status . . . based only on such choice."[36]

Similarly, Wemhoff sought to pull over the *driver* of the car for suspected driving under the influence and speeding.

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[34] Brief for appellant at 30-31.

[35] See *Henery, supra* note 1.

[36] *Id.* at 707, 641 N.W.2d at 649.

Because Werner was the *passenger* of the car, Wemhoff did not seek to apprehend Werner, regardless whether Wemhoff knew Werner was in the car. Like the passenger in *Henery*, Werner did not lose his "innocent third party" status simply by riding in the car.

We also note that Wemhoff's later discovery that Werner had been breaking the law was irrelevant to whether Wemhoff sought to apprehend Werner during the pursuit. This is because that inquiry is based on the officer's knowledge before the pursuit occurs, and not on what the officer discovers after the fact.[37] During the pursuit, Wemhoff did not know about Werner's breaking the law, and so he did not seek to apprehend him at that time.[38]

(ii) Werner Did Not Promote, Provoke, or Persuade Korth to Flee

The court found that Werner did not promote, provoke, or persuade Korth to flee. The County argues that "something clearly 'provoked' Korth . . . to flee"[39] and suggests that Werner spurred the flight.

[16,17] But whether Werner promoted, provoked, or persuaded Korth to flee was a factual finding, which we review for clear error.[40] The record shows that the court based its finding on Werner's testimony. Witness credibility and the weight to be given a witness' testimony are questions for the trier of fact.[41] Werner testified that although he had contraband on his person, he did not promote, provoke, or persuade Korth to flee. Werner testified that he knew about Korth's prior history of fleeing from law enforcement, that he was concerned only with his own safety, and that his possession of contraband was the last thing on his mind. The court found Werner's testimony credible and gave it substantial weight. Werner's testimony

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[37] See, *Henery, supra* note 1; *Jura, supra* note 32.

[38] See *Jura, supra* note 32.

[39] Brief for appellant at 33.

[40] See *Reed v. City of Omaha*, 15 Neb. App. 234, 724 N.W.2d 834 (2006).

[41] See, e.g., *Huffman v. Peterson*, 272 Neb. 62, 718 N.W.2d 522 (2006).

supports the court's finding, and thus, the court's finding was not clearly wrong.

(iii) Werner Was Not Disqualified From Being an "Innocent Third Party" as a Matter of Law

Finally, the County argues that as a matter of law Werner is not an "innocent third party." The County argues that "innocent" is generally defined as "'free from legal guilt or fault'"[42] and that because Werner was breaking the law, he cannot be considered innocent. And the County argues that to the extent we have defined an "innocent third party" to include individuals like Werner, we should alter our previous interpretation of the statutory language to carry out its intent.[43]

[18,19] We agree that Werner was not "innocent" as that term is ordinarily understood. But the phrase "innocent third party" is a term of art under the statute, and the ordinary meaning of "innocent" does not apply. Instead, we have defined an "innocent third party" as a person that was not "sought to be apprehended" by the pursuing officer and as a person who did not promote, provoke, or persuade the driver to flee.[44] In doing so, we noted that "by its use of the phrase 'innocent third party' . . . the Legislature was concerned with the actions of the third party *as those actions may relate to the flight of the driver sought to be apprehended*."[45] Simply put, a third party is "innocent" if he or she played no role in causing the law enforcement pursuit. Yes, Werner broke the law. But that does not affect Werner's "innocent third party" status under § 13-911 because Werner's breaking the law did not cause Wemhoff to pursue or Werner to instigate the driver to flee.

[20] But the County argues that we can (and should) redefine an "innocent third party" to exclude individuals who, like Werner, were breaking the law during the pursuit. We reject the County's invitation to do so. We explicitly defined an

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[42] Brief for appellant at 35.

[43] See *Bronsen v. Dawes County*, 272 Neb. 320, 722 N.W.2d 17 (2006).

[44] See *Henery, supra* note 1, 263 Neb. at 707, 641 N.W.2d at 649.

