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PSB CREDIT SERVICES, INC., A MINNESOTA CORPORATION, APPELLANT, V. BARRY RICH AND CAROL RICH, HIS WIFE, ET AL., APPELLEES.

558 N.W.2d 295

Filed January 10, 1997. No. S-95-1130.

1. **Pleadings: Demurrer: Appeal and Error.** When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader.
2. **Limitations of Actions: Appeal and Error.** The determination of which statute of limitations applies is a question of law, and an appellate court must decide the issue independently of the conclusion reached by the trial court.
3. **Trusts: Deeds: Foreclosure.** Two alternative methods of foreclosing a trust deed are available to the beneficiary of that deed. The first method allows the trustee to exercise the power of sale provided for in the trust deed, and the second method allows the beneficiary to foreclose in the same manner as provided by law for the foreclosure of mortgages.
4. ____: ____: ____. Should the beneficiary of a trust deed choose to pursue the option of foreclosing in the same manner as provided by law for the foreclosure of mortgages, the court, and not the trustee, possesses the power to decree a sale of the mortgaged premises.
5. **Trusts: Deeds: Foreclosure: Assignments: Limitations of Actions.** An assignee of a successor to a beneficiary's interest under a trust deed, which assignee elects to foreclose in the manner provided by law for the foreclosure of mortgages, must bring its action within 10 years of the date the debt secured by the mortgage matured unless, of course, the statute of limitations has been tolled.
6. **Statutes.** Statutory language is to be given its plain and ordinary meaning in the absence of anything indicating the contrary.

Petition for further review from the Nebraska Court of Appeals, HANNON, SIEVERS, and MUES, Judges, on appeal thereto from the District Court for Lincoln County, JOHN P. MURPHY, Judge. Judgment of Court of Appeals affirmed.

Michael G. Lessmann and Bruce R. Gerhardt, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellant.

Donald E. Girard, of Girard and Stack, P.C., for appellees Rich, Libby Franzen, and Craig Franzen.

WHITE, C.J., WRIGHT, CONNOLLY, and GERRARD, JJ., and LIKES, D.J.

WHITE, C.J.

On May 25, 1984, Helen M. Elander executed and delivered to American Security Bank of North Platte, Nebraska (American Security), a promissory note in the amount of $250,000. Concurrent with the execution of the note, and to secure the payment of the indebtedness, Elander executed and delivered to American Security a deed of trust on property she owned in Lincoln County, Nebraska. The deed of trust was filed on May 29, 1984, in the office of the register of deeds. On May 30, 1985, Elander and others executed a renewal promissory note in the amount of $260,000, which was payable in 176 days or upon demand.

The last payment on the note was made on April 27, 1987. Thereafter, Elander and the other debtors failed to pay the unpaid principal balance and accrued interest due. A notice of default under trust deed was filed by the trustee and recorded in the office of the register of deeds on April 27, 1994.

In October 1987, the Federal Deposit Insurance Corporation (FDIC) took possession and title to all of the assets and property of American Security. In June 1994, the FDIC sold, endorsed, assigned, and delivered to PSB Credit Services, Inc. (PSB), the deed of trust and the indebtedness secured thereby.

On March 13, 1995, PSB filed a petition of foreclosure and application for appointment of receiver against the heirs at law of Elander, who had died intestate in September 1990, and those other persons who had an interest in the real property which was subject to the deed of trust (appellees). PSB elected to foreclose the trust deed in the manner provided by law for the foreclosure of mortgages. In compliance with an order partially sustaining a motion to strike or make more definite and certain submitted by appellees, PSB filed an amendment to the petition on May 22, 1995. Appellees subsequently filed a demurrer to the petition and amendment on June 1, alleging that the action was barred by the statute of limitations.

The district court entered an order on September 14, 1995, sustaining appellees' demurrer. In sustaining the demurrer, the court concluded that the 5-year statute of limitations referred to in Neb. Rev. Stat. § 76-1015 (Reissue 1990) of the Nebraska Trust Deeds Act applied and that, therefore, PSB was barred

from bringing its action. The court dismissed PSB's petition on September 26. PSB timely appealed, arguing that the court incorrectly sustained appellees' demurrer and failed to properly apply the 10-year statute of limitations set out in Neb. Rev. Stat. § 25-202 (Reissue 1995).

The Court of Appeals reversed the lower court's dismissal of the petition. In support of its conclusion, the Court of Appeals determined that § 76-1015 applies only when a trustee sells property under a trust deed. Because this case involved a more formal judicial foreclosure, the Court of Appeals held that the 10-year statute of limitations set out in § 25-202 was applicable. Appellees filed a petition for further review on August 19, 1996.

Appellees' assignments of error attributed to the Court of Appeals can be summarized as follows: The court erred when it found that the time for commencement of an action to foreclose on real property under a deed of trust is governed by the 10-year statute of limitations under § 25-202. Such an issue is one of first impression before this court.

When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader. *Baltensperger v. Wellensiek*, 250 Neb. 938, 554 N.W.2d 137 (1996). The determination of which statute of limitations applies is a question of law, and an appellate court must decide the issue independently of the conclusion reached by the trial court. See *Whitten v. Whitten*, 250 Neb. 210, 548 N.W.2d 338 (1996).

Two alternative methods of foreclosing a trust deed are available to the beneficiary of that deed. The first method allows the trustee to exercise the power of sale provided for in the trust deed, and the second method allows the beneficiary to foreclose in the same manner as provided by law for the foreclosure of mortgages. Neb. Rev. Stat. § 76-1005 (Cum. Supp. 1994). Should the beneficiary choose to pursue the second option, the court, and not the trustee, possesses the power to decree a sale of the mortgaged premises. Neb. Rev. Stat. § 25-2138 (Reissue 1995).

PSB, as the assignee of the successor to the beneficiary's interest under the trust deed, elected to foreclose in the manner provided by law for the foreclosure of mortgages. Pursuant to such law, PSB was required to bring its action within 10 years of the date the debt secured by the mortgage matured unless, of course, the statute of limitations had been tolled. § 25-202. The renewal note matured in this case on November 22, 1985. However, a payment was made on April 27, 1987. Such a payment tolled the 10-year statute of limitations. See *Vanice v. Oehm*, 247 Neb. 298, 526 N.W.2d 648 (1995). Thus, the foreclosure action had to have been filed by April 27, 1997. PSB, which filed its action on March 13, 1995, filed well within the statute of limitations as required under applicable foreclosure law. Therefore, PSB's action was improperly dismissed, and appellees' demurrer was improperly granted.

Appellees contend that the statute of limitations as set out in § 76-1015 applies in this case. We disagree.

As we have repeatedly held, statutory language is to be given its plain and ordinary meaning in the absence of anything indicating to the contrary. See, *Village of Winside v. Jackson*, 250 Neb. 851, 553 N.W.2d 476 (1996); *In re Interest of Jaycox*, 250 Neb. 697, 551 N.W.2d 9 (1996). It is clear from a plain reading of the statute that it only pertains to a situation where the trustee exercises a power of sale upon default. Since the instant case involves a judicial foreclosure, as opposed to a trustee foreclosure, § 76-1015 is inapplicable.

AFFIRMED.

CAPORALE, J., not participating.

STEPHEN VAN ACKEREN, APPELLANT, V.
NEBRASKA BOARD OF PAROLE ET AL., APPELLEES.
558 N.W.2d 48

Filed January 10, 1997. No. S-96-162.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.

2. **Statutes: Legislature: Intent.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
3. **Statutes: Appeal and Error.** In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged in to ascertain their meaning.
4. **Records: Appeal and Error.** It is incumbent upon the party appealing to present a record which supports the errors assigned, and absent such a record, the decision of the lower court is generally affirmed.
5. **Judgments: Records: Appeal and Error.** Meaningful appellate review requires a record that elucidates the factors contributing to the lower court judge's decision.
6. **Appeal and Error.** Errors assigned but not argued will not be addressed.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Gerald L. Friedrichsen, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., for appellant.

Don Stenberg, Attorney General, and Alfonza Whitaker for appellee.

CAPORALE, FAHRNBRUCH, WRIGHT, CONNOLLY, and GERRARD, JJ., and CASSEL, D.J.

GERRARD, J.

This case presents the question of whether an offender whose parole has been denied is entitled to an annual public parole hearing under Neb. Rev. Stat. § 83-1,111(4) (Reissue 1994). Because we conclude that annual public hearings must be afforded only to those offenders whose cases have been *deferred for later reconsideration* and not to those offenders for whom parole has been *denied*, we affirm the judgment of the district court.

I. FACTUAL BACKGROUND

Stephen Van Ackeren was sentenced to the custody of the Nebraska Department of Correctional Services on December 20, 1988. Even though the record reveals that Van Ackeren had been convicted sometime in 1988 of burglary, possession of a weapon by a convicted felon, and use of a firearm in the commission of a felony, the record does not indicate the lengths or

terms of Van Ackeren's sentences or his parole eligibility date. Nevertheless, we are able to glean from the record that following a number of board reviews between June 1991 and July 1994, Van Ackeren was granted a public parole hearing on June 21, 1995.

By a letter dated June 22, 1995, the Nebraska Board of Parole notified Van Ackeren that it denied his parole due to public opposition and the fact that it would depreciate from the seriousness of the crime. Van Ackeren requested a rehearing from the board, contending in part that the board's decision to set a parole review rather than a parole hearing was contrary to § 83-1,111(4). The board met on July 20 to consider Van Ackeren's request for rehearing. By a letter dated July 21, 1995, the board informed Van Ackeren that "it was the determination of the Board to affirm our decision that your parole be *denied* and your case be reviewed again in June, 1996." (Emphasis supplied.)

Van Ackeren filed a petition in error in the district court, alleging that the board had violated § 83-1,111(4) by setting his case for board review rather than for a public hearing and alleging that his constitutional right to due process of law had been violated because the board's decision resulted in his removal from community custody and return to the Omaha Correctional Center. Following a hearing apparently based upon Van Ackeren's motion for summary judgment (even though no such motion appears in the record), the district court found that Van Ackeren was not entitled to the relief he requested and dismissed his petition.

Van Ackeren timely appealed to the Nebraska Court of Appeals. Pursuant to our power to regulate the docket of the Court of Appeals, we removed this case to our docket.

II. SCOPE OF REVIEW

Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *In re Interest of Jeffrey R., ante* p. 250, 557 N.W.2d 220 (1996).

III. ASSIGNMENTS OF ERROR

Van Ackeren asserts that the district court erred in (1) construing § 83-1,111(4) to allow the Board of Parole to set his case for a board review rather than a public hearing and (2) dismissing his petition when (a) the Board of Parole, in response to Van Ackeren's motion for summary judgment, did not file a motion seeking affirmative relief and (b) Van Ackeren's motion for summary judgment did not address the allegations in his petition that the action of the Board of Parole violated his constitutional right to due process.

IV. ANALYSIS

1. Claim of Right to Annual Hearing

Section 83-1,111 states, in pertinent part:

> (1) Every committed offender shall be interviewed and have his or her record reviewed by two or more members of the Board of Parole or a person designated by the board within sixty days before the expiration of his or her minimum term less any reductions. If, in the opinion of the reviewers, the review indicates the offender is reasonably likely to be granted parole, the Board of Parole shall schedule a public hearing before a majority of its members. . . .
>
> (2) The board shall render its decision regarding the committed offender's release on parole within a reasonable time after the hearing or review. . . . If the board shall *deny parole*, written notification listing the reasons for such denial and the recommendations for correcting deficiencies which cause the denial shall be given to the committed offender within thirty days following the hearing.
>
> . . . .
>
> (4) If the board *defers the case for later reconsideration*, the committed offender shall be afforded a parole hearing at least once a year until a release date is fixed. The board may order a reconsideration or a rehearing of the case at any time.

(Emphasis supplied.) It is the annual public parole hearing set forth in § 83-1,111(4) to which Van Ackeren claims he is entitled.

It is clear that following a parole hearing, the board has three options. The board may (1) deny parole, (2) defer reconsideration of the case to a later date, or (3) grant parole. See § 83-1,111; Rules and Regulations of the Nebraska Parole Board, title 270, ch. 4, § 011 (1989). If parole is denied, "written notification listing the reasons for such denial and the recommendations for correcting deficiencies which cause the denial shall be given to the committed offender within thirty days following the hearing." § 83-1,111(2). Conversely, if the case is deferred for later reconsideration, the offender is entitled to an annual parole hearing under § 83-1,111(4).

Pursuant to Nebraska statutes, the granting of parole to an inmate is a discretionary act of the board based upon a predictive judgment of what is best for the inmate and the community. The statutes provide a framework to guide the board in its decisions. Under the present statutory scheme quoted above, unless it is determined during a review that an inmate is a likely candidate for parole, a parole hearing is not scheduled. § 83-1,111(1). To do otherwise would waste valuable resources and create unrealistic expectations for inmates. If, after review, it is determined that an inmate is not yet a good risk for parole, he or she is provided with reasons for the decision and another review is scheduled. § 83-1,111(2). See, also, *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979).

In the instant case, the board's letter of June 22, 1995, clearly set forth that "it was the decision to *deny* your parole due to opposition and . . . the seriousness of the crime." (Emphasis supplied.) However, when advising Van Ackeren of the future board review in the same letter, the board stated: "Your case has been deferred to a June, 1996 Board Review . . . ."

Van Ackeren contends that in the context of Nebraska's parole statutes, the terms "deny" and "defer" are synonymous. Van Ackeren claims that when the board chooses not to grant parole, it is necessarily deferring the offender's release. In support of this contention, Van Ackeren asserts that the statute governing the criteria for determining whether to grant or deny parole does not contain the word "deny"; it uses the word "defer." That statute, Neb. Rev. Stat. § 83-1,114(1) (Reissue

1994), provides that "[w]henever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that *his release* should be *deferred*" because of certain statutory criteria, e.g., release would depreciate seriousness of crime or release would have adverse effect on institutional discipline, et cetera. (Emphasis supplied.)

However, in construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Village of Winside v. Jackson*, 250 Neb. 851, 553 N.W.2d 476 (1996). In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged in to ascertain their meaning. *Seevers v. Potter*, 248 Neb. 621, 537 N.W.2d 505 (1995).

With that in mind, we note that the verb "defer" is used in a completely different context in § 83-1,114 than in § 83-1,111(4). In § 83-1,114, the verb "defer" is used in conjunction with the subject offender's "release" in a section that describes the conditions under which it is appropriate for the board to deny parole and, necessarily, defer an offender's release. Conversely, in § 83-1,111(4), the verb "defer" is used in the context of when an offender's case may be called up for reconsideration.

In its plain and ordinary meaning, the verb "defer" means to "delay" or "postpone." Webster's Third New International Dictionary, Unabridged 591 (1993). The verb "deny" means to "turn down" or "give a negative answer to." *Id.* at 603. When the board "defers the case for later reconsideration," it delays making a determination regarding parole pending further consideration, and the board may order such reconsideration at any time. However, under such circumstances, § 83-1,111(4) affords an offender a public parole hearing at least once a year until a release date is fixed. A case is deferred for later reconsideration when an offender is a likely candidate for parole within a reasonable period of time.

We conclude that the phrases "deny parole" and "defers the case for later reconsideration" are not used synonymously in the parole statutes. Thus, an offender is not entitled to an annual public parole hearing under the plain language of § 83-1,111(4) after parole has been denied. The plain language of the board's June 22 and July 21, 1995, letters clearly supports the district court's conclusion that the board *denied* parole to Van Ackeren.

Accordingly, we determine that Van Ackeren is not entitled to an annual public parole hearing as a result of the board's denial of parole. However, our inquiry does not end here.

2. Claim Regarding Due Process Violation

Van Ackeren next claims that the district court erred in dismissing his petition because Van Ackeren's motion for summary judgment did not address the due process allegations contained in his petition.

We note from the outset that Van Ackeren's motion for summary judgment is not contained in the record. The transcript in the instant case consists of Van Ackeren's petition in error, the Board of Parole's answer, and a "journal entry" entered by the district court. The "journal entry" in the record is, in actuality, a notation on the district court docket sheet which does not contain the judge's signature and reads, in total, as follows:

> Briefs submitted by the parties and reviewed by the court. The court finds that Plaintiff is entitled to annual parole hearings only "if the board defers the case for later consideration." R.R.S. 83-1,111(4) 1994.
>
> In the case at bar the board denied parole and therefore plaintiff is not entitled to the relief requested and his petition is dismissed.

(Emphasis in original.) The notation in the docket sheet does not reveal that the order was entered as a result of Van Ackeren's motion for summary judgment, nor does the order reveal upon what basis Van Ackeren sought summary judgment. The only place in the record that provides a hint of the nature of the proceedings is at line 8 of the 44-line bill of exceptions, where Van Ackeren's counsel offers an exhibit "on behalf of [Van Ackeren's] motion for summary judgment."

We have held on numerous occasions that it is incumbent upon the party appealing to present a record which supports the errors assigned, and absent such a record, the decision of the lower court is generally affirmed. *Shuck v. Jacob*, 250 Neb. 126, 548 N.W.2d 332 (1996); *WBE Co. v. Papio-Missouri River Nat. Resources Dist.*, 247 Neb. 522, 529 N.W.2d 21 (1995). See *Terry v. Duff*, 246 Neb. 11, 516 N.W.2d 591 (1994). Meaningful appellate review requires a record that elucidates the factors contributing to the lower court judge's decision. *Spittler v. Nicola*, 239 Neb. 972, 479 N.W.2d 803 (1992).

We cannot determine, after reviewing this record, whether (1) Van Ackeren's motion for summary judgment addressed the violation of due process allegations or (2) the district court considered such allegations at the time it dismissed Van Ackeren's petition. There is certainly no evidence in the record that establishes a violation of Van Ackeren's right to procedural due process, and, in any event, this court will not speculate upon the basis on which Van Ackeren sought summary judgment.

We conclude that this assignment of error is without merit.

3. Claim of Erroneous Dismissal

Van Ackeren finally claims that the district court erred when it dismissed his petition after the summary judgment hearing even though the Board of Parole had not filed a cross-motion seeking affirmative relief. We first note that Van Ackeren's brief does not contain any legal or factual discussion regarding this claimed error. Errors assigned but not argued will not be addressed. *McWhirt v. Heavey*, 250 Neb. 536, 550 N.W.2d 327 (1996); *Goolsby v. Anderson*, 250 Neb. 306, 549 N.W.2d 153 (1996); *Jirkovsky v. Jirkovsky*, 247 Neb. 141, 525 N.W.2d 615 (1995). In light of this long-recognized rule and the fact that meaningful appellate review is impossible based on the sparse record before us, we do not consider Van Ackeren's last assignment of error.

V. CONCLUSION

Based on the foregoing reasons, the judgment of the district court is affirmed.

Affirmed.

White, C.J., not participating.

FIRST PLACE COMPUTERS, INC., APPELLANT, V. SECURITY NATIONAL BANK OF OMAHA, NEBRASKA, APPELLEE.

558 N.W.2d 57

Filed January 17, 1997. No. S-94-1080.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Uniform Commercial Code: Notice: Time.** Neb. U.C.C. § 4-406(4) (Reissue 1980) establishes a condition precedent that requires a customer to give notice to a bank within 1 year of the time the statement and items are made available to the customer of any unauthorized or altered signature as a prerequisite to filing suit.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed.

James R. Place, of Place Law Office, for appellant.

Myron L. Listrom, of Sloan, Listrom, Eisenbarth, Sloan & Glassman, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

GERRARD, J.

First Place Computers, Inc. (First Place), appeals from a summary judgment entered in the district court in favor of Security National Bank of Omaha, Nebraska (the bank). First Place brought suit against the bank, alleging that from September 1, 1988, through June 1989 the bank honored and paid several checks of First Place's that contained forged signatures, incomplete signatures, and unauthorized signatures, causing damages in the sum of $97,898.01. The bank answered, alleging that First Place's claim is barred by the provisions of Neb. U.C.C. § 4-406(4) (Reissue 1980) (now amended and codified at Neb. U.C.C. § 4-406(f) (Reissue 1992)). Section

4-406(4) places upon a bank's customer the duty of bringing to the bank's attention, within 1 year, any item containing an unauthorized signature which has been debited to the customer's account. There was also a contract between First Place and the bank that purportedly further restricted the time period in which an unauthorized signature must be reported to 60 days. This case requires us to decide whether § 4-406(4) should be construed as a statute of limitations rather than as a notice prerequisite to filing suit. We conclude that § 4-406(4) is a condition precedent that requires customer notice to a bank, within 1 year, as a prerequisite to filing suit. Because the evidence reveals that First Place did not discover and report the alleged unauthorized signatures to the bank within 1 year, we affirm the judgment of the district court.

I. FACTUAL BACKGROUND

First Place was incorporated on August 2, 1988, by Douglas Ellsworth and Tom Adair and opened for business in the fall of 1988.

On July 20, 1988, Ellsworth and Adair opened a checking account for First Place at the bank. On July 21, Ellsworth and Adair signed a standard signature card at the bank. First Place asserts, and the bank assumes in its brief, that the signature card requires two signatures (i.e., Ellsworth's and Adair's) on each check presented for payment, even though the signature card in evidence contains no such requirement. The 155 checks at issue in this case include checks on which Ellsworth's signature is improper, checks which purport to bear the signature of Douglas E. Ellsworth but which Ellsworth claims are forgeries of his signature, and checks on which only one of the two "required" signatures appears.

The bank mailed statements and canceled checks to First Place within a week of the cutoff date each month. However, Ellsworth employed a bookkeeper, and he did not personally inspect the check register on a routine basis.

On June 15, 1989, Ellsworth found a check stub in the check register indicating that a large check (approximately $4,000) had been written to Adair that Ellsworth had not signed. Ellsworth went to the bank and met with an officer of the bank.

Ellsworth told the bank officer that he had not signed the check and did not want it to be honored. In addition, he voiced his suspicion that the problems had been going on for a period of time. The check to Adair was not paid and is not at issue in the instant case.

The following week, Ellsworth talked with the same bank officer about irregularities in the account; however, they did not discuss specific checks. At about this same time, the bank officer called Ellsworth to discuss a number of checks that had been "in the float"; Ellsworth indicated that he had not signed these checks. However, Ellsworth wanted the checks to be paid, and he signed the checks at that time.