[45] *Id.* (emphasis supplied).

"innocent third party" in *Henery* (and did so implicitly in prior decisions[46]), and the Legislature has not replaced our definition with one of its own.[47] When an appellate court has judicially construed a statute and that construction has not evoked an amendment, there is a presumption that the Legislature has acquiesced in the court's determination of the Legislature's intent.[48] The County's argument has no merit.

3. Motion for Credit Against the Judgment

The court entered a $1 million judgment for Werner. The County argued that Werner had received $140,000 in compensation from other sources and that the County was entitled to a reimbursement (as a credit against the judgment) for that amount under § 13-911(2). The court determined that under § 13-926, however, the County's otherwise available reimbursement had to be eliminated in an attempt to "fully compensate" Werner. The County claims this was error. We disagree.

(a) Standard of Review

[21] Statutory interpretation presents a question of law. When reviewing questions of law, we resolve the questions independently of the conclusions reached by the trial court.[49]

(b) Analysis

The applicable statutory provisions are § 13-911(2) and (3) and § 13-926. A brief overview of these statutes is necessary to understand the issues presented by this assigned error.

Where a political subdivision is liable and pays damages to an "innocent third party," § 13-911(2) lists sources of reimbursement for the political subdivision. For example, a political subdivision may be reimbursed from, among other sources, the

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[46] See, e.g., *Stewart, supra* note 30.

[47] See, § 13-911; *Henery, supra* note 1.

[48] See, e.g., *Henery, supra* note 1; *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000).

[49] See, e.g., *Village of Hallam v. L.G. Barcus & Sons*, 281 Neb. 516, 798 N.W.2d 109 (2011).

driver of the fleeing vehicle, or any organization liable for the driver's conduct of the fleeing vehicle.[50]

Section 13-911(3) provides:

> This section shall not relieve any public or private source required statutorily or contractually to pay benefits for disability or loss of earned income or medical expenses of the duty to pay such benefits when due. No such source of payment shall have any right of subrogation or contribution against the political subdivision.

Finally, § 13-926 limits the liability of a political subdivision in a claim under the Act—in other words, § 13-926 is a damages cap. After setting the cap, however, § 13-926 then provides:

> If the damages sustained by an innocent third party pursuant to section 13-911 are not fully recoverable from one or more political subdivisions due to the limitations in this section, additional sources for recovery shall be as follows: First, any offsetting payments specified in subsection (3) of section 13-911 shall be reduced to the extent necessary to fully compensate the innocent third party; and second, if such reduction is insufficient to fully compensate the innocent third party, the right of reimbursement granted to the political subdivision in subsection (2) of section 13-911 shall be reduced to the extent necessary to fully compensate the innocent third party.

Thus, § 13-926 sets forth a process by which any reimbursement to the political subdivision is reduced "to the extent necessary to fully compensate the innocent third party." With that background, we now address the credit-against-the-judgment issue.

The County argues that § 13-926 required the court to reduce any "offsetting payments" under § 13-911(3) *before* reducing the County's right to reimbursement under § 13-911(2). The County argues that the court incorrectly bypassed this first step and proceeded immediately to reducing the County's right to reimbursement. And the County

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[50] See § 13-911(2)(a) and (b).

argues that it was Werner's burden to prove the existence and amounts of those "offsetting payments," if they existed, which Werner did not do. Therefore, the County argues, the court erred in eliminating its otherwise available reimbursement under § 13-911(2).

On its face, the County's argument seems to have merit. Section 13-926 does require that "offsetting payments" under § 13-911(3) be reduced before reducing the County's right to reimbursement under § 13-911(2). Yet, we cannot reconcile the "offsetting payments" language with the language of § 13-911(3). Section 13-911(3) says that any other "statutorily or contractually" required obligation to pay the "innocent third party" (such as a disability insurance policy) must be paid, regardless whether the political subdivision has paid damages under § 13-911. Section 13-911(3) says nothing about "offsetting payments." Nor can we interpret that phrase to mean the payments to the "innocent third party" which are referred to in § 13-911(3)—*reducing* them would obviously not serve to "fully compensate" the "innocent third party" as § 13-926 intends.