Sometime in late 1989 or early 1990, Ellsworth brought in five or fewer checks that he had not signed but wanted honored; again, he signed the checks at that time. These checks are not at issue in the instant case. At no other time prior to 1992 did Ellsworth present checks to the bank claiming that signatures were improper. The first time that Ellsworth gave notice to the bank of any specific checks paid by the bank which contained forged or unauthorized signatures was when a list of checks prepared by Ellsworth and his attorney was given to the bank sometime after June 22, 1992.

The bank moved for summary judgment, asserting that § 4-406(4) and the contract between the parties precluded recovery by First Place and that there was no evidence of any damage to First Place. The district court sustained the bank's motion for summary judgment and dismissed the lawsuit. The district court found that there was no genuine issue of material fact to be resolved and that recovery was barred by First Place's failure to comply with § 4-406(4) and with the agreement between the parties.

II. SCOPE OF REVIEW

Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Polinski v. Omaha Pub. Power Dist., ante* p. 14, 554

N.W.2d 636 (1996). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

III. ASSIGNMENTS OF ERROR

Summarized and restated, First Place asserts that summary judgment was improper in that the district court erred in (1) construing § 4-406(4) as a statute of limitations rather than as a notice prerequisite to filing suit, (2) determining that First Place had not provided the required notice to the bank, and (3) applying § 4-406(4) to checks on a two-signature account bearing only one signature.

IV. ANALYSIS

1. Duty to Discover and Report

The Uniform Commercial Code provision in effect at the time of the cause of action reads:

> Without regard to care or lack of care of either the customer or the bank a customer who does not within one year from the time the statement and items are made available to the customer (subsection (1)) discover and report his unauthorized signature or any alteration on the face or back of the item or does not within three years from that time discover and report any unauthorized indorsement is precluded from asserting against the bank such unauthorized signature or indorsement or such alteration.

§ 4-406(4).

Section 4-406(4) clearly places upon a bank's customer the duty of bringing to the bank's attention any item containing an unauthorized signature which has been debited to the customer's account. It "'evidence[s] a public policy in favor of imposing on customers the duty of prompt examination of their bank statements and the notification of banks of forgeries and alterations and in favor of reasonable time limitations on the responsibility of banks for payment of forged or altered items.'" *Knight Communications v. Boatmen's Nat.*, 805 S.W.2d 199, 202 (Mo. App. 1991). See, also, 7 Ronald A. Anderson, Anderson on the Uniform Commercial Code § 4-406:1, comment 7 (rev. 3d ed. 1995).

Failure to "discover and report" the unauthorized signature within 1 year from the time the bank makes available to the customer a statement of account accompanied by items paid in support of debit entries, precludes the customer's assertion of a claim against the bank. This constitutes "an absolute time limit on the right of a customer to make claim . . . without regard to care or lack of care of either the customer or the bank." See *id.*, comment 5 at 451.

The absolute nature of the time limit distinguishes it from a statute of limitations. Other jurisdictions have considered the identical limitation and concluded that it "'is not merely a statute of limitations, but a rule of substantive law barring absolutely a customer's untimely asserted right to make such a claim against the bank.'" *Provident Savings Bank v. United Jersey Bank*, 207 N.J. Super. 303, 307, 504 A.2d 135, 137 (1985) (quoting *Brighton, Inc. v. Colonial First Nat'l Bank*, 176 N.J. Super. 101, 422 A.2d 433 (1980), *aff'd* 86 N.J. 259, 430 A.2d 902 (1981)). The statute establishes a condition precedent to an action which, unlike a statute of limitations, may not be tolled. *Pine Bluff Nat'l Bk. v. Kesterson*, 257 Ark. 813, 520 S.W.2d 253 (1975); *Billings v. East Riv. Sav. Bank*, 33 A.D.2d 997, 307 N.Y.S.2d 606 (1970). We agree, and hold that § 4-406(4) establishes a condition precedent that requires a customer to give notice to a bank within 1 year of the time the statement and items are made available to the customer of any unauthorized or altered signature as a prerequisite to filing suit.

In the instant case, the evidence establishes that the bank mailed to First Place its bank statement on a monthly basis. The statement reflected all deposits, credits, and debits to First Place's account for the period beginning on the first day of each month and ending on the last day of each month. Included in each monthly bank statement were the originals of all checks paid during the statement period, including all checks upon which First Place is making a claim in this lawsuit.

First Place is complaining about forged and unauthorized signatures on several checks that the bank allegedly honored and paid from September 1, 1988, through June 1989. The first time that First Place ever gave notice to the bank of any alleged forged or unauthorized signatures regarding checks that are the

subject matter of the present lawsuit was when a list of checks prepared by Ellsworth and his attorney was given to the bank sometime after June 22, 1992. However, First Place asserts that the bank was placed on sufficient notice when Ellsworth met with a bank officer in June 1989 and voiced his objection to the $4,000 check written to Adair and general concerns about irregularities in the checking account.

First Place's assertion ignores the requirement of § 4-406(4) that the customer discover and report "the item" on which the unauthorized signature appears. An item, as defined in Neb. U.C.C. § 4-104(1)(g) (Reissue 1980) (now amended and codified at Neb. U.C.C. § 4-104(a)(9) (Reissue 1992)), is an instrument for the payment of money. The language of the statutes in effect at the relevant time specifically requires a report of each item or check which the customer claims contained an unauthorized or forged signature.

Ellsworth did not report to the bank, in 1989 or 1990, alleged unauthorized or forged signatures regarding *any* of the 155 checks at issue in this case. We, therefore, conclude that the general concerns about possible irregularities in the account voiced by Ellsworth to the bank officer in June 1989 did not meet the requirement of § 4-406(4) that the customer discover and report "the item" on which the unauthorized signature appears.

Thus, because First Place did not discover and properly report the alleged forged or unauthorized signatures to the bank within 1 year, First Place's first two assignments of error are without merit.

2. Single-Signature Checks

First Place next asserts that the district court erred in applying § 4-406(4) to 11 checks that bore only one of the two necessary signatures on this alleged two-signature account. First Place argues that the 1-year reporting prerequisite does not apply to these 11 checks because the absence of a necessary signature does not constitute an "unauthorized signature" within the meaning of § 4-406(4). Ellsworth signed nine of the "single-signature" checks; Adair signed the other two "single-signature" checks.

First Place's argument assumes, of course, that the signature card in evidence requires two signatures (i.e., Ellsworth's and Adair's) on each check presented for payment. The evidence does not support this assumption.

In spite of First Place's assertion, and the bank's assumption, the signature card does not require the signatures of both Ellsworth and Adair upon each check presented for payment. The signature card in evidence is set forth below.

SECURITY NATIONAL BANK
OMAHA, NEBRASKA

Signature Card for Deposit Accounts

Title of account: 1st Place Computers, Inc.
Social Sec. number/Fed ID number: 080-508-4
Account number
Date: 7-21-88
Deposit: Bkpg.
State ID number

Name of trust beneficiary, minor or POD payee

Type of account
- ☐ Checking
- ☐ Savings
- ☐ Interest plus Checking/Now
- ☐ Money Market Checking
- ☐ Money Market Savings
- ☐ Other _____

Deposition(s) is (are)
- ☐ an individual
- ☐ joint depositors with right of survivorship
- ☐ custodian for the minor named above
- ☐ trustee for the person named above

- ☐ a nonprofit corporation, partnership, association or organization
- ☐ a for-profit corporation, partnership, association or organization
- ☐ a government entity
- ☐ other _____

☐ This is a pay on death account, payable to the person named above. (Applies only if you offer this account.)
United States

Title of account: 1st Place Computers, Inc.
Account number: 080-508-4
Number of signatures required: 2 of 4

By signing this card, I acknowledge receipt of and agree to the General Terms for all Deposit Accounts which you have given me.

Authorized signature(s) — Title(s)

(X) [signature]

(X) [signature]

X

X

X

The initials of the bank officer that assisted First Place in opening the account ("ECH") appear in the space that is designated for the number of signatures required for each check. There is nothing contained (1) on the signature card, (2) in the general contract for all deposit accounts (referenced on the signature card), or (3) in a separate corporate resolution that sets forth a two-signature requirement for presentment and honoring of each check on this account.

Accordingly, First Place's claim for damages regarding those checks that contain only one of the two "required" signatures fails as a matter of law. We need not determine whether a missing but necessary drawer's signature constitutes an "unauthorized signature" within the meaning of § 4-406(4).

V. CONCLUSION

For the foregoing reasons, summary judgment was proper, and we affirm the judgment of the district court.

AFFIRMED.

LYNDA E. BOHL, APPELLANT, V. BUFFALO COUNTY, NEBRASKA, A POLITICAL SUBDIVISION, AND DAVID R. BUTLER, APPELLEES.

557 N.W.2d 668

Filed January 17, 1997. No. S-94-1199.

1. **Trial: Pleadings: Pretrial Procedure.** A motion for judgment on the pleadings is properly granted when it appears from the pleadings that only questions of law are presented. In making such motion, the moving party admits the truth of all well-pleaded facts in the opposing party's pleadings, together with all reasonable inferences to be drawn from such facts. The moving party also admits the untruth of his own allegations insofar as they have been controverted.
2. **Summary Judgment: Appeal and Error.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. A reviewing court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences deducible from submitted evidence.
3. **Political Subdivisions Tort Claims Act.** A plaintiff pursuing an action against a political subdivision must satisfy all the requirements which are set out in Neb. Rev. Stat. § 13-919(1) (Reissue 1991).

4. **Equity: Estoppel.** Six elements must be satisfied for the doctrine of equitable estoppel to apply: (1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; (3) knowledge, actual or constructive, of the real facts; (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

John H. Marsh, of Knapp, Fangmeyer, Aschwege & Besse, and James L. Bush, of Windscheffel & Bush, for appellant.

Richard L. Boucher and, on brief, Tamra L. Walz, of Boucher Law Firm, for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

On August 17, 1991, David R. Butler, a deputy sheriff for Buffalo County, accompanied by his 4-year-old son, was driving to Grand Island in Hall County to testify on August 19 concerning a matter which had arisen during Butler's prior employment with Hall County. While driving through Kearney, Nebraska, the vehicle Butler was operating collided with a vehicle in which the plaintiff, Lynda E. Bohl, was a passenger. As a result of the collision, Bohl alleges she suffered physical, mental, and economic harm and damages.

In April 1991, Butler was employed as a deputy sheriff by the Buffalo County Sheriff's Department. At the time of the accident, Butler was driving an unmarked official vehicle owned by the Buffalo County Sheriff's Department. Normally, Butler was not permitted to drive a vehicle to his home in Grand Island because it was located outside Buffalo County. However, Captain Anderson of the Buffalo County Sheriff's Department gave permission to Butler to drive the vehicle home on the date

of the accident, since Butler was scheduled to appear in traffic court in Grand Island on the following Monday and would be available to be on duty on Monday sooner than if he had driven his own vehicle.

In violation of county policy, Butler's son was present in the county vehicle at the time of the collision. Butler was carrying his sheriff's department pager and his weapon. He was wearing a T-shirt, shorts, and tennis shoes. As usual, he had been on call, but he was not being compensated for time spent driving to Grand Island. Butler was to have been compensated by Buffalo County, however, for time spent testifying in Hall County.

After the accident, Butler received a 3-day suspension for his violation of county policy prohibiting his son from riding with him in a county-owned vehicle. Bohl and her husband, James Bohl, signed a partial payment agreement acknowledging receipt of $10,485 paid on behalf of "NIRMA," Buffalo County, the Buffalo County Sheriff's Department, and Butler for property damage resulting from the accident. The agreement included the following language: "It is understood the Statute of Limitations requires that any legal action for damages from this accident must be commenced before August 17th 1995." The agreement was provided by T.A. Kahrhoff, an adjuster for Buffalo County's insurance carrier.

On August 18, 1993, in the district court for Buffalo County, Bohl filed an action for negligence against Butler in his capacity as an "undersheriff" and against Buffalo County. On that same day, a tort claim was filed with the board of county commissioners pursuant to Neb. Rev. Stat. § 13-920 (Reissue 1991). The tort claim was later withdrawn on August 15, 1994.

The defendants both demurred, challenging Bohl's petition on the grounds that the district court had no subject matter jurisdiction, that Bohl did not have capacity to sue, and that the petition failed to state facts sufficient to constitute a cause of action. The district court agreed. On August 31, 1993, the court sustained the defendants' demurrer and dismissed the case without prejudice, holding that the suit was brought prematurely. Neb. Rev. Stat. § 13-906 (Reissue 1991) provides that

> [n]o suit shall be permitted . . . unless the governing body of the political subdivision has made final disposition of

> the claim, except that if the governing body does not make final disposition of a claim within six months after it is filed, the claimant may, by notice in writing, withdraw the claim from consideration of the governing body and begin suit . . . .

The court stated that because Bohl did not abstain from filing a petition in the district court until the board had made a final disposition of the tort claim or until 6 months had passed, the suit was not properly before the court.

Bohl, in a motion for a new trial, requested that the court overrule the defendants' demurrer or, in the alternative, allow her to amend her petition. The court allowed Bohl to amend her petition. Bohl filed an amended petition on November 12, 1993. In his answer to the amended petition, Butler denied Bohl's allegations of negligence. In addition, Butler affirmatively alleged that the accident occurred while he was acting within the course of his employment as a deputy sheriff for Buffalo County, that § 13-920 of the Nebraska Political Subdivisions Tort Claims Act applied, and that Bohl failed to abide by the necessary requirements set out in the act. In May 1994, Butler moved for summary judgment.

Bohl filed a second amended petition on August 19, 1994, in which she alleged that Butler was acting within the scope of his employment and that the negligence of Butler was imputed to Buffalo County. Bohl requested the court to grant judgment against Butler and Buffalo County and further requested that Buffalo County be estopped from raising a statute of limitations defense provided in § 13-920 because she had relied on the 4-year statute of limitations set out in the partial payment agreement.

In Bohl's third amended petition, which was filed on September 1, 1994, Bohl asserted facts which, when read generously, alleged that Butler individually, and not within the scope of his employment, had acted negligently. Alternatively, Bohl alleged that Buffalo County was liable for Butler's negligent acts when he was acting within his official capacity. Bohl also prayed that the court grant judgment against Butler or Buffalo County and requested that Buffalo County be estopped from raising a statute of limitations defense provided in § 13-920.

In response to Bohl's second amended petition, Butler and Buffalo County filed a demurrer. With regard to Bohl's third amended petition, both defendants filed a motion to strike and objections to the third amended petition.

On September 13, 1994, the district court sustained Butler's motion for summary judgment. The court stated that the material facts involved in the case were not in dispute: Butler was employed by the Buffalo County sheriff's office; the vehicle Butler was operating was an unmarked county vehicle; Butler was casually dressed; Butler's son was a passenger in the vehicle; Butler was not being compensated for his time spent driving to Grand Island (i.e., not "on duty"), but was subject to calls on a 24-hour basis (i.e., "on call"); Butler had his revolver with him; Butler had received permission to take the unmarked cruiser to his residence; Butler was scheduled to testify in Hall County the following Monday regarding a case related to his prior employment with Hall County; and the purpose of allowing Butler to drive the cruiser to Grand Island was to go "on duty" sooner on Monday following his testimony.

While the district court concluded that the fact finder determines the issue of whether an employee is acting within the scope of his employment, it determined as a matter of law that the ultimate inference must be drawn that Butler's acts occurred within the course of employment. Therefore, the court held that § 13-920 was applicable and was not properly adhered to by Bohl. Shortly thereafter, Bohl moved for a new trial.

On September 26, 1994, the court addressed the defendants' demurrer to the second amended petition and their motion to strike and objections to the third amended petition. The court found that the action as to Butler in his individual and official capacity was dismissed per its order dated September 13, 1994. However, the action against Buffalo County was still a live controversy regarding the estoppel issue which was raised by Bohl in her second and third amended petitions. Furthermore, the court held that Buffalo County's arguments in support of its motion and demurrer could be construed as an oral motion for judgment on the pleadings.

In a journal entry and an amended journal entry dated November 21, 1994, the district court denied Bohl's motion for

new trial as to Butler. The court also granted Buffalo County's motion for judgment on the pleadings and dismissed the case as to the county. In support of its holding, the court determined from the face of the pleadings that Bohl failed to meet at least three of the six elements of estoppel because she failed to show (1) that Buffalo County's conduct constituted a false representation; (2) that Bohl lacked knowledge as to the truth of the representations and lacked the means of obtaining such knowledge; and (3) that the false representations relied on by Bohl were the cause of her inaction, which led to her injury, detriment, or prejudice.

Bohl moved for a new trial. The district court denied Bohl's motion on December 5, 1994. A timely notice of appeal was filed on December 13.

Bohl assigns the following errors: (1) The trial court erred in granting Buffalo County's motion for judgment on the pleadings and determining from the face of the pleadings that Bohl could not meet the elements of estoppel, and (2) the trial court erred in granting Butler's motion for summary judgment and finding as a matter of law that Butler was acting within the scope of his employment as a deputy sheriff. We affirm.

A motion for judgment on the pleadings is properly granted when it appears from the pleadings that only questions of law are presented. In making such motion, the moving party admits the truth of all well-pleaded facts in the opposing party's pleadings, together with all reasonable inferences to be drawn from such facts. The moving party also admits the untruth of his own allegations insofar as they have been controverted. *White v. Ardan, Inc.*, 230 Neb. 11, 430 N.W.2d 27 (1988).

Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. A reviewing court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences deducible from submitted evidence. *Boyd v. Chakraborty*, 250 Neb. 575, 550 N.W.2d 44 (1996).

We must first address whether the lower court erred in dismissing Bohl's action against Buffalo County.

A plaintiff pursuing an action against a political subdivision must satisfy all the requirements which are set out in Neb. Rev. Stat. § 13-919(1) (Reissue 1991). That section provides in part:

> Every claim against a political subdivision permitted under the Political Subdivisions Tort Claims Act shall be forever barred unless within one year after such claim accrued the claim is made in writing to the governing body. Except as otherwise provided in this section, all suits permitted by the act shall be forever barred unless begun within two years after such claim accrued.

Bohl neglected to submit a claim to the appropriate governing body until 2 years after the motor vehicle accident. Bohl alleges in her third amended petition, however, that Buffalo County should be estopped from raising statute of limitations and nonpresentment of claim defenses available under § 13-919 because she was led to believe that she had until August 17, 1995, to commence a legal action. According to the partial payment agreement provided to Bohl by an adjuster for the county's insurance carrier, the statute of limitations for any action arising from the accident occurring on August 17, 1991, was 4 years.

This court has never applied, and will not apply in this case, the doctrine of equitable estoppel to excuse a plaintiff's failure to comply with the Political Subdivisions Tort Claims Act. Even if we were to apply such a doctrine, however, a review of the pleadings suggests that Bohl failed to properly allege the elements of equitable estoppel.

This court has set forth six elements which must be satisfied for the doctrine of equitable estoppel to apply:

> (1) conduct which amounts to a false representation or concealment of material facts, or at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons . . . (3) knowledge, actual or constructive, of the real facts . . . [4] lack

> of knowledge and of the means of knowledge of the truth as to the facts in question; [5] reliance, in good faith, upon the conduct or statements of the party to be estopped; and [6] action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel . . . .

Hamilton v. Hamilton, 242 Neb. 687, 693, 496 N.W.2d 507, 512 (1993).

In her third amended petition, Bohl alleges in paragraph 11 that

> T. A. Kahrhoff, while acting as an adjuster for defendant Buffalo County's insurance carrier, provided a "Partial Payment Agreement" to the plaintiff and her husband, James Bohl, which stated and represented the statute of limitations to be August 17, 1995, the "Partial Payment Agreement" being attached hereto as Exhibit "1" and incorporated herein by reference. Plaintiff relied upon this representation by the insurance adjuster.

While it appears from the face of the pleadings that a misrepresentation was made and that Bohl relied on such misrepresentation, Bohl inadequately pled all six elements of equitable estoppel. Therefore, as a matter of law, Bohl was not entitled to relief under the doctrine of estoppel, Buffalo County's motion was properly granted, and Buffalo County was appropriately dismissed from this lawsuit.

While we have determined that Bohl may not pursue an action against Buffalo County, we must also determine whether she may pursue an action against Butler. If it is determined that Butler did not act within the scope of his employment, Bohl may pursue her claim against Butler individually; if it is determined that Butler did act within the scope of his employment, Bohl would have had to comply with the requisites set out in the Nebraska Political Subdivisions Tort Claims Act. See Neb. Rev. Stat. § 13-901 et seq. (Reissue 1991).

This court has, on a previous occasion, upheld a district court's determination that a defendant was acting within the scope of his employment while involved in an accident for purposes of the Political Subdivisions Tort Claims Act. In *Kuchar v. Krings*, 248 Neb. 995, 540 N.W.2d 582 (1995), Krings, an

employee of a public school district, was sued in his individual capacity after he struck a young girl with his personal vehicle. As an affirmative defense, Krings asserted that he was acting within his scope of employment at the time of the accident, thereby requiring the plaintiff to abide by the requirements of the Political Subdivisions Tort Claims Act. Due to conflicting evidence concerning whether Krings was acting within his scope of employment, the district court denied summary judgment, and trial was had to a jury. After the case was submitted to the jury but before a verdict was returned, the court determined that Krings was acting within his scope of employment at the time of the accident and dismissed the case because the plaintiff did not satisfy the act's statute of limitations.

In reviewing the decision of the district court, we noted that whether an employee of a political subdivision is acting within his scope of employment is not a question for a jury. See § 13-907 (stating that "all suits brought under sections 13-901 to 13-926 . . . shall be heard and determined by the appropriate court without a jury"). Despite the error in letting the case go to a jury, we upheld the court's determination that Krings was acting within his scope of employment at the time of the accident because the evidence established that Krings was en route to work on the school building. Moreover, Krings had never been told that using his own vehicle to conduct school business was prohibited by his employer. These facts were enough to allow the district court to conclude that Krings was acting within his scope of employment when he struck the plaintiff.

Much like the situation in *Kuchar*, Butler was sued in his individual capacity and responded that he was acting within his scope of employment at the time of the accident. The instant case differs from *Kuchar*, however, in that the material facts relating to the scope of employment issue are agreed upon. As with all cases brought under the act, the district court in the instant case acted as the fact finder. Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Polinski v. Omaha Pub.*

Power Dist., ante p. 14, 554 N.W.2d 636 (1996). The district court concluded that the ultimate inference to be drawn from these undisputed facts was that Butler's acts occurred within the course of his employment. We agree. As noted above, at the time of the accident, Butler was employed by the Buffalo County sheriff's office; the vehicle was a county vehicle; Butler was subject to calls on a 24-hour basis; Butler had his revolver with him; Butler had received permission to take the cruiser to his residence; Butler would have been compensated by Buffalo County for time spent testifying; and the purpose of allowing Butler to drive the cruiser to Grand Island was to go "on duty" sooner on the Monday following his testimony. In light of these undisputed facts, we cannot say that the district court erred in determining as a matter of law that Butler was acting within the scope of his employment. In fact, these facts are far more indicative of an employment situation than those adduced in *Kuchar*. Accordingly, the district court properly granted Butler's motion for summary judgment.

AFFIRMED.

JOHN C. TESS, APPELLANT, V. LAWYERS TITLE INSURANCE CORPORATION, A VIRGINIA CORPORATION, AND DAKOTA TITLE AND ESCROW CO., APPELLEES.

557 N.W.2d 696

Filed January 17, 1997. No. S-95-608.

1. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by the lower courts.
2. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. Conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.

4. **Final Orders: Appeal and Error.** Three types of final orders may be reviewed on appeal: (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.
5. **Final Orders: Words and Phrases.** To be final, an order must dispose of the whole merits of the case. When no further action of the court is required to dispose of a pending cause, the order is final. If the cause is retained for further action, the order is interlocutory.
6. **Final Orders: Dismissal and Nonsuit: Parties: Appeal and Error.** An order which effects a dismissal with respect to one of multiple defendants in an action is a final, appealable order as to the defendant dismissed.
7. **Final Orders: Dismissal and Nonsuit: Actions: Appeal and Error.** An order which effects a dismissal with prejudice of one of multiple causes of action is a final, appealable order as to that cause of action.
8. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
9. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
10. **Negligence: Proof.** In order to succeed in an action based on negligence, a plaintiff must establish the defendant's duty, a breach of that duty, proximate causation, and damages.
11. **Title: Insurance: Agents.** Title insurance companies and their agents are required to exercise the degree of skill and knowledge normally possessed by members of the profession in good standing in the locality concerning preliminary title information which is transmitted to their customers.
12. **Trial: Proximate Cause: Evidence.** The issue of proximate cause, in the face of conflicting evidence, is ordinarily a question for the trier of fact.

Petition for further review from the Nebraska Court of Appeals, on appeal thereto from the District Court for Douglas County, J. PATRICK MULLEN, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Vicki L. Boone, of Gunderson Law Offices, on brief for appellant.

Robert J. Becker, of Stalnaker, Becker, Buresh, Gleason & Farnam, P.C., for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

GERRARD, J.

Appellant, John C. Tess, seeks further review from the Nebraska Court of Appeals' summary dismissal of his appeal of a district court order sustaining summary judgment in favor of appellees, Lawyers Title Insurance Corporation and Dakota Title and Escrow Co. For the reasons stated herein, we conclude that the district court order sustaining appellees' motion for summary judgment, which in effect completely dismissed from the lawsuit one of two defendants and completely dismissed one of two causes of action pled, is a final, appealable order. As such, the Court of Appeals erred in summarily dismissing Tess' appeal. However, upon consideration of the merits, we affirm the judgment of the district court.

I. FACTUAL BACKGROUND

In the summer of 1986, Tess and his now former wife entered into negotiations with Herbert Osborne, now deceased, a real estate broker and developer, for the purchase of an 80-acre tract of land located on what was at that time the northwest outskirts of Omaha. Unable to afford the entire tract, Tess offered to purchase a 20-acre portion located on the corner of 168th Street and West Maple Road. Osborne readily agreed to Tess' proposal, as he had other prospective buyers interested in purchasing 10-acre portions of the same tract.

Osborne acted in several capacities during this transaction. He was the seller and trustee of the property, as well as Tess' lender and real estate agent. In addition, Osborne and his partner, Charles Rasmussen, were longtime clients of Dakota Title. On September 3, 1986, Osborne submitted an application for title insurance with respect to the property Tess intended to purchase to Dakota Title, the local agent for Lawyers Title. On this application, Osborne indicated that the parties to be insured were John C. and Maureen C. Tess.

The title insurance commitment issued to Osborne stated an effective date of September 9, 1986, and failed to recite that the parcel of land at issue was subject to any protective covenants. Further, the title insurance commitment provided that Dakota Title was to be notified prior to the closing of the transaction, so

that the status of title could be updated. Tess does not recall ever receiving the title insurance commitment.

Notwithstanding the fact that the title insurance commitment recited an effective date of September 9, 1986, a Dakota Title document described as a title binder search sheet and bearing the initials "EP" indicates that the title search on the property at issue was in fact conducted on September 11. Edwin Peabody, Dakota Title's former vice president and a licensed abstracter and title agent, claimed to have no recollection of the specific facts concerning this title search. However, Peabody explained the likely reason for the discrepancies between the effective date of the commitment for title insurance and the date the search was conducted in this matter was that Dakota Title would normally backdate title insurance commitments to reflect the delay expected between the recording of an instrument and its appearance in the index of the register of deeds.

The record also reflects that on the same day Dakota Title conducted its title search in regard to Tess' property, Osborne and Rasmussen executed protective covenants with respect to the entire 80-acre tract of land at issue. Peabody notarized the execution of these protective covenants. The covenants recite that they are to run with the land and bind all present and future owners. The covenants provide, in pertinent part, that the properties may only be used for residential and farming purposes, and specifically proscribe commercial farming and restrict the number of horses and ponies permitted on each lot. The covenants were recorded on September 12, 1986.

When Osborne divided the 80-acre tract for sale, he parceled out Tess' 20 acres and five other tracts roughly 10 acres each. Dakota Title prepared title insurance commitments for each of these tracts at approximately the same time it prepared the title insurance commitment for Tess. Only the commitments prepared listing Tess and his then father-in-law and mother-in-law as insureds failed to report the existence of the protective covenants. Title insurance commitments listing all of the other purchasers as insureds, all with the effective dates of September 11, 1986, recite the existence of the protective covenants even though the covenants were not recorded until September 12.

Tess was not represented by an attorney during this sale. Instead, Tess said he relied on Osborne, as the experienced real estate professional, to be fair and aboveboard during the entire transaction. At closing on October 1, 1986, Tess admitted seeing a warranty deed executed in his favor which recited that the property was subject to protective covenants of record. Tess said that he questioned Osborne about the covenants and told Osborne that he wanted to retain an attorney before proceeding. According to Tess, Osborne persuaded him that he did not need to hire an attorney and that the covenants did not apply to his 20-acre parcel, but instead pertained only to the 10-acre parcels. Tess closed on the property on October 1.

Dakota Title was not notified of the real estate closing date and did not conduct an updated search of title prior to the closing. The Lawyers Title insurance policy issued with Tess as the insured, effective October 7, 1986, notes Tess' recorded deed and mortgage of October 7, but the protective covenants are not shown as exceptions on the policy.

From 1986 to 1993, Tess lived in the farmstead house on the property and operated a boarding stable. In late 1992, Tess was approached by a representative of Emeth, Inc., and entered into negotiations for the sale of his property. When Emeth discovered the existence of the protective covenants on the eve of closing, it backed out of a proposed sale.

Tess filed suit against Lawyers Title and Dakota Title alleging two causes of action: (1) breach of the contract for title insurance and (2) negligence in regard to appellees' failure to either discover or disclose the existence of the protective covenants. On September 26, 1994, Dakota Title moved the court for summary judgment, and Lawyers Title moved the court for partial summary judgment. The district court granted Dakota Title's motion for summary judgment with respect to the breach of contract cause of action. The court found Dakota Title acted solely as a disclosed agent for Lawyers Title with respect to the purchase of title insurance and made no attempt to bind itself. The court overruled the motions with respect to the negligence cause of action.

Subsequently, on January 31, 1995, both appellees moved the court for summary judgment with respect to the negligence

cause of action. On May 4, the district court sustained appellees' motion. The court found that the commitment for title insurance accurately reflects the public record as of its effective date, September 9, 1986; therefore, as a matter of law, appellees were not negligent in its preparation. Further, Dakota Title was only under a duty to update the title status prior to closing upon notification by one of the parties. Because no one provided such notification, Dakota Title was without a duty to update the title status. Finally, the court found that Tess did not rely on Dakota Title's search of the record to establish marketable title at the time of closing. Instead, Tess relied on Osborne's representations.

The result of the district court order sustaining summary judgment was to effect a complete dismissal of Dakota Title as a party to the suit and the complete dismissal of Tess' negligence cause of action. Thus, the only matter pending before the district court is Tess' cause of action for breach of the insurance contract with respect to Lawyers Title.

Tess timely appealed the district court's May 4, 1995, order. The Court of Appeals summarily dismissed Tess' appeal, finding it lacked jurisdiction because the district court order was not a final order. See *Tess v. Lawyers Title Ins. Corp.*, 3 Neb. App. xlix (case No. A-95-608, July 13, 1995).

II. SCOPE OF REVIEW

When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by the lower courts. *City of Lincoln v. Twin Platte NRD*, 250 Neb. 452, 551 N.W.2d 6 (1996).

Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Larkin v. Ethicon, Inc., ante* p. 169, 556 N.W.2d 44 (1996).

III. ASSIGNMENTS OF ERROR

Tess asserts that the Court of Appeals erred in dismissing the instant appeal because complete dismissal of one of multiple

defendants in a suit is a final order with respect to that defendant, and complete dismissal of one of two separate causes of action is a final order with respect to that cause of action.

In regard to the merits of his appeal, Tess claims that the district court erred (1) in finding that as a matter of law, appellees were not negligent and that Tess did not rely on appellees in purchasing the property at issue, and (2) in overruling Tess' motion for a continuance of the summary judgment hearing.

IV. ANALYSIS

1. JURISDICTION

(a) Dismissal of Dakota Title as Party Defendant

For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. Conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *Currie v. Chief School Bus Serv.*, 250 Neb. 872, 553 N.W.2d 469 (1996); *City of Lincoln v. Twin Platte NRD, supra*. Three types of final orders may be reviewed on appeal: (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered. Neb. Rev. Stat. §§ 25-1902 and 25-1911 (Reissue 1995); *Currie v. Chief School Bus Serv., supra*; *Rohde v. Farmers Alliance Mut. Ins. Co.*, 244 Neb. 863, 509 N.W.2d 618 (1994); *Jarrett v. Eichler*, 244 Neb. 310, 506 N.W.2d 682 (1993). However, to be final, an order must dispose of the whole merits of the case. When no further action of the court is required to dispose of a pending cause, the order is final. If the cause is retained for further action, the order is interlocutory. *Olsen v. Olsen*, 248 Neb. 393, 534 N.W.2d 762 (1995).

In *Currie v. Chief School Bus Serv., supra*, we held that a district court order sustaining the defendant's motion for summary judgment which dismissed the plaintiff's negligence claim with prejudice is a final, appealable order because it affects substantial rights of the plaintiff and was made during a special proceeding, notwithstanding the fact the district court still had pending before it the defendant's counterclaim.

Tess asserts that the May 4, 1995, district court order was a final, appealable order because, in effect, it dismissed with prejudice his negligence cause of action against both appellees and, at the same time, dismissed with prejudice Dakota Title as a defendant in the lawsuit.

Appellees argue that the district court order was not a final, appealable order because the court did not completely dispose of all matters alleged in the suit. Tess may protect his interest by appealing the court's order at the conclusion of the litigation with respect to Tess' contract cause of action against Lawyers Title still pending before the district court.

In *Green v. Village of Terrytown*, 188 Neb. 840, 199 N.W.2d 610 (1972), we held that an order which effects a dismissal with respect to one of multiple defendants in a negligence action was a final, appealable order as to the defendant dismissed. In *Green*, this court recognized the competing interests at stake.

> [A] paramount consideration is to be liberal in permitting appeals, but, on the other hand, that piecemeal or successive appeals are not desirable. It would appear there is a further consideration, namely that where there are multiple defendants and the action is dismissed as to one defendant, that defendant no longer has a voice in the determination of the litigation and if the remaining parties permit the litigation to drag on for months or years, he has no way of bringing an end to the litigation or ascertaining whether or not it has been finally determined as to him. This is a very important consideration in determining whether or not such an order of dismissal is a "final order."

Id. at 841, 199 N.W.2d at 611.

Green controls the instant case. The district court order sustaining appellees' motion for summary judgment completely dismissed Dakota Title from the lawsuit. Accordingly, the order was a final, appealable order, and Tess is correct to assert that the Court of Appeals erred in dismissing his appeal in regard to Dakota Title.

(b) Dismissal of Negligence Cause of Action Against Both Appellees

Furthermore, Tess correctly asserts that complete dismissal with prejudice of one of multiple causes of action is a final,

appealable order as to that cause of action. In *Interholzinger v. Estate of Dent*, 214 Neb. 264, 333 N.W.2d 895 (1983), we held that an order sustaining the defendant's motion for summary judgment which dismissed the plaintiff's cause of action for alleged legal malpractice was a final, appealable order notwithstanding the fact that the separate and distinct cause of action for money had and received remained pending for trial. However, the *Interholzinger* court was careful to distinguish separate causes of action from different theories of recovery. Thus, if Tess pled separate causes of action as opposed to different theories of recovery, the district court order was a final, appealable order with respect to his negligence claim.

In *Interholzinger v. Estate of Dent, supra*, the plaintiff sued the estate of his attorney, alleging professional negligence on the part of the attorney concerning the manner in which he attempted to sell the plaintiff's business. The plaintiff also pled a cause of action for money had and received by the deceased attorney. In *Interholzinger*, we found this to be two separate causes of action, as the causes are based on two separate factual occurrences: the receipt and holding of money, and the performance of legal services.

Similarly, in *Ravenna Bank v. Custom Unlimited*, 223 Neb. 540, 391 N.W.2d 557 (1986), this court found a petition which alleged default on a promissory note by a partnership and enforcement of a guarantee of that debt by an individual partner to constitute two causes of action. Even though both causes were based on one debt, because a guarantee is a collateral undertaking by one to answer for the debt of another, the petition in fact described two transactions.

In contrast, in *P. R. Halligan Post 163 v. Schultz*, 212 Neb. 329, 322 N.W.2d 657 (1982), the plaintiff filed suit against the parents of a 13-year-old boy to recover damages to a building caused by a fire set by the child. The petition alleged two purported causes of action: parental liability for the willful and intentional acts of a child, and negligent supervision of the child. This court held dismissal of the first "cause of action" was not a final, appealable order, as both "causes of action" were instead merely different theories of recovery arising out of the same factual circumstances involving the same parties.

The instant case is controlled by the *Interholzinger* and *Ravenna Bank* cases. Here, Tess alleges that in 1986, appellees negligently failed to either discover or disclose in a title commitment protective covenants affecting property he intended to purchase, and later in 1994, Lawyers Title failed to indemnify him pursuant to the terms of the title insurance policy. Tess does not allege one set of operative facts from which all damages flow. Instead, he has alleged the occurrence of two separate transactions. The operative facts regarding the negligence cause of action commenced on September 11, 1986, and concluded on or about the October 1 closing date (i.e., failure to discover or disclose protective covenants in title commitment). The operative facts regarding the contract cause of action commenced with the issuance of the title insurance policy on October 7 and continue until the time of trial (i.e., failure to indemnify insured for damage by reason of defect or unmarketability of title for use intended by Tess). As such, we conclude that Tess has pled two causes of action, not two theories of recovery. Accordingly, the Court of Appeals erred in determining that the district court order was not a final, appealable order with respect to the complete dismissal with prejudice of Tess' negligence cause of action against both appellees.

2. Summary Judgment

Having determined the jurisdictional issue, we proceed to the merits of the appeal. In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Larkin v. Ethicon, Inc.*, *ante* p. 169, 556 N.W.2d 44 (1996). The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Melick v. Schmidt*, *ante* p. 372, 557 N.W.2d 645 (1997).

In order to succeed in an action based on negligence, a plaintiff must establish the defendant's duty, a breach of that duty, proximate causation, and damages. *Hand v. Starr*, 250 Neb. 377, 550 N.W.2d 646 (1996).

(a) Duty of Title Insurance Company

At the outset, it should be noted that Tess' negligence claim is based upon alleged acts or omissions in the preparation of the "September 9" title insurance commitment and not upon any responsibility imposed on the title insurance company on account of its October 7, 1986, policy of insurance. The title insurance commitment, oftentimes referred to as a binder, is not a title policy. As in the instant case, it is often in the form of a preliminary report on the status of the title. As such, it is issued at the end of the title search process undertaken by the insurer. D. Barlow Burke, Jr., Law of Title Insurance § 15.2 (2d ed. 1993). In contrast, title insurance is a contract for indemnity under which the insurer is obligated to indemnify the insured against losses sustained in the event that a specific contingency, e.g., the discovery of a lien or encumbrance affecting title, occurs. See *Heyd v. Chicago Title Ins. Co.*, 218 Neb. 296, 354 N.W.2d 154 (1984).

In *Heyd v. Chicago Title Ins. Co.*, 218 Neb. at 303, 354 N.W.2d at 158-59, we held that

> a title insurance company which renders a title report and also issues a policy of title insurance has assumed two distinct duties. In rendering the title report the title insurance company serves as an abstracter of title and must list all matters of public record adversely affecting title to the real estate which is the subject of the title report. When a title insurance company fails to perform its duty to abstract title accurately, the title insurance company may be liable in tort for all damages proximately caused by such breach of duty. A title insurance company's responsibility for its tortious conduct is distinct from the insurance company's responsibility existing on account of its policy of insurance. Different duties and responsibilities imposed on the title insurance company, therefore, can be the basis for separate causes of action—one cause of action in tort and another in contract.

In the instant case, Tess claims that Dakota Title is liable for either failing to discover or failing to disclose in its title insurance commitment the existence of protective covenants when Dakota Title had actual knowledge of such protective

covenants. Tess claims that Lawyers Title is vicariously liable for Dakota Title's misrepresentation because Dakota Title was acting as Lawyers Title's agent.

This case presents the question whether a title company has a duty to report known, but as yet unrecorded, matters affecting title to the real estate in a preliminary title insurance commitment. A majority of other jurisdictions have accepted the theory that a title company should be liable in tort for a misrepresentation made in a preliminary commitment of title insurance. See, e.g., *Bank of California v. First American*, 826 P.2d 1126 (Alaska 1992); *Moore v. Title Ins. Co. of Minnesota*, 148 Ariz. 408, 714 P.2d 1303 (Ariz. App. 1985); *White v. Western Title Ins. Co.*, 40 Cal. 3d 870, 710 P.2d 309, 221 Cal. Rptr. 509 (1985); *Shada v. Title & Trust Co. of Fla.*, 457 So. 2d 553 (Fla. App. 1984); *Ford v. Guarantee Abstract & Title Co.*, 220 Kan. 244, 553 P.2d 254 (1976); *Malinak v. Safeco Title Ins. Co. of Idaho*, 203 Mont. 69, 661 P.2d 12 (1983). But see, e.g., *Brown's Tie & Lumber v. Chicago Title*, 115 Idaho 56, 764 P.2d 423 (1988); *Walker Rogge, Inc. v. Chelsea Title & Guar. Co.*, 116 N.J. 517, 562 A.2d 208 (1989) (title company owes no duty beyond that which is assumed in its title policy).

The cases which find tort liability generally stress that one function of the preliminary commitment is to give interested persons knowledge concerning the state of the title so that they may plan and structure transactions concerning the property. See *Ford v. Guarantee Abstract & Title Co., supra.* This is a function distinct from that of insurance, for a title policy may be issued without a preliminary commitment and without reporting what the state of the title is. *Bank of California v. First American, supra.*

We agree with the authorities which hold that there may be tort liability for misrepresentations made in preliminary commitments for title insurance. In our view, the same reasoning would impose a duty upon a title company to report to interested persons known, but as yet unrecorded, matters affecting title to the real estate in a preliminary title insurance commitment. Such preliminary title insurance commitments provide an essential service to prospective buyers and lenders in this state. They are told what transactions must take place before they can

receive clear title or an effective security. *Bank of California v. First American, supra.*

> Despite disclaimers, preliminary title reports are normally relied upon by insureds, escrow agents, and lenders with full knowledge, and sometimes with the encouragement, of the insurance company. If the insurer actually intended the list of title defects in the preliminary report to be used just to inform the potential insured of the proposed contract terms, the list could be presented in the policy at the time it is offered to the insured, as is the case with most other types of insurance policies. Instead, the title insurance company's preliminary report is issued prior to closing of the land contract—at the same stage in the transaction as is the abstract or attorney's opinion—and the company should know that it will likely be used in the same manner.

Joyce Dickey Palomar, *Title Insurance Companies' Liability for Failure to Search Title and Disclose Record Title*, 20 Creighton L. Rev. 455, 480-81 (1987). We therefore hold that title insurance companies and their agents are required to exercise the degree of skill and knowledge normally possessed by members of the profession in good standing in the locality concerning preliminary title information which is transmitted to their customers.

The above-stated duty is not that of a guarantor; instead, it is the duty to exercise reasonable care. See Restatement (Second) of Torts § 552 at 126-27 (1977), which provides in relevant part:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the

information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Appellees assert that our holding in *Heyd v. Chicago Title Ins. Co.*, 218 Neb. 296, 354 N.W.2d 154 (1984), was abrogated in 1985 when the Legislature passed the Abstracters Act, Neb. Rev. Stat. §§ 76-535 through 76-558 (Reissue 1990 & Cum. Supp. 1994), and defined those matters which constitute a "report of title." Section 76-537(9) provides that a "report of title" shall not include a title insurance commitment or policy. Appellees claim that since a title insurance commitment is neither an abstract of title nor a "report of title," an "abstracter's duty" can no longer arise from the issuance of a title insurance commitment. This argument is misplaced, as the duty announced herein is one of reasonable care under the circumstances and not an "abstracter's duty" as set forth in *Heyd*.