[22] Interpreting these statutes to reach a legal conclusion presents a difficult task. We attempt to give effect to each word or phrase in a statute and ordinarily will not read language out of a statute.[51] But we see no way to give effect to the command of § 13-926 to reduce "offsetting payments" under § 13-911(3) before reducing the County's right to reimbursement under § 13-911(2). Therefore, once it was clear that Werner's damages exceeded the statutory cap, the court properly proceeded to reduce the County's right to reimbursement under § 13-911(2). The County's argument has no merit.

The County next argues that the court erred in calculating the amount of damages ($3 million) and then entering a $1 million judgment under the statutory cap. The County argues that once the court determined Werner's damages exceeded the statutory cap, it should have simply entered judgment for the maximum allowed under the cap. But § 13-926 required the

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[51] See, e.g., *In re Claims Against Atlanta Elev., Inc.*, 268 Neb. 598, 685 N.W.2d 477 (2004).

court to calculate Werner's damages before entering judgment for the statutory cap amount.

Because § 13-926 imposed a statutory cap on a political subdivision's liability, it logically envisioned cases where the damages would exceed that amount.[52] When the damages suffered by the "innocent third party" are not fully recoverable because of the cap, § 13-926 requires a court to reduce a political subdivision's right to reimbursement "to the extent necessary to fully compensate" the "innocent third party." That would be impossible if the court could not calculate the exact damages the "innocent third party" had suffered—the extent to which reduction is "necessary" would depend on the total damages suffered by the "innocent third party."

Finally, the County argues that the court erred in its ultimate determination that the County was not entitled to reimbursement under § 13-911(2). But as explained above, where the recovery of an "innocent third party" is limited by the cap, § 13-926 requires that the political subdivision's reimbursement be reduced "to the extent necessary to fully compensate" the party.

Here, Werner suffered $3 million in damages, but the court entered judgment for $1 million under the statutory cap. The County's claimed reimbursement was $140,000. Section 13-926 required that the reimbursement be reduced "to the extent necessary" to fully compensate the "innocent third party." Because Werner's actual damages exceeded the capped amount by $2 million, and other sources provided only $140,000, the court properly concluded that the County was not entitled to reimbursement.

4. Application of the "Seatbelt" Statute

Werner was not wearing his seatbelt, so the court reduced Werner's $3 million damages by 5 percent under § 60-6,273. The court applied this reduction *before* applying the statutory cap of $1 million. The County argues that that was error and

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[52] See § 13-926.

that the court should have applied the 5-percent reduction *after* applying the cap. We conclude that the court followed the proper procedure.

(a) Standard of Review

Statutory interpretation presents a question of law. When reviewing questions of law, we resolve the questions independently of the conclusions reached by the trial court.[53]

(b) Analysis

Section 60-6,273 provides:

> Evidence that a person was not wearing an occupant protection system at the time he or she was injured shall not be admissible in regard to the issue of liability or proximate cause but may be admissible as evidence concerning mitigation of damages, except that it shall not reduce recovery for damages by more than five percent.

We have not decided this exact issue. And how a court should apply the seatbelt statute with the statutory cap under the Act is unclear from its language. Under that statute, evidence of not using a seatbelt is admissible only for "mitigation of *damages*."[54] So it would make sense to apply the 5-percent reduction to the total "damages" incurred and then apply the cap. But the statute goes on to say that "it shall not reduce *recovery for damages* by more than five percent."[55] Werner can only possibly "recover" $1 million under the statutory cap. Thus, the statute could be read to apply only to the possible "recovery" for damages, rather than to the actual amount of damages incurred.