Further, appellees assert that because the commitment for title insurance accurately reflected all matters of public record as of its effective date, September 9, 1986, there could be no breach of duty.

This assertion, however, ignores Tess' claim that Dakota Title had *actual notice* of the protective covenants at issue when it conducted its title search for his title insurance commitment. Peabody, Dakota Title's vice president, notarized the protective covenants executed by Osborne and Rasmussen on the same day that an agent for Dakota Title with the initials "E.P." conducted the title search with respect to Tess' property. Further, the protective covenants are noted on all other title insurance commitments prepared for the buyers of the 10-acre parcels—except the commitment prepared for Tess' father-in-law and mother-in-law. These other title insurance commitments were prepared contemporaneously with Tess' title insurance commitment.

The evidence construed in a light most favorable to Tess reveals that appellees were on actual notice of something outside the record which clearly affected title, as Dakota Title had actual knowledge of the protective covenants at the time it pre-

pared the preliminary commitment for title insurance. Here, an issue of material fact existed regarding the knowledge that appellees possessed at the time they prepared the preliminary title commitment and whether appellees' failure to note the protective covenants in the preliminary commitment for title insurance breached their duty as a title insurer rendering a preliminary title commitment. As such, it would be erroneous for the district court to grant appellees' motion for summary judgment, unless the court properly concluded as a matter of law that appellees' alleged breach of duty was not a proximate cause of Tess' damages.

(b) Proximate Cause

Appellees assert and the district court found that Tess did not rely on the title insurance commitment in deciding to proceed with the transaction. Instead, Tess relied on Osborne's assurances that the protective covenants referenced in the warranty deed only applied to the 10-acre parcels. Thus, appellees' negligence, if any, did not cause Tess' damages.

The issue of proximate cause, in the face of *conflicting evidence*, is ordinarily a question for the trier of fact. *World Radio Labs. v. Coopers & Lybrand, ante* p. 261, 557 N.W.2d 1 (1996). The evidence regarding causation is not in conflict. The president of Dakota Title, by way of affidavit, asserted that a copy of the title insurance commitment was sent to Osborne and was not sent to Tess. By deposition, Tess testified that he did not recall receiving or seeing a title insurance commitment prior to, or at the time of, closing on October 1, 1986. There is simply no evidence in the record that Tess saw the title insurance commitment, much less relied upon any representations made in the commitment.

In *Lawrence v. Chicago Title Ins. Co.*, 192 Cal. App. 3d 70, 77, 237 Cal. Rptr. 264, 268 (1987), the court aptly stated: "Even if the preliminary report constitutes a representation of title upon which the recipient is entitled to rely, a claim of negligence must be predicated upon the insured's *actual reliance* on the report." (Emphasis supplied.) See, also, *Muhlenkort v. Union County Land Trust*, 530 N.W.2d 658 (S.D. 1995). We agree. The evidence establishes, as a matter of law, that Tess did

not see the title insurance commitment prior to closing and did not rely upon any representations in the commitment in deciding to proceed to closing in this matter. As such, we determine that any alleged acts of appellees in failing to note the protective covenants in the preliminary commitment for title insurance are not the proximate cause of any damages to Tess.

Tess also claims that the district court erred in failing to grant a continuance to allow Tess an opportunity to elicit expert testimony with regard to the issue of appellees' duty and breach thereof. In light of our determination regarding proximate cause, it is unnecessary to consider this assignment of error.

V. CONCLUSION

The judgment of the Court of Appeals is thus reversed, and the cause remanded thereto with the direction that it affirm the May 4, 1995, judgment of the district court with regard to the negligence cause of action. As noted in part I, Tess' cause of action for breach of contract with respect to Lawyers Title is pending in the district court.

REVERSED AND REMANDED WITH DIRECTION.

LANPHIER, J., concurring.

I concur. The majority states, on the issue of proximate causation, that Tess did not rely upon any representations made in the title commitment. I agree that Tess did not see the title insurance commitment.

Tess *did* however rely on the statements of his agent, Osborne, regarding the title insurance commitment. Osborne was sent a copy of the title insurance commitment. Osborne also persuaded Tess that he did not need to hire an attorney and that the covenants did not apply to his 20-acre parcel, but, instead, pertained only to the 10-acre parcels.

Further, Osborne acted as a dual agent by functioning as seller and trustee of the property as well as Tess' lender and real estate agent. Under Nebraska law, notice or knowledge of a dual agent is imputed to and binds the principal to whom such notice or knowledge would be imputed if the agent represented him alone. See *Thomas v. Jarecki*, 109 Neb. 549, 191 N.W. 669 (1922). Thus, Osborne's notice and knowledge of the title insurance commitment is imputed to Tess. Tess' reliance on

Osborne's statements establishes actual reliance on the document which supports Tess' claim of negligence.

However, Neb. Rev. Stat. § 76-537(9) (Cum. Supp. 1994) provides that a report of title does not include a title insurance commitment; therefore, no abstracter's duty arises. In the absence of a duty, there is no negligence.

CAPORALE, J., joins in this concurrence.

STATE OF NEBRASKA EX REL. RONALD SHEPHERD, APPELLEE, V. NEBRASKA EQUAL OPPORTUNITY COMMISSION ET AL., APPELLANTS.

STATE OF NEBRASKA EX REL. RANDALL CHAPP, APPELLEE, V. NEBRASKA EQUAL OPPORTUNITY COMMISSION ET AL., APPELLANTS.

557 N.W.2d 684

Filed January 17, 1997. Nos. S-95-984, S-95-985.

1. **Constitutional Law: Statutes: Proof.** The party claiming a statute is unconstitutional has the burden to show and clearly demonstrate that the questioned statute is unconstitutional.
2. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
3. **Constitutional Law: Statutes.** Even when a law is constitutionally suspect, a court will attempt to interpret it in a manner consistent with the Constitution.
4. **Moot Question.** A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation.
5. **Moot Question: Appeal and Error.** The public interest exception to the rule precluding consideration of issues on appeal due to mootness requires a consideration of the public or private nature of the question presented, desirability of an authoritative adjudication for further guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.
6. **Constitutional Law: Appeal and Error.** Except in the most unusual cases, for a question of constitutionality to be considered on appeal, it must have been properly raised in the trial court. If not so raised, it will be considered to have been waived.
7. **Constitutional Law: Mandamus.** A defendant must have an opportunity to raise nonfrivolous, constitutional challenges to the issuance of a peremptory writ of mandamus.
8. **Constitutional Law.** Article II, § 1, of the Nebraska Constitution prohibits one branch of government from encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives.

9. **Public Officers and Employees.** The power to remove an employee in the executive branch of state government is an executive duty and prerogative.
10. ____. The Public Counsel (also known as the Ombudsman) is an officer of the legislative branch of state government.
11. **Statutes: Words and Phrases.** As a general rule, in the construction of statutes, the word "shall" is considered mandatory and inconsistent with the idea of discretion.
12. **Statutes: Intent: Words and Phrases.** While the word "shall" may render a particular provision of a statute as mandatory in character, when the spirit and purpose of the legislation require that the word "shall" be construed as permissive rather than mandatory, such will be done.
13. **Statutes: Intent.** A word or phrase repeated in a statute will bear the same meaning throughout the statute, unless a different intention appears.
14. **Constitutional Law: Jurisdiction.** It is an imperative duty of the judicial department of government to protect its jurisdiction at the boundaries of power fixed by the Constitution.
15. **Constitutional Law: Legislature.** In accordance with constitutional provisions separating the departments of government, the Legislature cannot interfere with, or exercise any powers properly belonging to, the executive department.
16. ____: ____. The Legislature can neither enforce the laws which it has the power to make, nor, in the usual instance, appoint the agents charged with the duty of such enforcement.

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

Don Stenberg, Attorney General, Alfonza Whitaker, and Charles Lowe for appellants.

Dalton W. Tietjen, of Tietjen, Simon & Boyle, for appellees.

WHITE, C.J., CAPORALE, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ., and REAGAN, D.J.

CONNOLLY, J.

This consolidated appeal from the district court for Lancaster County arises out of the district court's issuance of peremptory writs of mandamus that ordered the Nebraska Equal Opportunity Commission (NEOC) to return Ronald Shepherd and Randall Chapp (appellees) to their previously held positions of employment with the NEOC. In this appeal, we are asked to determine the constitutionality of Neb. Rev. Stat. §§ 81-2706 and 81-2707(1) (Reissue 1994) of the State Government Effectiveness Act.

We conclude that § 81-2707(1) is unconstitutional because it permits an officer of the legislative branch of state government to encroach upon the prerogatives and duties of the executive branch in violation of the separation of powers clause of article II, § 1, of the Nebraska Constitution. As a result, we reverse the district court's orders issuing peremptory writs of mandamus, without reaching the constitutionality of § 81-2706.

I. BACKGROUND

In March 1995, the appellees were fired from their employment as full-time investigators with the NEOC pursuant to disciplinary charges brought against them. As a result, they filed charges with the Public Counsel (Ombudsman), claiming that they had been wrongfully fired by the NEOC in retaliation for having cooperated with a legislative investigation of possible NEOC wrongdoing. The appellees assert that their cooperation in the investigation constituted protected whistleblower activity under the State Government Effectiveness Act (Whistleblower Act), Neb. Rev. Stat. §§ 81-2701 through 81-2710 (Reissue 1994 & Cum. Supp. 1996).

The Whistleblower Act was enacted by the Legislature in order to "encourage public officials and employees to disclose information concerning possible violations of law and fiscal waste or mismanagement in state government to elected state officials or the [Ombudsman] and to prohibit reprisals for such disclosures by state employees." § 81-2702.

As required by § 81-2706(1) of the Whistleblower Act, the Ombudsman conducted an investigation and found there existed reasonable grounds to believe that the appellees were fired for engaging in protected whistleblower activity. The Ombudsman, as required by § 81-2706(4), then issued his findings to the State Personnel Board. The State Personnel Board, without any further proceedings, then ordered the NEOC to reverse the firings and to reinstate the appellees to their previously held positions of employment until an official hearing could be held pursuant to § 81-2707(1).

The NEOC refused to comply with these orders. As a result, the appellees commenced this action in the district court, which issued peremptory writs of mandamus ordering the NEOC to

reinstate the appellees to their positions. The NEOC appeals, and the two appeals have been consolidated for purposes of briefing and argument.

II. ASSIGNMENTS OF ERROR

Summarized and rephrased, the NEOC alleges the district court erred in entering peremptory writs of mandamus because §§ 81-2706 and 81-2707(1) of the Whistleblower Act are unconstitutional, in violation of the separation of powers clause of Neb. Const. art. II, § 1.

We note that §§ 81-2706 and 81-2707 were amended effective September 9, 1995. See §§ 81-2706 and 81-2707 (Cum. Supp. 1996). The amended versions did not go into effect until after the Ombudsman and the State Personnel Board acted under, and the district court applied, §§ 81-2706 and 81-2707 (Reissue 1994) in the instant case. The amendments do not affect any issue pertinent to these appeals. Thus, these appeals will be decided under §§ 81-2706 and 81-2707 (Reissue 1994).

III. STANDARD OF REVIEW

The party claiming a statute is unconstitutional has the burden to show and clearly demonstrate that the questioned statute is unconstitutional. *Callan v. Balka*, 248 Neb. 469, 536 N.W.2d 47 (1995).

A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Chrysler Motors Corp. v. Lee Janssen Motor Co.*, 248 Neb. 322, 534 N.W.2d 309 (1995); *Pick v. Nelson*, 247 Neb. 487, 528 N.W.2d 309 (1995).

Even when a law is constitutionally suspect, a court will attempt to interpret it in a manner consistent with the Constitution. *CenTra, Inc. v. Chandler Ins. Co.*, 248 Neb. 844, 540 N.W.2d 318 (1995); *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994).

IV. ANALYSIS

1. Whether Case Is Moot

As a result of a grievance procedure contained in the state's union contract with the Nebraska Association of Public

Employees/AFSCME, an arbitrator has ordered that the appellees be reinstated to employment with the NEOC. Thus, a preliminary issue presented is whether the arbitration order rendered the appeal before this court moot.

A case becomes moot when the issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation. *Duggan v. Beermann*, 245 Neb. 907, 515 N.W.2d 788 (1994). The public interest exception to the rule precluding consideration of issues on appeal due to mootness requires a consideration of the public or private nature of the question presented, desirability of an authoritative adjudication for further guidance of public officials, and the likelihood of future recurrence of the same or a similar problem. *Bamford v. Upper Republican Nat. Resources Dist.*, 245 Neb. 299, 512 N.W.2d 642 (1994).

In the instant appeal, the State continues to have a legally cognizable interest in the constitutionality of the Whistleblower Act despite the arbitration order. Furthermore, there is a public desire for an authoritative adjudication to guide public officials (Ombudsman, personnel board) in the performance of their duties. Moreover, there is a likelihood that this same constitutional problem will reoccur in the future yet evade review if we find the issue to be moot. As a result, we will proceed with the merits of this appeal.

2. Whether Constitutionality of Statutes Was Properly Raised

Before reaching the NEOC's separation of powers argument, we must first address the appellees' claim that the NEOC did not properly raise the constitutional issue at the district court level. Except in the "most unusual cases," for a question of constitutionality to be considered on appeal, it must have been properly raised in the trial court. If not so raised, it will be considered to have been waived. See, *State v. Huebner*, 245 Neb. 341, 513 N.W.2d 284 (1994); *In re Estate of Snyder*, 217 Neb. 356, 348 N.W.2d 136 (1984).

The NEOC does not argue that it raised the separation of powers issue in the district court. However, the NEOC argues that it did not have an opportunity to raise the issue in the dis-

trict court because of the nature of peremptory writs of mandamus. A discussion of the types of mandamus writs will be helpful to understand this argument.

Two types of writs of mandamus are recognized and defined: (1) alternative writs and (2) peremptory writs. Neb. Rev. Stat. § 25-2158 (Reissue 1995). The basic difference between these two types of writs is that alternative writs require the defendant be given an opportunity to "show cause why he [or she] has not done as commanded," whereas peremptory writs are generally issued in an ex parte fashion and do not require notice or that the defendant be given an opportunity to "show cause why he [or she] has not done as commanded." § 25-2158. See Neb. Rev. Stat. § 25-2160 (Reissue 1995). "When the right to require the performance of the act is clear and it is apparent that no valid excuse can be given for not performing it, a peremptory mandamus may be allowed in the first instance. In all other cases, the alternative writ must be first issued . . . ." Neb. Rev. Stat. § 25-2159 (Reissue 1995).

In the instant case, the district court, as permitted by statute, issued the peremptory writs without first issuing alternative writs. Furthermore, the court issued the peremptory writs in an ex parte fashion without providing the NEOC notice or an opportunity to show cause why the writs should not be issued. Moreover, no other pleadings or written allegations are allowed by law. See Neb. Rev. Stat. § 25-2164 (Reissue 1995). Thus, the NEOC correctly asserts that it did not have an opportunity to raise the separation of powers argument at the district court level.

We determine that a defendant must be given an opportunity to raise nonfrivolous, constitutional challenges to the issuance of peremptory writs of mandamus. Our standard when reviewing the alleged unconstitutionality of a statute is that it presents a question of law that must be determined independently from the conclusion reached by the trial court. *Jones v. State*, 248 Neb. 158, 532 N.W.2d 636 (1995). As a result, we conclude that this case need not be remanded to the district court, because it is one of those "most unusual cases" in which a question of constitutionality has not been waived and will be considered on

appeal although it was not raised in the district court. See, *In re Estate of Snyder, supra*; *State v. Huebner, supra*.

3. Whether Statutes Are Violative of Separation of Powers Clause of Nebraska Constitution

(a) Overview of Whistleblower Act

The NEOC asserts that § 81-2707(1) of the Whistleblower Act is unconstitutional because it permits an officer of the legislative branch of state government to encroach upon the prerogatives and duties of the executive branch, in violation of the separation of powers clause of Neb. Const. art. II, § 1.

Section 81-2705 sets forth the conduct that is prohibited under the Whistleblower Act. That section states in pertinent part that any person who has authority to take or effect personnel action shall not, with respect to such authority, take such personnel action against an employee because of the employee's disclosure of information, submission of allegations of wrongdoing, or providing of information or testimony to the Ombudsman or other official. The term "personnel action" is defined broadly in § 81-2703(4) to encompass virtually any action in the workplace which might adversely affect the employee.

Sections 81-2706 and 81-2707(1) are challenged by the NEOC. Section 81-2706(1) states that "[t]he [Ombudsman] shall receive any allegation of a violation of section 81-2705 and investigate to determine whether there are reasonable grounds to believe that a violation has occurred or is about to occur." Section 81-2706(4) then goes on to provide in pertinent part that if the Ombudsman finds there are reasonable grounds to believe that a violation of § 81-2705 has occurred, he or she shall transmit his or her findings in writing to the Governor and to the State Personnel Board. Finally, § 81-2707(1) states in pertinent part:

> Upon receiving the [Ombudsman's] finding that there is reason to believe a violation of section 81-2705 has occurred or is about to occur, the State Personnel Board . . . *shall*, without further proceedings, stay or reverse the personnel action until a hearing can be held to determine

> if there is reason to believe that a violation of section 81-2705 is contemplated or has occurred. Such board . . . shall, at the earliest possible date, hold a hearing to determine whether a violation has occurred or is about to occur.

(Emphasis supplied.)

(b) Whether Removal of Executive Employees Is Duty and Prerogative of Executive Branch of State Government

The NEOC asserts that § 81-2707(1) is violative of Neb. Const. art. II, § 1, which provides:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise *any* power properly belonging to either of the others, except as hereinafter expressly directed or permitted.

(Emphasis supplied.)

In other words, the Nebraska Constitution prohibits one branch of government from encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives. *Calabro v. City of Omaha*, 247 Neb. 955, 531 N.W.2d 541 (1995); *Clemens v. Harvey*, 247 Neb. 77, 525 N.W.2d 185 (1994). This aspect of the separation of powers clause serves as the beam from which our system of checks and balances is suspended. *State ex rel. Spire v. Conway*, 238 Neb. 766, 472 N.W.2d 403 (1991).

Article IV, § 1, of the Nebraska Constitution states in pertinent part:

> The heads of all executive departments established by law, other than those to be elected as provided herein, shall be appointed by the Governor, with the consent of a majority of all members elected to the Legislature, but officers so appointed may be removed by the Governor. Subject to the provisions of this Constitution, the heads of the various executive or civil departments shall have power to appoint and remove all subordinate employees in their respective departments.

Article IV, § 10, of the Nebraska Constitution states in pertinent part:

> The Governor shall have power to remove, for cause and after a public hearing, any person whom he may appoint for a term except officers provided for in Article V of the Constitution . . . . The Governor shall have power to remove any other person whom he appoints at any time and for any reason.

In *State ex rel. Beck v. Young*, 154 Neb. 588, 591, 48 N.W.2d 677, 679 (1951), this court held:

> Except as limited by the Constitution itself the supreme executive power is to be exercised by the Governor and, under the division of powers devised by the Constitution, neither the Legislature nor the courts may exercise the powers thus conferred upon the executive branch. *The power to remove an officer or employee in the executive branch of the government is an executive function.*

(Emphasis supplied.)

The *Beck* court then went on to restate that "[t]he power of appointment and removal is in the Governor . . . and the legislative or judicial branches may not properly trench upon the executive power thus granted." *Id.* at 594, 48 N.W.2d at 681 (citing *Myers v. United States*, 272 U.S. 52, 47 S. Ct. 21, 71 L. Ed. 160 (1926)). Thus, it is clear that the power to remove an employee in the executive branch of state government is an executive duty and prerogative.

(c) Whether Ombudsman Is Officer of Legislative Branch of State Government

The NEOC asserts that § 81-2707(1) calls for an officer of the Legislature to encroach upon the executive branch's duty and prerogative to remove executive employees. The crux of the NEOC's separation of powers argument is premised on the claim that the Ombudsman is an officer of the legislative branch of state government. This claim is not disputed by the appellees and is supported by state statutory law.

The Ombudsman is nominated and appointed, his or her salary is set, and he or she may be removed, by the Legislature. See Neb. Rev. Stat. §§ 81-8,241 and 81-8,243 (Reissue 1994). Furthermore, the Ombudsman reports to the Legislature and exercises the authority and performs the duties provided by the

Legislature. See § 81-8,241; Neb. Rev. Stat. § 81-8,251 (Reissue 1994). As such, we conclude that the Ombudsman is an officer of the legislative branch of state government.

(d) Whether "Shall" as Used in § 81-2707(1) Should Be Construed as Mandatory or Discretionary

The NEOC argues that encroachment occurs because § 81-2707(1) mandates, through the use of the word "shall," that the State Personnel Board either temporarily stay or reverse the personnel action taken against an employee based upon the Ombudsman's finding of reasonable grounds to believe that a violation of the Whistleblower Act has occurred. Conversely, the appellees argue that the word "shall" as used in § 81-2707(1) should not be construed as mandatory and, thus, that that subsection does not call for encroachment upon the executive branch's duties and prerogatives.

(i) General Rule That "Shall" Considered Mandatory

Neb. Rev. Stat. § 49-802 (Reissue 1993) states in pertinent part that

> [u]nless such construction would be inconsistent with the manifest intent of the Legislature, rules for construction of the statutes of Nebraska hereafter enacted shall be as follows:
>
> (1) When the word may appears, permissive or discretionary action is presumed. When the word shall appears, mandatory or ministerial action is presumed.

See, also, *Bank of Gering v. Glover*, 192 Neb. 575, 223 N.W.2d 56 (1974); *Anderson v. Carlson*, 171 Neb. 741, 107 N.W.2d 535 (1961).

In other words, the general rule is that in the construction of statutes, the word "shall" is considered mandatory and inconsistent with the idea of discretion. *Payne v. Nebraska Dept. of Corr. Servs.*, 249 Neb. 150, 542 N.W.2d 694 (1996). It is particularly so considered when the statute is addressed to public officials. *State ex rel. Smith v. Nebraska Liquor Control Commission*, 152 Neb. 676, 42 N.W.2d 297 (1950); *Trobough v. State*, 120 Neb. 453, 233 N.W. 452 (1930).

(ii) Spirit and Purpose of Whistleblower Act Do Not Require "Shall" To Be Construed as Permissive Rather Than Mandatory

While the word "shall" may render a particular provision of a statute as mandatory in character, when the spirit and purpose of the legislation require that the word "shall" be construed as permissive rather than mandatory, such will be done. *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994).

It is clear that the spirit and purpose of the Whistleblower Act were to ensure that an allegedly aggrieved state employee could bring his or her complaint to the Ombudsman and, if the Ombudsman finds reasonable grounds to believe the complaint has merit, that the employee "shall" receive an immediate stay or reversal from the personnel action taken against him or her and a prompt evidentiary hearing. However, if the State Personnel Board is free to disregard the Ombudsman's reasonable-grounds finding and to not order an immediate stay or reversal and an evidentiary hearing, then the legislative intent has been undermined.

A further indication that the Legislature intended the word "shall" to be mandatory is the additional language in § 81-2707(1) which provides:

> Upon receiving the [Ombudsman's] finding that there is reason to believe a violation of section 81-2705 has occurred or is about to occur, the State Personnel Board . . . *shall*, without further proceedings, stay or reverse the personnel action until a hearing can be held to determine if there is reason to believe that a violation of section 81-2705 is contemplated or has occurred.

(Emphasis supplied.)

In other words, the statute proscribes the State Personnel Board from conducting further proceedings before it issues the order of stay or reversal. If the word "shall" was merely intended to be a recommendation to the State Personnel Board, then the board would be unable to make a rational, independent decision, since it is proscribed from hearing argument and receiving evidence before making its decision. Thus, by proscribing further proceedings, the Legislature has made clear its intent to require the State Personnel Board to issue orders of

stay or reversal based on nothing more than the Ombudsman's finding of reasonable grounds.

Furthermore, the word "shall" appears 36 times in the Whistleblower Act. A word or phrase repeated in a statute will bear the same meaning throughout the statute, unless a different intention appears. *Anderson v. Carlson, supra.* If the word "shall" in § 81-2707(1) means "may," then what meaning are we to give "shall" the other 35 times it appears in the Whistleblower Act? Moreover, through its use of the word "may" nine times in close proximity to the word "shall," it is clear that the Legislature understands the distinction between these words and intended each to mean what it says.

Thus, upon reviewing the statutory language and context of the Whistleblower Act, we are not persuaded that the spirit and purpose of the legislation require us to depart from the general rule and construe the word "shall" in § 81-2707(1) as permissive rather than mandatory.

(iii) Case Distinguishable From Those in Which This Court Has Construed "Shall" as Permissive Rather Than Mandatory

Only three times has this court construed the word "shall" to be permissive in order to save a statute from constitutional infirmity. In *Nebraska Loan & Building Ass'n v. Perkins*, 61 Neb. 254, 85 N.W. 67 (1901), this court construed as permissive a portion of a legislative act of 1873 which stated in pertinent part that although the dues, fines, premiums, and other charges paid by members of a building and loan association may aggregate a greater amount than the legal rate of interest on loans made to them, such payments shall not be construed to make such transactions usurious. The court reasoned:

> It is not within the province of the legislature to interpret the law, or to apply it to particular cases, that being peculiarly the duty of the courts. But we do not think that the legislature, in reciting that the contracts of these associations should not be construed to be usurious, intended to usurp judicial functions. While the wording of the statute would bear the construction that it was a direction to the courts, yet the substance of the legislation must be

> regarded, rather than the form, and for that reason we are of opinion that it was rather the intention of the legislature to establish a rule of interest relative to this particular class of contracts; that the act is declaratory, the intent thereby being to relieve the contracts of these institutions from the operation of the usury laws, rather than an attempt to arrogate to the legislature judicial functions.

Id. at 261, 85 N.W. at 69.

In *State, ex rel. Sorensen, v. State Bank of Minatare*, 123 Neb. 109, 242 N.W. 278 (1932), we held that a legislative act providing that the secretary of the department of trade and commerce shall be the sole receiver of all insolvent state banks amounts to no more, in a judicial proceeding properly pending in a court of equity for the liquidation of a bank, than a legislative recommendation to the judiciary to appoint him, as otherwise the enactment would be an unconstitutional encroachment on judicial power. The court reasoned:

> French legislators once imprisoned judges for failure to comply with the legislative will. Montesquieu suggested a government with legislative, executive and judicial departments, each independent of the other. The framers of the American Constitution and the people of Nebraska adopted that plan. It has been regarded by statesmen and philosophers as an outstanding advancement in the science of government. Throughout the judicial history of the present system the courts have scrupulously respected the prerogatives of the legislative and executive departments and extended to them the comity due to governmental divisions of equal rank, *but courtesy does not extend to the surrendering of judicial power. It is an imperative duty of the judicial department of government to protect its jurisdiction at the boundaries of power fixed by the Constitution.*

(Emphasis supplied.) *Id.* at 114, 242 N.W. at 280-81.

In *State ex rel. Grape v. Zach*, 247 Neb. 29, 37, 524 N.W.2d 788, 797 (1994), this court was faced with construing a statute which read, " 'If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed

jurisdiction it shall stay the proceeding and communicate with the court in which the other proceeding is pending . . . .' "

The court held that the word "shall" was directory, stating that "if the portions of [the statutes] at issue merely recommend that a judge engage in certain communications rather than command that the judge do so, that is, if the provisions are directory rather than mandatory, they will survive constitutional scrutiny." *Id.* at 42, 524 N.W.2d at 799-800. The court reasoned:

> The due process and ethical problems which arise when judges turn into inquisitors by undertaking to personally investigate the facts in matters they must adjudicate illustrate one of the reasons *the distribution of powers clause contained in Neb. Const. art. II, § 1, prohibits the legislative department of government from telling the judicial department of government how to conduct judicial business.*

(Emphasis supplied.) *Id.* at 41-42, 524 N.W.2d at 799 (citing *State, ex rel. Sorensen, v. State Bank of Minatare, supra*).

Thus, this court has construed the word "shall" to be directory, in order to save the constitutionality of a statute only in cases where the Legislature has attempted to encroach upon the judiciary's duties and prerogatives by telling the judiciary how to conduct its judicial business.

In *Anderson v. Carlson*, 171 Neb. 741, 107 N.W.2d 535 (1961), this court held that a statute permitting private taxation without affording property owners the opportunity to be heard by a competent tribunal upon the question of whether the property has been arbitrarily or unjustly included within the boundaries of the proposed district is an unconstitutional delegation of legislative power. In that case the court stated:

> In order to suggest a question on construction, appellants urge that the word "shall" be interpreted as permissive in order to uphold a legislative act. With this we do not agree. It is not the function of the courts to legislate. There may be occasions where it is apparent the word "shall" may have been used by inadvertence, and the rest of the act so indicates, in which case appellants' argument would have merit. However, that is not the case here. . . .
>
> . . . .

> . . . To so hold would be judicial legislation in which we do not intend to indulge.

Id. at 745-46, 107 N.W.2d at 538-39.

The instant case is distinguishable from *Nebraska Loan & Building Ass'n v. Perkins*, 61 Neb. 254, 85 N.W. 67 (1901); *State, ex rel. Sorensen, v. State Bank of Minatare*, 123 Neb. 109, 242 N.W. 278 (1932); and *State ex rel. Grape v. Zach, supra*, in that in the instant case the Legislature's encroachment is upon the executive branch, not the judiciary. The judiciary, not the executive branch, serves as a check upon the constitutionality of legislative enactments. As such, the judiciary is permitted to construe legislative enactments in a manner that eliminates legislative attempts to usurp judicial power. As stated, "It is an imperative duty of the judicial department of government to protect its jurisdiction at the boundaries of power fixed by the Constitution." *State, ex rel. Sorensen, v. State Bank of Minatare*, 123 Neb. at 114, 242 N.W. at 281. See, also, *State ex rel. Grape v. Zach, supra.*

For the foregoing reasons, we refuse to give the word "shall," as it appears in § 81-2707(1), a permissive construction and instead apply the general rule that the word "shall" is mandatory and inconsistent with the idea of discretion.

(e) Whether § 81-2707(1) Calls for Legislative Branch to Encroach Upon Executive Branch's Duties and Prerogatives

The appellees assert that § 81-2707(1) is not violative of the separation of powers clause, because the State Personnel Board's actions are not taken because of any order or directive of the Ombudsman, but instead are taken pursuant to the directive of § 81-2707(1). However, this argument places form over substance and is without merit, because it is the Legislature that empowers the Ombudsman with the authority to force a stay or reversal of the firing decision in the first place.

The appellees further assert that even if the word "shall" in § 81-2707(1) is construed as mandatory, that section does not impermissibly permit the legislative branch to encroach upon the executive branch's duties and prerogatives. They argue that although the Ombudsman's findings must temporarily be fol-

lowed, ultimately a hearing before the State Personnel Board is held, and thus, the final decisionmaking power as to whether or not to reinstate the employee is in the hands of the State Personnel Board, which is part of the executive branch of state government. See Neb. Rev. Stat. §§ 81-1318, 81-1318.01, and 81-1316 (Reissue 1994). Thus, it is claimed that the Ombudsman exercises no control over, but merely has a permissible effect upon, the State Personnel Board because once the Ombudsman submits his or her findings, his or her involvement in the matter has ended.

The appellees are correct in their assertion that under the Whistleblower Act the ultimate authority to determine whether an executive employee was fired in violation of the Act is vested in the State Personnel Board. However, we determine that § 81-2707(1)'s requirement that the Ombudsman's finding be followed, albeit temporarily, impermissibly calls for the legislative branch to encroach upon the executive branch's duties and prerogatives. See, Neb. Const. art. IV, § 1; Neb. Const. art. IV, § 10; *State ex rel. Beck v. Young*, 154 Neb. 588, 48 N.W.2d 677 (1951).

"In accordance with constitutional provisions separating the departments of government, the legislature cannot interfere with, or exercise *any* powers properly belonging to, the executive department." (Emphasis supplied.) 16 C.J.S. *Constitutional Law* § 134 at 434 (1984). See, also, *State ex rel. Meyer v. State Board of Equalization & Assessment*, 185 Neb. 490, 176 N.W.2d 920 (1970); *State ex rel. Beck v. Young, supra.* "Thus, the legislature cannot relieve or preclude any executive officer from the performance of a duty enjoined on him by the constitution . . . ." 16 C.J.S., *supra*, at 434. "The legislature can neither enforce the laws which it has the power to make, nor, in the usual instance, appoint the agents charged with the duty of such enforcement." 16 Am. Jur. 2d *Constitutional Law* § 323 at 858 (1979). "The two departments should be kept as distinct and independent as possible." *Id.* at 857.

In short, § 81-2707(1) places the legislative branch in a position to dictate to the executive branch how the latter will treat certain executive branch employees until an evidentiary hearing is held. Thus, the Legislature not only is empowered to declare

what the law is, but, through § 81-2707(1), attempts to reserve to itself the power and authority to administer and enforce the law as well. This we determine is impermissible under the Nebraska Constitution.

V. CONCLUSION

We conclude that § 81-2707(1) of the State Government Effectiveness Act is unconstitutional, in violation of the separation of powers clause of Neb. Const. art. II, § 1. As a result, we reverse the district court's orders issuing peremptory writs of mandamus.

REVERSED.

FAHRNBRUCH, J., not participating.

WRIGHT, J., dissenting.

I dissent because I cannot conclude that Neb. Rev. Stat. § 81-2707(1) (Reissue 1994) is unconstitutional. In my opinion, § 81-2707(1) does not violate the separation of powers clause of Neb. Const. art. II, § 1, which prohibits one branch of government from exercising the duties and powers "properly belonging to either of the others." Rather, it is my opinion that § 81-2707(1) merely tells the State Personnel Board (executive branch) how to proceed in order to effectively carry out a law properly enacted by the Legislature. Such procedural constraints imposed by the legislative branch do not intrude upon the central prerogatives of the executive branch such that the Legislature can be said to be exercising a "power properly belonging" to the executive branch. See *Loving v. U.S.*, ___ U.S. ___, 116 S. Ct. 1737, 135 L. Ed. 2d 36 (1996).

The legislative power is set forth in article III of the Nebraska Constitution. The executive power is set forth in article IV. The judicial power is set forth in article V. The personnel board is a body created specifically by legislative enactment. See Neb. Rev. Stat. § 81-1318 (Reissue 1994). The manner in which the personnel board is to operate is not controlled by the Public Counsel (also known as the Ombudsman), nor is the power of the personnel board exercised by the Public Counsel.

The Legislature enacted the State Government Effectiveness Act, Neb. Rev. Stat. §§ 81-2701 through 81-2710 (Reissue 1994 & Cum. Supp. 1996), as a means to ensure that the government

operates in accordance with the law, by protecting public employees who disclose possible illegalities or improprieties. See § 81-2702. The act requires that the Public Counsel (legislative branch) first make an investigation into charges of any possible violation. The Public Counsel then makes a determination as to whether reasonable grounds exist to believe the act has been violated. See § 81-2706.

If the Public Counsel finds reasonable grounds to believe a violation has occurred, a report is forwarded to the personnel board (executive branch), which is then required to hold a hearing to determine whether there has been a statutory violation. Until the personnel board carries out the hearing, however, it is required to stay the action. The personnel board's determination is subject to review by the district court (judicial branch). See § 81-2707(3).

In my opinion, the required stay is basic procedural due process, which the Legislature may establish in order to effectively carry out a law that was within the Legislature's power to enact to protect the public welfare.

It is obvious that the Nebraska Constitution, like the federal Constitution, " 'contemplates that practice will integrate the dispersed powers into a workable government. . . .' " *Loving*, 116 S. Ct. at 1743 (quoting *Youngstown Co. v. Sawyer*, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952) (Jackson, J., concurring)). See, also, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995) (state court decisions in period immediately after ratification of federal Constitution drew little distinction between federal and state Constitutions in their understanding of separation of powers). Separation of powers " 'd[oes] not mean that these [three] departments ought to have no partial agency in, or no controul [sic] over the acts of each other.' " *Loving*, 116 S. Ct. at 1743 (quoting *Mistretta v. United States*, 488 U.S. 361, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989)). A " 'hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively.' " *Loving*, 116 S. Ct. at 1743 (quoting *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976)).

In my opinion, § 81-2707(1) does not create a legislative exercise of power properly belonging to either the executive or the judicial branch. Instead, § 81-2707(1) is merely an example of the necessary integration of those powers.

LANPHIER, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V.
RICKY G. HINGST, APPELLANT.
557 N.W.2d 681

Filed January 17, 1997. No. S-95-1120.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the decision made by the court below.
2. **Criminal Law: Trial: Juries: Evidence: Appeal and Error.** In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
3. **Verdicts: Juries: Evidence: Appeal and Error.** An error is harmless when the improper admission of evidence did not materially influence the jury to reach a verdict adverse to the substantial rights of the defendant.
4. **Convictions: Evidence: Appeal and Error.** If there is sufficient evidence to support a conviction, the cause may be remanded to the district court for further proceedings; if not, the cause must be dismissed.

Petition for further review from the Nebraska Court of Appeals, HANNON, SIEVERS, and MUES, Judges, on appeal thereto from the District Court for Pierce County, RICHARD P. GARDEN, Judge, on appeal thereto from the County Court for Pierce County, RICHARD W. KREPELA, Judge. Judgment of Court of Appeals affirmed.

Dennis W. Morland, of Johnson & Morland, P.C., for appellant.

Don Stenberg, Attorney General, and Jay C. Hinsley for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, WRIGHT, CONNOLLY, and GERRARD, JJ., and CASSEL, D.J.

PER CURIAM.

Ricky G. Hingst was convicted of driving under the influence of alcoholic liquor, second offense. The Nebraska Court of Appeals reversed the jury verdict and remanded the cause for a new trial, concluding that the district court committed plain error in failing to exclude the chemical test results because the postarrest advisement form failed to conform to this court's decision in *Smith v. State*, 248 Neb. 360, 535 N.W.2d 694 (1995). We affirm.

BACKGROUND

On October 26, 1994, at approximately 3:30 a.m., Officer Matthew Roskens of the Pierce Police Department observed Hingst's car cross both the center line and shoulder line of Highway 13 before coming to a stop. Upon approaching the vehicle, Roskens was informed by Hingst that his car accelerated unexpectedly due to a mechanical problem. At this point, Roskens smelled alcohol on Hingst's breath and found a partial six-pack of beer in the vehicle, including two open bottles. Roskens radioed his dispatcher, requesting assistance.

Pierce County Deputy Sheriff Scott Blair arrived at the scene at approximately 4 a.m. Blair also smelled alcohol on Hingst's breath and noted that his eyes were bloodshot. Blair then administered several field sobriety tests. Hingst failed twice to correctly recite the alphabet. In addition, when asked to count backward from 100 to 79, Hingst continued to count backward to 59. Hingst also failed a finger dexterity test in that he began the test before Blair instructed him to do so. At trial, Blair testified that Hingst's speech appeared to be slurred while the field sobriety tests were being administered. Blair also testified that Hingst admitted to consuming 2½ beers that evening.

Hingst was subsequently arrested for driving under the influence and transported to the Pierce County sheriff's office, where he consented to a breath test after reading and signing the "Administrative License Revocation Advisement Post Arrest" form. The test indicated an alcohol concentration of .129 of a gram of alcohol per 210 liters of breath. Hingst was charged with driving under the influence, second offense.

At Hingst's jury trial, Roskens and Blair testified that Hingst was, in their opinion, under the influence of alcohol on the evening in question. In addition to this testimony, the postarrest advisement form was admitted into evidence. The jury entered a verdict of guilty, and Hingst subsequently was sentenced to 30 days in jail and was ordered to pay a $500 fine; his license was revoked for 1 year. Hingst appealed to the Court of Appeals, contending that his criminal conviction, in lieu of the administrative revocation of his license, amounted to double jeopardy; that it was plain error for the district court not to have found that Hingst was not properly advised of the consequences of submitting to a breath test as required by *Smith v. State, supra*; and that the district court failed to find plain error in that the jury was selected 1 week before the trial began.

The Court of Appeals reversed the conviction, holding that it was plain error to admit the breath test results because the postarrest advisement form did not conform to the requirements set forth by this court in *Smith v. State, supra*. See *State v. Hingst*, 4 Neb. App. 768, 550 N.W.2d 686 (1996). We granted the State's petition for further review.

ASSIGNMENT OF ERROR

In its petition for further review, the State contends that the Court of Appeals erred in finding plain error in the district court's failure to find that the results of the chemical test should have been excluded.

STANDARD OF REVIEW

Statutory interpretation is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the decision made by the court below. *State v. Christner, post* p. 549, 557 N.W.2d 707 (1997); *State v. Emrich, post* p. 540, 557 N.W.2d 674 (1997).

In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Lee*, 247 Neb. 83, 525 N.W.2d 179 (1994); *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994).

ANALYSIS

We begin our analysis noting that the postarrest advisement form read to Hingst prior to his submission to a chemical blood test is, in all respects, the same as those used in *State v. Christner, supra*, and in *State v. Emrich, supra*. In both those cases, we held that the form was inadequate because it failed to inform the driver of the "natural and direct legal consequences" of submitting to a chemical test as required by Neb. Rev. Stat. § 60-6,197 (Reissue 1993). *State v. Christner, post* at 554, 557 N.W.2d at 710; *State v. Emrich, post* at 546, 557 N.W.2d at 680. As such, we held in both cases that the district court erred in admitting chemical test results obtained after the driver was read the inadequate advisement form.

Obviously, the same holds true for Hingst. Because the postarrest advisement form read to him suffers from the same infirmities as those in *Christner* and in *Emrich*, we conclude that the Court of Appeals was correct in its determination that the district court erred in failing to exclude the results of Hingst's chemical test results.

An important procedural distinction must be made, however, between the present case and *Christner* and *Emrich*. Unlike *Christner* and *Emrich*, Hingst's case was tried before a jury. In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Lee, supra*; *State v. Carter, supra*. An error is harmless when the improper admission of evidence did not materially influence the jury to reach a verdict adverse to the substantial rights of the defendant. *State v. Carter, supra*; *State v. Hughes*, 244 Neb. 810, 510 N.W.2d 33 (1993).

The record before us reveals that Hingst was charged with driving under the influence, in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 1993). We have repeatedly held that a violation of this statute can be proved in various ways. See *State v. Dake*, 247 Neb. 579, 529 N.W.2d 46 (1995). In addition to Hingst's breath test results, there exists other evidence that Hingst may have been driving while under the influence on the night in question. In the instant case, we cannot determine which evidence the jury relied on in convicting Hingst. As such,

we cannot say the State has proved that the erroneous admission of Hingst's breath test results was harmless beyond a reasonable doubt. Consequently, we affirm the Court of Appeals' reversal of Hingst's conviction.

Although the admission of the breath test results requires us to reverse Hingst's conviction, we must still examine the sufficiency of the evidence presented against him to resolve this matter completely. *State v. Christner, supra*; *State v. Emrich, supra*. If there is sufficient evidence to support Hingst's conviction, the cause may be remanded to the district court for further proceedings; if not, the cause must be dismissed. See *id.* As previously noted, and as made evident from the facts set forth above, we conclude that there is sufficient evidence upon which a jury could, on remand, find Hingst guilty of driving under the influence.

CONCLUSION

In accordance with the foregoing analysis, we affirm the Court of Appeals' decision in this matter reversing Hingst's conviction and remanding the cause to the district court with directions to remand the matter to the county court for a new trial.

AFFIRMED.

CASSEL, D.J., concurring.

The decision in this case is controlled by the decision in *State v. Christner, post* p. 549, 557 N.W.2d 707 (1997), which follows from the decision in *Smith v. State*, 248 Neb. 360, 535 N.W.2d 694 (1995).

The principle of stare decisis requires adherence to past decisions. As Justice Brandeis stated:

> *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation.

Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406, 52 S. Ct. 443, 76 L. Ed. 815 (1932) (Brandeis, J., dissenting).

I am constrained to follow the principles previously established by the majority in *Christner* and in *Smith*. Although I

might have decided those cases differently, the rule of law demands adherence to settled principles. This is particularly true where the Legislature can, and indeed has chosen to, provide for a different result in future cases. Accordingly, I concur in the judgment of the court.

CONNOLLY, J., dissenting.

I dissent for the reasons set forth in my dissent in *State v. Christner, post* p. 549, 557 N.W.2d 707 (1997).