Both parties cite to outside jurisdictions in support of their respective positions, but none of the cited cases deal with seatbelt provisions and their application with a statutory cap on damages. Instead, the cases deal with the similar issue of when to apply the comparative negligence statutes with a statutory

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[53] See, e.g., *Village of Hallam, supra* note 49.

[54] § 60-6,273 (emphasis supplied).

[55] *Id.* (emphasis supplied).

cap on damages. We agree that these types of cases are applicable here and that there are cases from outside jurisdictions to support both parties' respective positions.[56]

But while those cases are informative, our recent case *Connelly v. City of Omaha*[57] resolves this dispute. In that case, as with those cited by the parties, at issue was the proper order in which to apply the comparative negligence statutes and the statutory cap under the Act. We determined that the comparative negligence statutes should be applied before the statutory cap. We explained that

> a statutory limitation on damages such as that of § 13-926(1) "applies to cap the total recovery after the reduction of the plaintiff's damages for his or her comparative negligence, rather than applying to the total damages established before the reduction for comparative negligence, since the latter approach would multiply the effect of the damage limitation."[58]

We conclude that the same reasoning applies here. The court properly applied the seatbelt statute before the statutory cap.

V. CONCLUSION

The district court's only error was admitting Fitzgerald's hearsay testimony, but that error did not unfairly prejudice a substantial right of the County. We affirm.

AFFIRMED.

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[56] See, e.g., *Fairfax Hosp. System, Inc. v. Nevitt*, 249 Va. 591, 457 S.E.2d 10 (1995); *Rodriguez v. Cambridge Housing Authority*, 59 Mass. App. 127, 795 N.E.2d 1 (2003).

[57] *Connelly v. City of Omaha, ante* p. 131, 816 N.W.2d 742 (2012).

[58] *Id.* at 159, 816 N.W.2d at 764-65.

CASSEL, J., concurring.

I doubt that most members of the Legislature, if asked, would characterize a passenger in a vehicle fleeing from law enforcement, who has on his person methamphetamine and glass pipes for smoking it later "that evening" and who possesses (and likely is drinking from) an open container of an alcoholic beverage when the pursuit begins, as an "innocent

third party."[1] Yet, Nebraska jurisprudence compels this court to accept such a result, as the court's opinion cogently explains. I write separately only to emphasize that the Legislature has the power to change the result in a future case.

Because the Legislature has not defined "innocent third party," the Nebraska appellate courts have repeatedly addressed its meaning as applied to a passenger in a fleeing vehicle.[2] This court first upheld a judgment determining that a motorcycle passenger—who, according to the trial court's factual findings, was not accused of any wrongdoing other than the flight from arrest and had "'no opportunity to dismount'"—qualified as an "innocent third party."[3] In 2002, this court again affirmed a trial court judgment for a passenger in a fleeing vehicle.[4] Although the passenger had a blood alcohol level of .123, she had not "commit[ted] any crimes" and had no "reason . . . to flee from police."[5] There was no evidence that she had "planned or encouraged" the driver's flight from police.[6] Indeed, the police officer who conducted the pursuit testified that he was unaware that the passenger "'did anything wrong'" at the time of the pursuit.[7] It was in that 2002 decision that this court defined an "innocent third party" as "one who has not promoted, provoked, or persuaded the driver to engage in flight from law enforcement personnel and one who is not sought to be apprehended in the fleeing vehicle."[8] Applying this definition, the Nebraska Court of Appeals, in separate decisions

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[1] See Neb. Rev. Stat. § 13-911(1) (Reissue 2012).

[2] See, *Henery v. City of Omaha*, 263 Neb. 700, 641 N.W.2d 644 (2002); *Stewart v. City of Omaha*, 242 Neb. 240, 494 N.W.2d 130 (1993), *disapproved on other grounds, Henery v. City of Omaha, supra*; *Jura v. City of Omaha*, 15 Neb. App. 390, 727 N.W.2d 735 (2007); *Reed v. City of Omaha*, 15 Neb. App. 234, 724 N.W.2d 834 (2006).