WRIGHT and GERRARD, JJ., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V.
ROBERT R. EMRICH, APPELLANT.
557 N.W.2d 674

Filed January 17, 1997. No. S-96-024.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the decision made by the court below.
2. **Judgments: Trial: Evidence: Proof: Appeal and Error.** In a bench trial of a law action, including a criminal case tried without a jury, erroneous admission of evidence is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's factual findings necessary for the judgment or decision reviewed; therefore, an appellant must show that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through use of erroneously admitted evidence in a case tried without a jury.
3. **Convictions: Appeal and Error.** In determining whether evidence is sufficient to sustain a conviction in a bench trial, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition. A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. The trial court's findings have the effect of a jury verdict and will not be set aside unless clearly erroneous.
4. **Convictions: Evidence: Appeal and Error.** On appeal, if it appears the evidence is sufficient to support a conviction, the cause may be remanded to the district court for further proceedings; if the evidence is not sufficient, the cause must be dismissed.

Appeal from the District Court for Red Willow County, JOHN J. BATTERSHELL, Judge, on appeal thereto from the County Court

for Red Willow County, CLOYD CLARK, Judge. Judgment of District Court reversed, and cause remanded with direction.

P. Stephen Potter for appellant.

Don Stenberg, Attorney General, and Jay C. Hinsley for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

FAHRNBRUCH, J.

Robert R. Emrich appeals his conviction for operating or being in the actual physical control of a motor vehicle upon the public streets and highways within Red Willow County while he had a concentration of .10 of 1 gram or more by weight of alcohol per 100 milliliters of his blood.

Following a bench trial conviction in the Red Willow County Court, Emrich was placed on probation for 18 months. Among the provisions of his probation, Emrich was ordered to pay a $200 fine and ordered not to drive a motor vehicle for any purpose for 60 days.

Emrich appealed his conviction and sentence to the district court for Red Willow County, but failed to comply with Neb. Ct. R. of Cty. Cts. 52(I)(G) (rev. 1996), which reads as follows:

> Within 10 days of the filing of the bill of exceptions in the district court, the appellant shall file with the district court a statement of errors, which shall consist of a separate, concise statement of each error a party contends was made by the trial court. . . . Consideration of the case will be limited to errors assigned and discussed.

The rule further provides that the district court may, at its option, notice a plain error not assigned.

The district court reviewed Emrich's case for plain error and upheld the county court's conviction and sentence of Emrich. Thereafter, Emrich filed an appeal in the Nebraska Court of Appeals. This court authorized that this appeal be transferred to its docket.

We reverse the decision of the district court for Red Willow County and remand the cause to the district court with direction to remand the matter to the county court for a new trial.

ASSIGNMENT OF ERROR

In this court, Emrich submits only one assignment of error: The district court erred in affirming the county court's decision finding that the administrative license revocation postarrest advisement (advisory form) read to Emrich was adequate.

STANDARD OF REVIEW

Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the decision made by the court below. *State v. Christner, post* p. 549, 557 N.W.2d 707 (1997); *State v. Johnson*, 250 Neb. 933, 554 N.W.2d 126 (1996); *Smith v. State*, 248 Neb. 360, 535 N.W.2d 694 (1995).

In a bench trial of a law action, including a criminal case tried without a jury, erroneous admission of evidence is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's factual findings necessary for the judgment or decision reviewed; therefore, an appellant must show that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through use of erroneously admitted evidence in a case tried without a jury. *State v. Christner, supra*; *State v. Lujano, ante* p. 256, 557 N.W.2d 217 (1996); *State v. Lomack*, 239 Neb. 368, 476 N.W.2d 237 (1991). See, also, *State v. Chambers*, 241 Neb. 66, 486 N.W.2d 481 (1992).

In determining whether evidence is sufficient to sustain a conviction in a bench trial, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition. A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. The trial court's findings have the effect of a jury verdict and will not be set aside unless clearly erroneous. *State v. Christner, supra*; *State v. Johnson, supra*; *State v. Hand*, 244 Neb. 437, 507 N.W.2d 285 (1993).

On appeal, if it appears the evidence is sufficient to support a conviction, the cause may be remanded to the district court for further proceedings; if the evidence is not sufficient, the cause

must be dismissed. *State v. Christner, supra*; *State v. Lee*, 227 Neb. 277, 417 N.W.2d 26 (1987). See *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986).

FACTS

At approximately 1:30 a.m. on April 8, 1995, McCook police officer Larry Kinne stopped a pickup truck containing three people for investigation of "suspicious behavior." The truck was being driven by Emrich, and it contained two female passengers. The vehicle had been parked close to the front door of a closed, local law office when Kinne passed by it. At that time, Kinne observed a male in the driver's seat of the truck and another person kneeling or squatting down by the front door of the law office. A female who was standing by a door of the truck was behaving nervously, according to Kinne.

Kinne circled the block in his police cruiser and had radio contact with his superior. Kinne testified that as he approached the site of the law office, the people he had previously observed near the law office got into the truck. The truck backed out from where it had been parked and then proceeded down the street. At that time, Kinne turned around in the law office parking lot, activated his cruiser's emergency lights, and stopped the truck, which Emrich was driving.

When Kinne made personal contact with the occupants of the truck, he detected a fairly strong odor of alcohol coming from inside the truck. When he talked to the driver, who he later determined was Emrich, Kinne noticed that Emrich's eyes were bloodshot and that his speech was slurred and "thick-tongued."

While Kinne questioned the truck's occupants about what they were doing at the law office site, Emrich admitted he had been drinking. In response to Kinne's request, Emrich exited the truck he had been driving. Kinne noted that when Emrich got out of his truck he hung onto its door to support himself, he swayed from side to side in a somewhat circular motion, and he wavered to the side as he was walking. Kinne then asked Emrich to perform some field sobriety tests.

In all, Kinne had Emrich perform six sobriety tests. For the first test, Emrich was to recite the alphabet, which he did correctly, but his speech was slurred. On the second test, a finger

dexterity test, Emrich did not touch the tip of his finger to the tip of his thumb as directed. The thumb touched more to the top of the knuckle as opposed to the tip of the finger. During the third test, a one-leg stand, Emrich swayed from side to side and bounced on one foot, contrary to the instructions given him. He also failed to follow other instructions on how to perform the test. While the fourth test was being explained to him, Emrich was "kind of swaying." The test was to walk a straight line with heel to toe for nine steps, turn around, and return in the same manner. The record reflects he performed that test fairly well. The fifth test was a finger-to-nose test. In this test, the performer is instructed to stand with his heels together and his toes pointing out at a 45-degree angle. The performer's head is tilted back slightly, his eyes are closed, and his arms are raised out to the side. He is then told to touch the tip of his nose with his finger. The evidence reflects that Emrich failed this test. The sixth test was a Romberg balance test, wherein the performer puts his heels together, points his toes out at a 45-degree angle, keeps his arms to his sides, tilts his head back, and closes his eyes. In such position, the performer, upon command, is to count 30 seconds and say stop. Emrich's stopping time was 34 seconds. While performing the test, Emrich swayed "quite a bit from front to back and side to side."

Kinne testified that during the tests he detected the odor of alcoholic beverage on Emrich's breath. Based upon his observations and the results of the sobriety tests, Kinne testified that he was of the opinion that Emrich was intoxicated. The officer then administered a preliminary breath test to Emrich, arrested him, and transported him to the police station.

At the police station, Kinne read to Emrich an "Administrative License Revocation Advisement/Post Arrest" form. Subsequently, with Emrich's consent, a sample of his blood was taken by a nurse. The McCook Community Hospital clinical laboratory tested Emrich's blood.

Thereafter, Emrich was charged with operating or being in the actual physical control of a motor vehicle upon the public streets and highways within Red Willow County while he (1) was under the influence of alcoholic liquor *or* (2) had a concentration of .10 of 1 gram or more by weight of alcohol per

100 milliliters of his blood, to wit: .20 of 1 gram by weight of alcohol per 100 milliliters of his blood.

At trial, over the objection of Emrich, the trial court accepted into evidence exhibit 1, a report from the laboratory stating that Emrich had a concentration of .10 of 1 gram or more by weight of alcohol per 100 milliliters of his blood, to wit: .205.

The trial court made no finding in regard to whether Emrich was under the influence of alcohol while he was driving his truck prior to his arrest. Instead, the trial court specifically found Emrich guilty of operating or being in the actual physical control of a motor vehicle upon the public streets or highways within Red Willow County while he had a concentration of .10 of 1 gram or more by weight of alcohol per 100 milliliters of his blood.

ANALYSIS

The determinative issue in this appeal is whether, over the objection of Emrich, the trial court erred in admitting into evidence the result of his blood alcohol test. We find that the trial court erred in admitting the test into evidence because Emrich was not adequately advised of the consequences of submitting to a blood test as required by Neb. Rev. Stat. § 60-6,197 (Reissue 1993) and this court's decisions in *Smith v. State*, 248 Neb. 360, 535 N.W.2d 694 (1995), a civil case of administrative driver's license revocation, and *State v. Christner, post* p. 549, 557 N.W.2d 707 (1997), a criminal case similar to the case at bar.

In *Christner* and in *Smith*, we addressed the issue of whether an arresting officer, by reading an advisory form identical to the one in this case, gave a driver-arrestee adequate notice, as required by § 60-6,197(10), of the consequences of failing a chemical test to detect alcohol concentration in the driver-arrestee's body. We held in both *Christner* and *Smith* that the advisory form used in those cases prior to the administration of a chemical test to detect alcohol concentration in a driver-arrestee's body failed to fully inform the driver-arrestee of the consequences of submitting to, or submitting to and failing, a chemical test as mandated by § 60-6,197(10). That statute, in relevant part, provides:

> Any person who is required to submit . . . to a chemical blood, breath, or urine test or tests . . . *shall be advised* of (a) the consequences of refusing to submit to such test or tests and (b) the consequences if he or she submits to such test and the test discloses the presence of a concentration of alcohol in violation of subsection (1) of section 60-6,196.

(Emphasis supplied.)

(As an aside, we again note that the Nebraska Legislature amended the foregoing provision, with an operative date of February 27, 1996, to read: "Any person who is required to submit to a chemical blood, breath, or urine test or tests pursuant to this section shall be advised that refusal to submit to such test or tests is a separate crime for which the person may be charged." § 60-6,197(10) (Cum. Supp. 1996).)

We have held that the sensible reading of § 60-6,197(10) indicates that the Legislature intended drivers to be advised of the natural and direct legal consequences flowing from submitting to a chemical test and failing it. See, *Christner, supra*; *Smith, supra.* We have previously found that the advisory form used in this case fails to inform a driver-arrestee that the results of a valid chemical test could be competent evidence in any prosecution involving a driving under the influence offense. See, *Christner, supra*; *Smith, supra.* Citing our decision in *State v. Deets*, 234 Neb. 307, 450 N.W.2d 696 (1990), we concluded in *Christner* and in *Smith* that the purpose of requiring an officer to advise a driver-arrestee of the consequences of refusing to take a breath test was to ensure that the driver-arrestee was in a position to make a rational and voluntary decision as to whether to submit to a chemical test. As a result, we have held that an advisory form identical to the one used here is statutorily inadequate because it does not fully inform a driver-arrestee of the consequences of submitting to and failing a chemical test.

We held in *Smith* that the defendant's motor vehicle operator's license could not be revoked by the director of the Nebraska Department of Motor Vehicles because the defendant was not fully informed of the consequences of submitting to a chemical test for alcohol concentration in his body. We reaffirmed our *Smith* decision in *Perrine v. State*, 249 Neb. 518, 544

N.W.2d 364 (1996), and in *Biddlecome v. Conrad*, 249 Neb. 282, 543 N.W.2d 170 (1996).

In *Christner*, a criminal case, we held that a defendant's blood test should not be received in evidence when the defendant had not been fully advised of the consequences of taking the test, including the fact that the test result could be used against him in a criminal prosecution. At the time of the *Christner* appeal, this court had not ruled in a criminal case upon the admissibility of a chemical test for alcohol when the driver-arrestee had not been fully advised of the consequences of taking or refusing the test. However, the Court of Appeals had held that when a driver-arrestee has not been fully informed of the consequences of taking a chemical test to determine the concentration of alcohol in his or her body, his or her refusal to take the test is not admissible in evidence to support a criminal charge of refusing to take such a test. *State v. McGurk*, 95 NCA No. 45, case No. A-95-162 (not designated for permanent publication). The Court of Appeals, in *State v. Hatcliff*, 95 NCA No. 45, case No. A-95-198 (not designated for permanent publication), held that the results of a blood test which were preceded by an inadequate advisement of the consequences of taking the test are inadmissible in a criminal case to prove the concentration of alcohol in a driver-arrestee's body. The Court of Appeals reached the same conclusion in a criminal case, *State v. Hingst*, 4 Neb. App. 768, 550 N.W.2d 686 (1996). On petition for further review by this court, we affirmed the Court of Appeals' judgment. See *State v. Hingst, ante* p. 535, 557 N.W.2d 681 (1997).

We again hold that a driver-arrestee in a criminal case who is required to submit to a chemical blood, breath, or urine test under § 60-6,197 should be advised of the natural and direct legal consequences of submitting to a chemical test. Such consequences include that any incriminating results from such a test may be used against the driver-arrestee in a criminal proceeding. We also hold that in a criminal case, if the defendant was read an inadequate advisory form before taking the test, it is error for a trial court, over the defendant's objection, to admit into evidence the results of a chemical blood, breath, or urine

test to prove the concentration of alcohol in the defendant's body.

In Emrich's case, the trial court could not have determined that Emrich was operating a motor vehicle with .10 of 1 gram or more of alcohol per 100 milliliters of his blood without relying upon the results of Emrich's blood test. The record clearly establishes that the county court in convicting Emrich relied solely upon the results of Emrich's blood test.

In *State v. Chambers*, 241 Neb. 66, 70, 486 N.W.2d 481, 484 (1992), we held that "the erroneous admission of evidence in a bench trial of a law action, including a criminal case tried without a jury, is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's necessary factual findings." A reversal is warranted in such a case "if the record shows that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence." *Id.* (citing *State v. Chambers*, 241 Neb. 60, 486 N.W.2d 219 (1992)).

In Emrich's case, there is no admissible evidence to support a finding that he had .10 of 1 gram or more of alcohol per 100 milliliters of his blood, an essential element of the offense based on alcohol concentration. The trial court committed trial error when it relied explicitly and exclusively upon the inadmissible result of a blood test to find Emrich guilty of operating or being in the actual physical control of a motor vehicle upon the public streets and highways while he had a concentration of .10 of 1 gram or more of alcohol per 100 milliliters of his blood.

Although we are compelled to reverse Emrich's conviction of the charge based on alcohol concentration, we must examine the sufficiency of all the evidence presented against him in order to resolve this matter completely. See *State v. Lee*, 227 Neb. 277, 417 N.W.2d 26 (1987). See, also, *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986).

In *Lee*, we stated that if it appears the evidence is sufficient to support a conviction, the cause may be remanded to the district court for further proceedings; if the evidence is not sufficient, the cause must be dismissed.

After a careful examination of the record, we find that there is sufficient admissible evidence upon which a fact finder could find Emrich guilty of operating or having physical control of a motor vehicle on a public road or highway while he was under the influence of alcohol.

CONCLUSION

Because Emrich's blood test result should not have been received in evidence, we reverse Emrich's conviction for operating or being in the actual physical control of a motor vehicle while he had a concentration of .10 of 1 gram or more of alcohol per 100 milliliters of his blood.

Because there is sufficient evidence in the record from which a fact finder could find Emrich guilty beyond a reasonable doubt of operating or being in the actual physical control of a motor vehicle upon the public streets and highways while he was under the influence of alcohol, we reverse the decision of the district court for Red Willow County and remand the cause to the district court with direction to remand the matter to the county court for a new trial.

REVERSED AND REMANDED WITH DIRECTION.

CONNOLLY, J., dissenting.

I dissent for the reasons stated in my dissent in *State v. Christner, post* p. 549, 557 N.W.2d 707 (1997), and would therefore affirm.

WRIGHT and GERRARD, JJ., join in this dissent.

STATE OF NEBRASKA, APPELLEE,
v. KELLY R. CHRISTNER, APPELLANT.
557 N.W.2d 707

Filed January 17, 1997. No. S-96-200.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the decision made by the court below.
2. **Judgments: Trial: Evidence: Proof: Appeal and Error.** In a bench trial of a law action, including a criminal case tried without a jury, erroneous admission of evidence is not reversible error if other relevant evidence, admitted without objection or

properly admitted over objection, sustains the trial court's factual findings necessary for the judgment or decision reviewed; therefore, an appellant must show that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through use of erroneously admitted evidence in a case tried without a jury.

3. **Convictions: Appeal and Error.** In determining whether evidence is sufficient to sustain a conviction in a bench trial, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition. A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. The trial court's findings have the effect of a jury verdict and will not be set aside unless clearly erroneous.
4. **Convictions: Evidence: Appeal and Error.** On appeal, if it appears the evidence is sufficient to support a conviction, the cause may be remanded to the district court for further proceedings; if the evidence is not sufficient, the cause must be dismissed.
5. **Trial: Evidence: Records: Appeal and Error.** The erroneous admission of evidence in a bench trial of a law action, including a criminal case tried without a jury, is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's necessary factual findings. A reversal is warranted in such a case if the record shows that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence.

Appeal from the District Court for Red Willow County, JOHN J. BATTERSHELL, Judge, on appeal thereto from the County Court for Red Willow County, CLOYD CLARK, Judge. Judgment of District Court reversed, and cause remanded with directions to dismiss.

G. Peter Burger, of Burger & Bennett, P.C., for appellant.

Don Stenberg, Attorney General, and David T. Bydalek for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

Kelly R. Christner claims that due to the test result from an improperly obtained sample of his blood, a Red Willow county judge convicted him of operating or being in the actual physical control of a motor vehicle while he had an excessive concentration of alcohol in his body.

Upon Christner's appeal to the district court for Red Willow County, that court affirmed Christner's county court conviction.

Christner then appealed to the Nebraska Court of Appeals. We transferred the matter to this court's docket pursuant to our authority to regulate the dockets of the two appellate courts.

We reverse Christner's conviction and direct that the charge against him be dismissed.

FACTS

The sole charge against Christner, for which he was convicted in the Red Willow County Court, was that Christner, while operating a motor vehicle upon the public streets and highways within Red Willow County, violated that portion of Neb. Rev. Stat. § 60-6,196 (Reissue 1993) which provides, in pertinent part: "It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle: . . . (b) When such person has a concentration of ten-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her blood . . . ."

Christner entered a not guilty plea to the charge and waived a jury trial. At a bench trial, certain facts contained in the arresting officer's report and certain other facts were received in evidence by stipulation of the parties. It was also stipulated that if certain witnesses were called to testify, they would lay the necessary foundation for the introduction into evidence of exhibit 5, which is a report of the McCook Community Hospital clinical laboratory. The report reflects that shortly after Christner was arrested, a sample of his blood was taken, and that a chemical test of it revealed that Christner had a concentration of .10 of 1 gram or more by weight of alcohol per 100 milliliters of his blood, to-wit: .188. Christner objected to the court's receiving in evidence the test result, because he was not adequately advised of the consequences of his taking or refusing to submit to a blood test. The trial court overruled Christner's objection and admitted into evidence the result of his blood test.

The status of this appeal is such that if Christner's blood test result should not have been received in evidence, then there was insufficient evidence to convict him of the violation with which he was charged. On the other hand, if the trial court properly received into evidence Christner's blood test result, Christner's conviction should be affirmed.

ASSIGNMENTS OF ERROR

Restated, Christner contends that the trial court erred in (1) receiving into evidence the result of his blood test and (2) finding that the evidence supported a finding that he had .10 of 1 gram or more by weight of alcohol per 100 milliliters of his blood, in violation of § 60-6,196.

STANDARD OF REVIEW

Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the decision made by the court below. *State v. Lujano, ante* p. 256, 557 N.W.2d 217 (1996); *State v. Johnson*, 250 Neb. 933, 554 N.W.2d 126 (1996); *Smith v. State*, 248 Neb. 360, 535 N.W.2d 694 (1995).

In a bench trial of a law action, including a criminal case tried without a jury, erroneous admission of evidence is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's factual findings necessary for the judgment or decision reviewed; therefore, an appellant must show that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through use of erroneously admitted evidence in a case tried without a jury. *State v. Lujano, supra*; *State v. Lomack*, 239 Neb. 368, 476 N.W.2d 237 (1991). See, also, *State v. Chambers*, 241 Neb. 66, 486 N.W.2d 481 (1992).

In determining whether evidence is sufficient to sustain a conviction in a bench trial, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition. A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. The trial court's findings have the effect of a jury verdict and will not be set aside unless clearly erroneous. *State v. Johnson, supra*; *State v. Hand*, 244 Neb. 437, 507 N.W.2d 285 (1993).

On appeal, if it appears the evidence is sufficient to support a conviction, the cause may be remanded to the district court for further proceedings; if the evidence is not sufficient, the cause

must be dismissed. *State v. Lee*, 227 Neb. 277, 417 N.W.2d 26 (1987). See *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986).

ANALYSIS

Under his first assignment of error, Christner contends that the administrative license revocation postarrest advisement (advisory form) read to him prior to his agreeing to take a blood test did not adequately advise him of the consequences of submitting to a blood test, as required by Neb. Rev. Stat. § 60-6,197(10) (Reissue 1993) and this court's decision in *Smith v. State*, 248 Neb. 360, 535 N.W.2d 694 (1995). Specifically, Christner contends that the advisory form did not advise him that the result from his blood test could be used against him in a criminal proceeding. It is undisputed that the advisory form read to Christner prior to his blood test was the same as the advisory form adjudged statutorily inadequate under § 60-6,197(10) in *Smith*.

In *Smith*, we addressed the issue of whether an arresting officer, by reading an advisory form, gave a driver-arrestee adequate notice, as required by § 60-6,197(10), of the consequences of failing a chemical test. We held that the advisory form read to the defendant in *Smith* prior to the administration of his chemical breath test failed to fully inform him of the consequences of submitting to, or submitting to and failing, a chemical test as mandated by § 60-6,197(10). That statute, in relevant part, provides:

> Any person who is required to submit . . . to a chemical blood, breath, or urine test or tests . . . *shall be advised* of (a) the consequences of refusing to submit to such test or tests and (b) the consequences if he or she submits to such test and the test discloses the presence of a concentration of alcohol in violation of subsection (1) of section 60-6,196.

(Emphasis supplied.)

(As an aside, we note that the Nebraska Legislature amended the foregoing provision, with an operative date of February 27, 1996, to read: "Any person who is required to submit to a chemical blood, breath, or urine test or tests pursuant to this section

shall be advised that refusal to submit to such test or tests is a separate crime for which the person may be charged." § 60-6,197(10) (Cum. Supp. 1996).)

We held in *Smith v. State*, 248 Neb. at 365, 535 N.W.2d at 697-98, that "[t]he sensible reading of § 60-6,197(10) indicates that the Legislature intended drivers to be advised of the natural and direct legal consequences flowing from submitting to a chemical test and failing it." We found that the advisory form in *Smith* failed to inform the defendant that "the results of a valid chemical test could be competent evidence in any prosecution involving a driving under the influence offense." *Id.* at 366, 535 N.W.2d at 698. Citing our decision in *State v. Deets*, 234 Neb. 307, 450 N.W.2d 696 (1990), we concluded in *Smith* that the purpose of requiring an officer to advise a driver-arrestee of the consequences of refusing to take a breath test was to ensure that the driver-arrestee was in a position to make a rational and voluntary decision as to whether to submit to a chemical test. As a result, we held that the advisory form used in *Smith* was statutorily inadequate because it did not inform a driver-arrestee of all of the consequences of submitting to and failing a chemical test. We ultimately held that the defendant's motor vehicle operator's license could not be revoked by the director of the Nebraska Department of Motor Vehicles because the defendant was not fully informed of the consequences of submitting to a chemical test for alcohol concentration in his body.

We have reaffirmed our *Smith* decision in *Perrine v. State*, 249 Neb. 518, 544 N.W.2d 364 (1996), and in *Biddlecome v. Conrad*, 249 Neb. 282, 543 N.W.2d 170 (1996).

As previously stated, the key question in Christner's appeal is whether the result of his chemical blood test should have been received in evidence when he had not been fully advised of the consequences of taking the test, including the fact that the test result could be used against him in a criminal prosecution.

This court has not ruled upon the issue involved in the case at bar as it pertains to a criminal case. However, the Court of Appeals has held that when a driver-arrestee has not been fully informed of the consequences of taking a chemical test to determine the concentration of alcohol in his or her body, his or her refusal to take the test is not admissible in evidence to support

a criminal charge of refusing to take such a test. *State v. McGurk*, 95 NCA No. 45, case No. A-95-162 (not designated for permanent publication). The Court of Appeals, in *State v. Hatcliff*, 95 NCA No. 45, case No. A-95-198 (not designated for permanent publication), held that the results of a blood test which were preceded by an inadequate advisement of the consequences of taking the test are inadmissible in a criminal case to prove the concentration of alcohol in a driver-arrestee's body. The Court of Appeals reached the same conclusion in a criminal case, *State v. Hingst*, 4 Neb. App. 768, 550 N.W.2d 686 (1996). On petition for further review by this court, we affirmed the Court of Appeals' judgment. See *State v. Hingst, ante* p. 535, 557 N.W.2d 681 (1997).

A driver-arrestee who is required to submit to a chemical blood, breath, or urine test under § 60-6,197 should be advised of the natural and direct legal consequences of submitting to a chemical test. See *Smith v. State*, 248 Neb. 360, 535 N.W.2d 694 (1995). Such consequences include that any incriminating results from such a test may be used against the person in a criminal proceeding. *Id.* Thus, we determine that in a criminal case, if the defendant was read an inadequate advisory form before taking the test, it is error for a trial court, over the defendant's objection, to admit into evidence the results of a chemical blood, breath, or urine test to prove the concentration of alcohol in the defendant's body.

In this case, the trial court could not have determined that Christner was operating a motor vehicle with .10 of 1 gram or more of alcohol per 100 milliliters of his blood without relying upon the results of Christner's blood test. The record clearly establishes the fact that the county court, acting as the trier of fact, relied upon the results of Christener's blood test to reach its factual finding that Christner operated his motor vehicle with .10 of 1 gram or more of alcohol per 100 milliliters of his blood in his body. It is also clear that the court based its legal conclusion that Christner operated his motor vehicle while he had .10 of 1 gram or more of alcohol per 100 milliliters of his blood based on Christner's blood test.

In *State v. Chambers*, 241 Neb. 66, 70, 486 N.W.2d 481, 484 (1992), we held that "the erroneous admission of evidence in a

bench trial of a law action, including a criminal case tried without a jury, is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's necessary factual findings." A reversal is warranted in such a case "if the record shows that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence." *Id.* (citing *State v. Chambers*, 241 Neb. 60, 486 N.W.2d 219 (1992)).

In this case, there is no other evidence to support a finding that Christner had .10 of 1 gram or more of alcohol per 100 milliliters of his blood, an essential element of the crime with which he was charged and upon which he was tried and convicted. The trial court relied explicitly and exclusively upon the result of a blood test to find Christner guilty of the charge against him.

Although we are compelled to reverse Christner's conviction, we must examine the sufficiency of the evidence presented against him in order to resolve this matter completely. See *State v. Lee*, 227 Neb. 277, 417 N.W.2d 26 (1987). See, also, *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986).

In *Lee*, we stated that "[i]f it appears the evidence is sufficient to support the convictions, the cause may be remanded to the district court for further proceedings; if the evidence is not sufficient . . . the cause must be dismissed." 227 Neb. at 283, 417 N.W.2d at 30.

After a careful examination of the record, we find that no properly admissible evidence was obtained upon which Christner could be convicted of either operating or having actual physical control of a motor vehicle upon the public streets and highways while he was under the influence of alcohol or while he had an illegal concentration of alcohol in his body.

Therefore, we must reverse Christner's conviction and direct that the charge against him be dismissed.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

FAHRNBRUCH, J., concurring.

I agree with the majority that it is error for a trial court, over a defendant's objection, to admit into evidence the results of a chemical blood, breath, or urine test to prove the concentration of alcohol in the defendant's body if the defendant was read an inadequate advisory form before taking the test. The dissenters contend that the legislative intent behind Neb. Rev. Stat. § 60-6,197(10) (Reissue 1993), as it stood at the time relevant to this case, controlled the meaning of the statute. To support their contention, the dissenters cite legislative history, as well as the revised version of § 60-6,197(10) that followed this court's decision in *Smith v. State*, 248 Neb. 360, 535 N.W.2d 694 (1995).

In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature *as ascertained from the entire language of the statute* considered in its plain, ordinary, and popular sense. See, *Village of Winside v. Jackson*, 250 Neb. 851, 553 N.W.2d 476 (1996); *County Cork v. Nebraska Liquor Control Comm.*, 250 Neb. 456, 550 N.W.2d 913 (1996); *State v. Cox*, 247 Neb. 729, 529 N.W.2d 795 (1995).

Section 60-6,197(10), as it stood at the time relevant to this case, provided, in relevant part:

> Any person who is required to submit . . . to a chemical blood, breath, or urine test or tests . . . *shall be advised* of (a) the *consequences* of refusing to submit to such test or tests and (b) the consequences if he or she submits to such test and the test discloses the presence of a concentration of alcohol in violation of subsection (1) of section 60-6,196.

(Emphasis supplied.) The dissenters contend that the above statutory language, when read in light of its legislative history, should be construed to mean something less than what it says. Specifically, the dissenters contend that "the only relevant consequences contemplated by § 60-6,197(10) are the penalties for refusing to submit to a chemical test and for failing a chemical test." The language of § 60-6,197(10) does not support such a contention.

When the Legislature enacted § 60-6,197(10), it mandated that a driver-arrestee be advised of "*the natural and direct legal*

consequences flowing from submitting to a chemical [blood, breath, or urine] test and failing it," *Smith*, 248 Neb. at 365, 535 N.W.2d at 697-98, because the Legislature substantively required, by the words of the statute, that any person who is required to submit to a chemical test be advised of the *consequences* of submitting to such a test. Section 60-6,197(10) contains no language limiting the advisement of consequences in the manner suggested by the dissenters.

Under the law of this state, statutes covering substantive matters in effect at the time of the transaction govern, not later enacted statutes. See *State v. Groff*, 247 Neb. 586, 529 N.W.2d 50 (1995).

The dissenters seemingly have forgotten that beginning with the founding of this nation one of the basic reasons for courts to exist is to protect the individual from arbitrary acts of government. The right to be fully advised of the consequences of taking or refusing to take a chemical test for alcohol was granted by the Legislature in § 60-6,197(10). The dissenters ignore the plain language of the statute as it existed at the time of Christner's arrest and would arbitrarily take away a right of Christner's which was bestowed upon him by the Legislature.

Accordingly, I concur in the majority's decision because at the time of Christner's arrest *Smith* was the controlling law and § 60-6,197(10) had *yet* to be revised. The advisory form read to Christner was inadequate, and the trial court erred in receiving Christner's blood test result into evidence.

WHITE, C.J., joins in this concurrence.

CONNOLLY, J., dissenting.

In my opinion, the advisory form which the law enforcement officer read to Christner, prior to his blood test, was adequate under Neb. Rev. Stat. § 60-6,197(10) (Reissue 1993) to advise Christner of the penal consequences of refusing to submit to the test and of failing the test.

It is undisputed that the advisory form read to Christner is the same as the advisory form that was at issue in *Smith v. State*, 248 Neb. 360, 535 N.W.2d 694 (1995). Thus, the only discernible difference between *Smith* and the instant case is that *Smith* arose in the context of an administrative license revoca-

tion proceeding, whereas the instant appeal arises from a criminal prosecution for driving under the influence.

As in *Smith*, the majority of this court once again ignores the legislative intent behind § 60-6,197(10). See *Smith v. State, supra* (Connolly, J., dissenting). This is so, as the majority notes, despite the Nebraska Legislature's having amended § 60-6,197(10), which now provides: "Any person who is required to submit to a chemical blood, breath, or urine test or tests pursuant to this section shall be advised that refusal to submit to such test or tests is a separate crime for which the person may be charged." § 60-6,197(10) (Cum. Supp. 1996).

While this amended version of § 60-6,197(10) is not applicable in the instant case, it is clear that the amendment was "in direct response to the July 1995 ruling of the Nebraska Supreme Court in a case called *Smith v. State*." Public Hearing, L.B. 939, Committee on Transportation, 94th Leg., 2d Sess. 17 (Jan. 16, 1996). At the public hearing for L.B. 939, Senator Douglas A. Kristensen, principal introducer, stated:

> The logical conclusion of the Supreme Court's ruling could be an unending and an unlimited advisement form. . . . That could affect all drunk driving cases in this state. That's not the logical conclusion. That's not what the Legislature intended, and it certainly isn't what good public policy should be.

Id. at 18-19.

Clearly, the only relevant consequences contemplated by § 60-6,197(10) are the penalties for refusing to submit to a chemical test and for failing a chemical test. In the instant case, the advisory form which the law enforcement officer read to Christner advised him of the criminal penalties for first, second, third, and fourth or subsequent convictions for both offenses. As a result, Christner was sufficiently informed of the requisite consequences. Accordingly, the trial court was correct in receiving Christner's blood test result, and therefore, I would affirm.

WRIGHT and GERRARD, JJ., join in this dissent.

LARRY D. STONES AND LORENE A. STONES, HUSBAND AND WIFE, APPELLANTS, V. SEARS, ROEBUCK & COMPANY, A CORPORATION, APPELLEE.

558 N.W.2d 540

Filed January 24, 1997. No. S-94-1208.

1. **Judgments: Appeal and Error.** Regarding questions of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.
2. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Summary Judgment.** Conclusions based upon guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment.
5. **Uniform Commercial Code: Sales: Vendor and Vendee: Breach of Warranty: Proof.** A plaintiff relying on the implied warranty of fitness for a particular purpose must prove that (1) the seller had reason to know of the buyer's particular purpose in buying the goods, (2) the seller had reason to know that the buyer was relying on the seller's skill or judgment to furnish appropriate goods, and (3) the buyer, in fact, relied upon the seller's skill or judgment.
6. **Uniform Commercial Code: Sales: Warranty.** The warranty of implied fitness for a particular purpose does not apply when the goods in question are purchased and used for ordinary purposes.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Michael W. Pirtle and Betty L. Egan, of Walentine, O'Toole, McQuillan & Gordon, for appellants.

Craig A. Knickrehm and Kermit A. Brashear III, of Brashear & Ginn, for appellee.

Eugene L. Hillman and Patricia McCormack for amicus curiae Nebraska Association of Trial Attorneys.

CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and ROWLANDS, D.J.

CONNOLLY, J.

Larry D. Stones and Lorene A. Stones sued Sears, Roebuck & Company (Sears) for fire damage to their home after their Kenmore gas grill caught fire and the fire spread to their house, causing considerable damage. The operative petition sets out a number of theories of recovery, including strict liability in tort, negligence, and breach of implied warranty for a particular purpose. Finding no material issue of fact, the district court granted Sears' motion for summary judgment on all theories of recovery. Conceding that Sears was not the actual manufacturer of the grill, the Stoneses nevertheless appeal the district court's decision and request this court to adopt the "apparent manufacturer" doctrine for the strict liability claim. We decline to adopt the doctrine in the instant case and affirm the district court's decision granting summary judgment in favor of Sears on all theories of recovery.

BACKGROUND

In July 1988, the Stoneses purchased a Kenmore propane grill from Sears at its Southroads location in Bellevue, Nebraska. After having the grill assembled by Sears' employees, the Stoneses took the grill home, where it was used several times a week throughout the spring and summer months.

On several occasions, the igniter portion of the grill would not work, requiring the Stoneses to call Sears to make repairs. All repair work performed on the grill between the date of purchase and the summer of 1991 were covered by the "Customer Maintenance Agreement Plan" the Stoneses purchased from Sears. This plan was similar to an extended warranty in that Sears agreed to pay for all parts and labor associated with repairing the grill. Although Sears provided this protection plan, Sunbeam Corporation, and not Sears, actually manufactured the propane grill.

Sears' service technicians made two visits to the Stoneses' residence in the summer of 1991 to make repairs. One such visit occurred on June 18, when Donald Dickman, a Sears service technician, responded to a service call from the Stoneses stating that the grill would not light and that the hose was "shot." Dickman replaced the hose connecting the propane tank to the

grill and then turned on the gas and tested the hose and its connections for leaks, but found none. In addition to replacing the hose, Dickman also ordered a new igniter, a new bottom grate, a new electrode, a new left valve, and ceramic rock for the grill. The ordered parts were taken to the Stoneses' residence on July 2 by David Wacker, another Sears service technician. Wacker installed the new parts, and then tested the grill for any leaks and determined that there were none. Between Wacker's July 2 visit and July 16, the Stoneses used the grill on at least two occasions without incident.

On July 16, 1991, Lorene Stones and her daughter Susan were grilling cube steaks at approximately 6:30 p.m. After grilling the steaks for approximately 15 minutes on "medium," Lorene left the meat on the grill and turned the temperature gauge to "low," allowing her and Susan to finish preparing the other dinner courses inside the house. When Susan went back outside to get the steaks, she noticed bright orange flames shooting from the grill. At that time, the grill was located approximately 12 to 18 inches from the garage wall and directly beneath the eave of the garage. Despite attempts by Larry Stones and his son to put out the fire, it spread into the eave of the garage, eventually moving up into the attic of the house, causing considerable damage.

The Stoneses subsequently brought this action against Sears under four separate theories: (1) strict liability in tort, (2) negligence, (3) breach of implied warranty of fitness, and (4) breach of the Magnuson-Moss Warranty Act.

James Belina, an expert for the Stoneses, surveyed the damage after the fire. Although Belina repeatedly stated he had no opinion as to whether Sears' service technicians were negligent in installing the replacement parts, he offered two possible causes for the fire: a manufacturing defect in the replacement parts *or* improper assembly of those parts by Sears' service technicians. Belina could not provide an opinion as to the exact failure of the grill leading to the fire.

Sears moved for a summary judgment on all theories. The district court sustained the motion, finding no genuine issue of material fact. The Stoneses appeal.

ASSIGNMENTS OF ERROR

The Stoneses contend the district court erred (1) in failing to find, as a matter of law, that Sears was a "manufacturer" for purposes of Neb. Rev. Stat. § 25-21,181 (Reissue 1995) and (2) in sustaining Sears' motion for summary judgment.

STANDARD OF REVIEW

Regarding questions of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *State v. Hawes, ante* p. 305, 556 N.W.2d 634 (1996); *Traphagan v. Mid-America Traffic Marking, ante* p. 143, 555 N.W.2d 778 (1996).

Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Chism v. Campbell*, 250 Neb. 921, 553 N.W.2d 741 (1996); *Young v. Eriksen Constr. Co.*, 250 Neb. 798, 553 N.W.2d 143 (1996). In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Chism v. Campbell, supra*; *Torrison v. Overman*, 250 Neb. 164, 549 N.W.2d 124 (1996).

ANALYSIS

The Stoneses' first assignment of error relates to the strict liability cause of action brought against Sears. According to § 25-21,181:

> No product liability action based on the doctrine of strict liability in tort shall be commenced or maintained against any seller or lessor of a product which is alleged to contain or possess a defective condition unreasonably dangerous to the buyer, user, or consumer *unless the seller or lessor is also the manufacturer of the product or part thereof claimed to be defective.*

(Emphasis supplied.)

We have examined § 25-21,181 on one occasion in which we upheld a directed verdict in favor of a defendant corporation after the plaintiff failed to prove that the defendant was a manufacturer of the defective product. *Kudlacek v. Fiat S.p.A.*, 244 Neb. 822, 509 N.W.2d 603 (1994).

Although the Stoneses admit that Sears was not the manufacturer of the grill in question, they contend that a strict liability claim is appropriate because Sears was the "apparent manufacturer" of the grill. As such, we are asked to adopt the "apparent manufacturer" doctrine.

APPARENT MANUFACTURER DOCTRINE

The apparent manufacturer doctrine stems from the Restatement (Second) of Torts § 400 at 337 (1965), which states: "One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer." Comment *d.* to § 400 sets out the situations in which the doctrine applies, and states in part:

> The rule stated in this Section applies only where the actor puts out the chattel as his own product. The actor puts out a chattel as his own product in two types of cases. The first is where the actor appears to be the manufacturer of the chattel. The second is where the chattel appears to have been made particularly for the actor. In the first type of case the actor frequently causes the chattel to be used in reliance upon his care in making it; in the second, he frequently causes the chattel to be used in reliance upon a belief that he has required it to be made properly for him and that the actor's reputation is an assurance to the user of the quality of the product.

Id. at 338.

In its essence, this doctrine simply allows a fact finder to transfer the liability of a manufacturer to a separate entity holding itself out as the manufacturer.

Two rationales are provided for the doctrine. First, it is argued that when a seller causes the public to believe that it is the manufacturer of the product (through labeling, advertising, et cetera), a consumer will rely on that company's reputation and care in making products. As such, the selling company

should be estopped from disclaiming any liability simply because it did not actually manufacture the product. See, *Burkhardt v. Armour & Co.*, 115 Conn. 249, 161 A. 385 (1932); *Davidson v. Montgomery Ward & Co.*, 171 Ill. App. 355 (1912). The second underlying rationale for the doctrine is that "where a defendant puts out a product as its own, the purchaser has no means of ascertaining the identity of the true manufacturer, and it is thus fair to impose liability on the party whose actions effectively conceal the true manufacturer's identity." *Hebel v. Sherman Equipment*, 92 Ill. 2d 368, 372, 442 N.E.2d 199, 201-02 (1982).

APPROPRIATENESS OF DOCTRINE IN THIS CASE

Even if this court were inclined to adopt the doctrine, we decline to do so in the instant case because there is no evidence in the record that the Stoneses believed Sears was the manufacturer or that Sears held itself out as the manufacturer of the grill in question. In this regard, we note that there is no evidence in the record that the name "Sears" was on the grill. In fact, the assembly instructions for the grill explicitly referred to it as a "Kenmore" outdoor gas grill. While "Kenmore" may be commonly associated with Sears, there is no evidence supporting that contention in the record before us.

The Stoneses give great weight to the fact that Sears sold a customer maintenance agreement plan along with the grill. The fact that this plan closely resembles a warranty does not convince us that it causes the public to believe that Sears manufactured the grill. Indeed, Sears' technician Dickman testified that Sears often provides service to customers for non-Sears appliances.

While a grill owner's manual introduced into the record with Belina's testimony contained a picture of a grill with the word "Sears" on its base, there is simply no evidence that the grill in the picture was the same type of grill sold to the Stoneses. In fact, the manual was dated 1977, some 10 years before the Stoneses purchased their grill.

Because the record in the instant case simply does not support a cause of action against Sears under the apparent manu-

facturer doctrine, we leave for another day whether the doctrine is in conflict with the plain language of § 25-21,181.

The Stoneses' remaining assignment of error is that summary judgment was inappropriate because genuine issues of material fact exist. To adequately address this contention, we must examine each theory of recovery separately.

Strict Liability

Our conclusion that the facts in this case do not warrant recovery under the apparent manufacturer doctrine necessarily supports summary judgment on the theory of strict liability. In support of its motion, Sears produced an affidavit from Sue Billington, an associate buyer with Sears, in which she stated that the manufacturer of the grill was not Sears, but Sunbeam Corporation. In addition, Billington stated that none of the replacement parts for the grill were produced by Sears. The Stoneses failed to produce any contrary evidence regarding these statements. Instead, as noted above, the Stoneses moved forward with their strict liability claim under the auspices of the apparent manufacturer doctrine. Because the undisputed facts in this case do not warrant application of the doctrine, we conclude that the district court properly sustained the summary judgment for the cause of action brought under the theory of strict liability.

Negligence

The Stoneses, in their second amended complaint, alleged that Sears was negligent in the following particulars:

> a. Failure to inspect the replacement hose and gas valve assembly for defects that would allow propane to escape, ignite and cause a fire;
>
> b. Failure to test the replacement hose and gas valve assembly for defects that would allow propane to escape, ignite and cause a fire;
>
> c. Failure to properly install and connect the replacement hose and gas valve assembly to the propane tank and to the grill, thereby allowing propane to escape, ignite and cause a fire; and

d. Failure to furnish and utilize nondefective replacement parts in repairing Plaintiffs' gas grill, thereby allowing propane to escape, ignite and cause a fire.