[3] *Stewart v. City of Omaha, supra* note 2, 242 Neb. at 245-46, 494 N.W.2d at 134.

[4] *Henery v. City of Omaha, supra* note 2.

[5] *Id.* at 704, 641 N.W.2d at 647.

[6] *Id.*

[7] *Id.*

[8] *Id.* at 707, 641 N.W.2d at 649.

arising from a single incident, affirmed trial court judgments refusing to treat the respective passengers as innocent third parties because, in one case, the passenger had an outstanding arrest warrant and told the driver, "'[H]urry up and get away from 'em 'cause I got a warrant,'"[9] and in the other, the police were seeking to apprehend the passenger as an occupant of a stolen vehicle.[10]

This court's 2002 decision premised its definition upon the belief that the Legislature was "concerned with the actions of the third party as those actions may relate to the flight of the driver sought to be apprehended."[11] The test fashioned in 2002 reasonably addressed that concern, and the rule of statutory construction presuming acquiescence in the court's determination of legislative intent[12] requires this court to adhere to its understanding of the Legislature's intent.

But the Legislature may wish to place an additional limitation on the definition of an "innocent third party" in light of the facts of the instant case, and *it is free to do so*. For example, the Legislature might decide to narrow the definition of an "innocent third party" to exclude a person then engaged in a violation of a felony or misdemeanor offense, without regard to whether such person or his or her conduct was known to law enforcement officers before initiating the pursuit. "To assist in construing statutes, courts employ presumptions which are applicable when a court has doubt as to the intent of the legislature."[13] The court's opinion in the instant case applies such a well-settled presumption.[14] However, "such presumptions disappear in light of an express legislative declaration."[15]

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[9] *Reed v. City of Omaha, supra* note 2, 15 Neb. App. at 240-41, 724 N.W.2d at 840.

[10] *Jura v. City of Omaha, supra* note 2.

[11] *Henery v. City of Omaha, supra* note 2, 263 Neb. at 707, 641 N.W.2d at 649.

[12] See *Underhill v. Hobelman*, 279 Neb. 30, 776 N.W.2d 786 (2009).

[13] 82 C.J.S. *Statutes* § 375 at 465 (2009).

[14] See *id.*, § 384.

[15] *Id.*, § 375 at 465-66.

Thus, the Legislature may amend the statute to refine or change the definition of an "innocent third party."

But because such a change is the province of the Legislature, it cannot come from this court. For over 10 years, the Legislature has apparently acquiesced in this court's 2002 assessment of legislative intent and its definition fashioned to implement that intent. If the definition is to be changed now, it must be enacted by the Legislature. I therefore join the court's opinion.

STATE OF NEBRASKA, APPELLEE, V. DEVIN D. QUALLS, APPELLANT.
824 N.W.2d 362

Filed December 21, 2012. No. S-12-409.

1. **Constitutional Law: Waiver: Appeal and Error.** In determining whether a defendant's waiver of a statutory or constitutional right was voluntary, knowing, and intelligent, an appellate court applies a clearly erroneous standard of review.
2. **Criminal Law: Statutes: Presentence Reports.** The plain language of Neb. Rev. Stat. § 29-2261(1) (Cum. Supp. 2012) provides that a presentence investigation is mandatory in felony cases, except if it would be impractical.
3. **Presentence Reports: Waiver.** The right to a presentence investigation may be waived.
4. **Waiver: Words and Phrases.** A waiver is the voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by or inferred from a person's conduct.
5. **Constitutional Law: Waiver: Records.** A voluntary waiver, knowingly and intelligently made, must affirmatively appear from the record, before a court may conclude that a defendant has waived a right constitutionally guaranteed or granted by statute.

Appeal from the District Court for Sarpy County: DAVID K. ARTERBURN, Judge. Affirmed.

Patrick J. Boylan, Chief Deputy Sarpy County Public Defender, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

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