As with any negligence action, the Stoneses were required to adduce evidence showing that there was a negligent act or omission by Sears and that such act or omission was the proximate cause of their injury or was a cause which proximately contributed to it. See *Miles v. Box Butte County*, 241 Neb. 588, 489 N.W.2d 829 (1992). The fact that the grill caught fire is not enough to warrant a finding of negligence, for negligence is never presumed, and the mere happening of an accident does not prove negligence as a matter of law. *Scholl v. County of Boone,* 250 Neb. 283, 549 N.W.2d 144 (1996).

The evidence offered in support of and in opposition to summary judgment for the negligence claim consisted largely of deposition testimony. Both Larry Stones and Lorene Stones testified that they did not know what caused the fire and that they had no knowledge of a factual basis for the allegation that Sears' service technicians failed to properly attach the hose, thereby causing the fire. According to Dickman, the new hose that he installed on the Stoneses' grill on June 18, 1991, was properly replaced and tested negative for any leaks. Wacker also testified that when he worked on the grill July 2, the gas lines were checked for leaks and the grill was in proper working condition.

The Stoneses' expert, Belina, gave his opinion as to what caused the fire. In so doing, Belina originally stated that a portion of the grill's gas system failed somewhere between the regulator on the propane bottle and the point where the hose or fuel line was connected to the burner assembly. Belina could not provide an opinion as to the exact source of the failure, stating that the "exact malfunction of the cooking grill which caused the fire could not be determined." Throughout his deposition, Belina repeatedly testified that he had no opinion as to whether the actions of Dickman and Wacker in any way caused the fire. In fact, at one point, Belina specifically stated that "I don't have an opinion with regards to negligence" and that all of his opinions concerning the cause of the fire related solely to the actual grill and its parts.

At a later point in his deposition, Belina expanded his opinion to include two possible causes of the fire. In that respect, Belina opined that the fire could only have been caused by a manufacturing defect in the replacement parts or by an improper assembly or installation of the parts by the Sears service technicians. However, even after providing these two possible causes of the fire, Belina reiterated his inability to give an opinion as to what part was defective or whether the Sears service technicians were negligent. When specifically asked what his opinion was, the following exchange took place:

> A. My opinion is . . . that either the parts were defective or the parts were not assembled properly.
>
> Q. Okay. All right. Again, no specific — you cannot identify a specific defect with any specific part?
>
> A. That is correct.
>
> Q. And you cannot identify any specific action or inaction on the part of Mr. Dickman or Mr. Wacker which resulted in the fire?
>
> A. That is correct.

As this excerpt shows, Belina provided a choice of possibilities as to what caused the fire. Additionally, in so doing, Belina could not supply any concrete opinion as to what part was defective, nor could he form an opinion as to whether the actions of Dickman and Wacker contributed to the cause of the fire. Conclusions based upon guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment. See *Swoboda v. Mercer Mgmt. Co., ante* p. 347, 557 N.W.2d 629 (1997). Because the only evidence produced by the Stoneses regarding their negligence cause of action was provided by Belina and was based upon his speculation and providing a choice of possibilities, the district court was correct in granting summary judgment.

Breach of Implied Warranty for Particular Purpose

As a third theory of recovery, the Stoneses alleged that "Defendant impliedly warranted to Plaintiffs that the subject replacement parts for the gas grill were properly designed, manufactured and reasonably fit for their intended purpose." We read this cause of action as one for breach of the implied war-

ranty of fitness for a particular purpose. In fact, the Stoneses argue a breach of Neb. U.C.C. § 2-315 (Reissue 1992) in their brief. Section 2-315 provides:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

A plaintiff relying on the implied warranty of fitness for a particular purpose must prove that (1) the seller had reason to know of the buyer's particular purpose in buying the goods, (2) the seller had reason to know that the buyer was relying on the seller's skill or judgment to furnish appropriate goods, and (3) the buyer, in fact, relied upon the seller's skill or judgment. *Laird v. Scribner Coop*, 237 Neb. 532, 466 N.W.2d 798 (1991). Ordinarily, whether or not the implied warranty of fitness for a particular purpose arises in any individual case is a question of fact to be determined by the circumstances of the contracting between the parties. See *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 261 N.W.2d 358 (1978). In this regard, a buyer proceeding under this implied warranty must first provide some evidence that the seller knew of the buyer's particular purpose for which the goods are acquired. See *Laird v. Scribner Coop, supra.*

> A "particular purpose" differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his or her business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question.

§ 2-315, comment 2.

In examining the record, we are unable to detect any evidence that the Stoneses purchased the grill or its replacement parts for a "particular purpose." We also note that the Stoneses do not allege any particular use of the grill. Instead, pertinent testimony of Larry Stones and Lorene Stones establishes that

they cooked food on the grill on a regular basis throughout the spring and summer months. When the grill was not working properly, they would call Sears to have it repaired in conformance with the customer maintenance agreement plan. Quite obviously, the Stoneses purchased the grill and replacement parts for a customary purpose; the grilling of food. Liability under § 2-315 lies only when goods do not fulfill the specific need for which they were purchased, and not when the goods in question are defective per se or fail to meet their ordinary purpose. As such, we hold that summary judgment was appropriate because the warranty of implied fitness for a particular purpose does not apply when the goods in question are purchased and used for ordinary purposes. See, e.g, *DiIenno v. Libbey Glass Div., Owens-Illinois, Inc.*, 668 F. Supp. 373, 376 (D. Del. 1987) (buyer's claim that failure of jar to open and close without breaking was breach of § 2-315 warranty was "ridiculous" because opening and closing of jar are jar's ordinary purpose); *Royal Lincoln-Mercury Sales v. Wallace*, 415 So. 2d 1024 (Miss. 1982) (no § 2-315 warranty for car purchased only for normal transportation).

MAGNUSON-MOSS WARRANTY ACT

Finally, we address whether summary judgment was appropriate for the Stoneses' claim against Sears under the Magnuson-Moss Warranty Act.

Enacted in 1975, the Magnuson-Moss Warranty Act (15 U.S.C. § 2301 et seq. (1994)) created a federal remedy for breach of written and implied warranties. *Hyler v. Garner*, 548 N.W.2d 864 (Iowa 1996). This remedy is specifically set forth at § 2310(d)(1), which provides that "a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation . . . under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal or equitable relief . . . ." In addition, a consumer who prevails under this section may recover attorney fees, as well as the costs and expenses associated with the action. § 2310(d)(2). For purposes of the act, the term "implied warranty" is defined as "an implied warranty arising under State law . . . ." § 2301(7).

The broad assignment of error in this matter is not helpful in ascertaining why the Stoneses believe summary judgment was inappropriate for their Magnuson-Moss Warranty Act cause of action. However, in their brief, the Stoneses argue that "the trial court erred in granting summary judgment on this issue as it relates to the issue of breach of implied warranty of fitness for a particular purpose." Brief for appellant at 30. Having determined that summary judgment was appropriate for the breach of implied warranty for a particular purpose cause of action, it follows that summary judgment was also appropriate on the Magnuson-Moss Warranty Act cause of action.

CONCLUSION

In accordance with the foregoing analysis, we conclude that the district court was correct in granting Sears' motion for summary judgment on all theories of recovery.

AFFIRMED.

WHITE, C.J., participating on briefs.

STATE OF NEBRASKA EX REL. TWILA KEENER, AS MOTHER AND NEXT FRIEND OF TRESA KEENER, A MINOR CHILD, APPELLANT, V. JACK D. GRAFF, APPELLEE.

STATE OF NEBRASKA EX REL. JOYCE C. SOHL, AS MOTHER AND NEXT FRIEND OF TERESSA L. SOHL, A MINOR CHILD, APPELLANT, V. JACK D. GRAFF, APPELLEE.

558 N.W.2d 538

Filed January 24, 1997. Nos. S-94-1232, S-94-1233.

1. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. Conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
2. **Child Support.** A court may not modify a child support order without hearing any evidence.
3. **Demurrer: Pleadings.** In determining whether a cause of action has been stated, a petition is to be construed liberally. If as so construed the petition states a cause of action, a demurrer based on the failure to state a cause of action is to be overruled.

4. **Demurrer: Final Orders: Appeal and Error.** An order overruling a demurrer, in the absence of further proceedings, is not a final order for purposes of appellate review.
5. **Jurisdiction: Final Orders: Appeal and Error.** In the absence of a final order from which an appeal may be taken, the appeal must be dismissed for lack of jurisdiction.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Appeal dismissed.

John J. Kohl, Platte County Attorney, and W. Patrick Dunn for appellant.

David A. Battiato, of University of Nebraska Civil Clinical Law Program, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ.

CONNOLLY, J.

After a hearing on appellant State of Nebraska's demurrers, the district court for Platte County found, without taking any evidence, appellee Jack D. Graff's incarceration for sexual assault a material change in circumstances and therefore reduced his child support obligations. Because we conclude there is no final order for purposes of appeal, we dismiss this appeal for lack of jurisdiction.

BACKGROUND

Graff was determined to be the natural father of Tresa Keener on April 2, 1982, and of Teressa L. Sohl on October 2, 1987. As a consequence of these findings, Graff was required to pay child support on behalf of Tresa in the amount of $140 per month and on behalf of Teressa in the amount of $100 per month. Graff filed applications for modification of his child support obligations with the district court, alleging that there had been a material change in circumstances so as to warrant a reduction in his payment obligations. The material change in question is Graff's incarceration within the Nebraska Department of Correctional Services facilities for a term of 4 to 6 years for sexual assault.

The State responded to Graff's petitions by filing a demurrer to each application, contending that each failed to state a cause of action upon which relief could be granted. Argument was had

on the demurrers before the district court on November 4, 1994. The court did not immediately rule on the demurrers, but instead took the matter under advisement.

Despite hearing no evidence, the district court, in journal orders dated December 1, 1994, granted Graff's applications, specifically finding that Graff's incarceration constituted a material change in circumstances, thereby warranting a decrease in his obligations to $50 per month per child. The State appeals. For purposes of appeal, the two cases have been consolidated.

ASSIGNMENT OF ERROR

The State contends the district court erred in finding that Graff's incarceration was a material change in circumstances warranting a reduction of his child support obligations.

STANDARD OF REVIEW

For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. Conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *City of Lincoln v. Twin Platte NRD*, 250 Neb. 452, 551 N.W.2d 6 (1996); *Village of Orleans v. Dietz*, 248 Neb. 806, 539 N.W.2d 440 (1995).

ANALYSIS

Determination of this appeal requires us to examine the procedural posture of the lower court proceedings.

The relatively short transcripts and bill of exceptions in this matter reveal that Graff's applications for modification of child support were filed on October 21, 1994. The State's corresponding demurrers were filed shortly thereafter, on November 3. As indicated above, argument was had on the demurrers the following day, and the trial court took the matter under advisement.

On December 1, 1994, the district court filed journal entries for each application. The beginning of each order recites, "NOW on this 4th day of November, 1994, the above-entitled matter comes before the Court for hearing on the defendant's Application for Modification of Order." The court, without

hearing any evidence, proceeded to grant Graff's modification requests, specifically finding his incarceration to be a material change in circumstances warranting a reduction in payment obligations. As a result, Graff's obligation was reduced to $50 per month per child. It is axiomatic, however, that a court may not modify a child support order without hearing any evidence. See *Cagle v. Cagle*, 205 Neb. 747, 290 N.W.2d 192 (1980) (modification of support order requires subjective reasoning and analysis based on evidence and witnesses).

In examining the record and, in particular, the court's December 1, 1994, orders, we note that no mention is made regarding the State's demurrers and hearing thereon. As the beginning of each order reveals, however, the decision issued by the court was based upon what occurred at the November 4 hearing. This hearing was solely on the State's demurrers and was not a trial to determine the merits of the applications. Consequently, we must assume that the December 1 orders were issued in response to the State's demurrers, because the court could not have made a determination that a material change in circumstances had occurred when no evidence was adduced.

In determining whether a cause of action has been stated, a petition is to be construed liberally. If as so construed the petition states a cause of action, a demurrer based on the failure to state a cause of action is to be overruled. *Crider v. Bayard City Schools*, 250 Neb. 775, 553 N.W.2d 147 (1996); *Pilot Investment Group v. Hofarth*, 250 Neb. 475, 550 N.W.2d 27 (1996). The district court, through its December 1 orders, obviously concluded that Graff's applications for modification stated a plausible cause of action, as evidenced by the court's granting the relief requested. As such, we conclude the order effectively overruled the State's demurrer.

That being the case, this matter is not properly before this court, for an order overruling a demurrer, in the absence of further proceedings, is not a final order for purposes of appellate review. *Lindquist v. Towle*, 164 Neb. 524, 82 N.W.2d 631 (1957); *Barry v. Wolf*, 148 Neb. 27, 26 N.W.2d 303 (1947); *Anson v. Kruse*, 147 Neb. 989, 25 N.W.2d 896 (1947). In the absence of a final order from which an appeal may be taken, the

appeal must be dismissed for lack of jurisdiction. *Currie v. Chief School Bus Serv.*, 250 Neb. 872, 553 N.W.2d 469 (1996). Accordingly, we must dismiss this appeal.

APPEAL DISMISSED.

KRISTOFFER A. KOLESNICK, A MINOR, BY AND THROUGH HIS MOTHER AND NEXT FRIEND, EDITH SHAW, APPELLEE, V. OMAHA PUBLIC SCHOOL DISTRICT ET AL., APPELLANTS.
558 N.W.2d 807

Filed January 24, 1997. No. S-95-099.

1. **Administrative Law: Schools and School Districts: Appeal and Error.** Appeals from the district court under the Student Discipline Act are governed by the Administrative Procedure Act.
2. **Administrative Law: Judgments: Appeal and Error.** On an appeal under the Administrative Procedure Act, an appellate court reviews the judgment of the district court for errors appearing on the record and will not substitute its factual findings for those of the district court where competent evidence supports those findings.
3. **Administrative Law: Final Orders: Appeal and Error.** A final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
4. **Constitutional Law: Schools and School Districts.** Education has not been determined to be a fundamental right under the U.S. Constitution.
5. ____: ____. In the context of student discipline, the Nebraska Constitution has not been construed to mean that a fundamental right to education exists in this state.
6. **Constitutional Law: Schools and School Districts: Taxes: Fees: Words and Phrases.** The term "free instruction" in right to education cases refers to the issue of the constitutionality of school financing, including collection of fees, tuition, and taxes.
7. **Constitutional Law: Schools and School Districts.** In the context of student discipline cases, a student does not have a fundamental right to education, which would trigger strict scrutiny analysis whenever a student's misconduct results in expulsion for the interest of safety.
8. **Schools and School Districts.** In the context of student discipline cases, the appropriate level of scrutiny is the rational basis test.
9. **Constitutional Law: Words and Phrases.** Under the rational basis test, as long as the official action is directed to a legitimate purpose and is rationally related to achieving that purpose, it is not unconstitutional.
10. **Schools and School Districts: Courts.** A court may overturn a school district's ruling if there is a shocking disparity between the punishment and the offense.

11. **Due Process: Schools and School Districts.** The fact that a school board opts for consistency of punishment rather than a tailoring of the punishment to the child does not implicate the Due Process Clause of the Constitution.
12. **Administrative Law: Schools and School Districts: Courts.** The wisdom or expediency of a rule adopted by a school board and the motive prompting it are not open to judicial inquiry, where it is within the administrative power of that body.
13. **Administrative Law: Appeal and Error.** An appellate court will sustain the decision of an administrative body if there is evidence in the record to sustain its findings.
14. **Words and Phrases.** An arbitrary action is one which is taken in disregard of the facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion.
15. ____. A capricious action is one guided by fancy rather than by judgment or settled purpose; such a decision is apt to change suddenly; it is freakish, whimsical, humorsome.
16. **Administrative Law.** An agency's judgment must be based on a factual foundation and must give due consideration to all the essential elements involved.
17. **Legislature: Schools and School Districts: Courts: Jurisdiction.** If a school board acts within the power conferred upon it by the Legislature, courts cannot question the manner in which the board has exercised its discretion in regard to subject matter over which it has jurisdiction, unless such action is so unreasonable and arbitrary as to amount to abuse of the discretion reposed in it.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Reversed.

David M. Pedersen and David J. Kramer, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellants.

C. Jan Headley and Jeffrey T. Palzer for appellee.

Catherine Mahern, of Creighton Legal Clinic, for amicus curiae Paul Dilly.

WHITE, C.J., FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

LANPHIER, J.

The Omaha Public School District (OPS) adopted a student code of conduct for the 1994-95 school year, which provided for a two-semester expulsion for the possession of a weapon, including a knife, at school. On September 23, 1994, Kristoffer Kolesnick, an eighth grade student at King Science Center, brought a switchblade knife to school. On September 29, after learning about the knife incident, Deborah Frison, the assistant

principal at King Science Center, sent a letter to Kolesnick's mother, Edith Shaw, recommending expulsion of Kolesnick for the current semester and the following semester. On October 4, OPS received a request for a hearing concerning the recommendation that Kolesnick be expelled. On October 11, a hearing was held, whereby the hearing officer to the department of student personnel for OPS recommended expulsion. Kolesnick was notified of this decision on October 17. Kolesnick appealed this decision, and on November 11, the ad hoc discipline hearing committee of the board of education of OPS affirmed the expulsion decision.

Kolesnick filed a petition in Douglas County District Court by and through his mother and next friend, appealing this decision. The district court found that Kolesnick had been prejudiced by the two-semester expulsion because his substantial rights were violated. The district court then reduced the two-semester expulsion to a one-semester expulsion. OPS appealed the district court's decision pursuant to the Administrative Procedure Act and filed a petition to bypass review by the Nebraska Court of Appeals. We granted OPS' petition to bypass.

BACKGROUND

OPS adopted a student code of conduct for the 1994-95 school year, which included the following section:

> **e. Weapon (Guns, Knives and Other Dangerous Weapons) (Grades 7-12)**
>
> Students are forbidden knowingly and voluntarily to bring to school, possess, handle, transmit or use any gun, knife, or other dangerous weapons in school or on school grounds or at a school function off school grounds.
>
> **First Offense: Expulsion. Remainder of the semester and the following semester or the remainder of the semester, summer school and the first semester of the following year.**

In August 1994, Kolesnick signed a form acknowledging his receipt of a handbook containing the student code of conduct and other school rules.

Sometime prior to September 23, 1994, Kolesnick obtained a switchblade comb. Kolesnick and a friend removed the comb portion of the switchblade and replaced it with a knife blade. Kolesnick boarded OPS bus 686 on the morning of September 23, with the switchblade knife in his pocket. In the presence of Tim Condon, a fourth grade student on the bus, Kolesnick opened the switchblade knife and poked a hole in his own jacket sleeve. Condon stated that Kolesnick also poked a hole in the seat in front of him. Condon told two other students that Kolesnick had a knife. Kolesnick then placed the knife in his notebook, where he carried it throughout the schoolday at King Science Center.

That evening, Condon told his parents about the incident on the bus. Condon's mother asked him not to discuss the incident with anyone for fear of retaliation by Kolesnick. On the evening of September 27, Condon's mother informed Frank Murch, OPS bus 686's regular driver, of the incident and told him she had been keeping Condon home out of concern for Condon's safety.

On the morning of September 28, Murch related his conversation with Condon's mother to his supervisor, Martha Holmes. Holmes immediately contacted King Science Center to inform them that Kolesnick was in possession of a knife on OPS bus 686. Upon receiving that information, Frison and Forth Carmichael, a security officer, immediately searched Kolesnick's locker. When no knife was found, Kolesnick was asked to go to Frison's office.

Frison asked Kolesnick about the incident on OPS bus 686. Kolesnick stated that he had shown Condon a nail clipper with a foldout knife he had found on the street. Frison then contacted Condon's mother, who related Condon's story about the switchblade knife to Frison. Robert Jorgensen, principal of King Science Center, questioned Kolesnick as to where the switchblade was. Kolesnick told him it was at his home. Jorgensen then suggested that Frison and Kolesnick go to Kolesnick's home and retrieve the knife.

Frison, Carmichael, and Kolesnick then went to Kolesnick's home. Frison explained the situation to Shaw, and Shaw invited Frison and Carmichael into her home. Kolesnick then went to

his room and produced a nail clipper which did not fit Condon's description of the knife he saw. Frison explained to Shaw and Kolesnick that the item did not match the description of the object on the bus. After a more extensive search by Shaw and Kolesnick, the switchblade knife was produced and given to Frison.

On September 29, 1994, Frison sent a letter to Shaw notifying her that Frison was recommending that Kolesnick be expelled from King Science Center for the remainder of the current semester and the following semester. On October 4, OPS received a request for a hearing concerning the recommendation that Kolesnick be expelled. On October 11, a hearing was held before a hearing officer to the department of student personnel for OPS, and expulsion was recommended. On October 17, Ronald Burmood, director of student personnel services for OPS, notified Kolesnick of the decision to expel him for the remainder of the current semester and the following semester. Kolesnick filed a timely appeal of that decision of the superintendent to the board of education. On November 9, the ad hoc discipline hearing committee of the board of education of OPS affirmed the decision.

Pursuant to Neb. Rev. Stat. § 79-4,201 (Reissue 1994), Kolesnick then filed a petition in the district court for Douglas County by and through his mother and next friend to appeal the decision of the board of education and asked for an injunction. The defendants are OPS, the board of education for the city of Omaha, Frison, and Burmood. The court found that Kolesnick was prejudiced because his "substantial rights were violated by the decision of the Defendants." The court then found that the OPS decision should be modified to an expulsion of Kolesnick for the remainder of the 1994 fall semester only.

OPS and the other defendants appeal from that decision.

ASSIGNMENTS OF ERROR

Summarized and restated, OPS assigns as error (1) the district court's ruling that the two-semester expulsion was in violation of constitutional provisions and (2) the district court's failure to rule that Kolesnick's expulsion with regard to the switchblade knife was within the statutory authority of OPS;

was supported by competent, material, and substantial evidence in the record as made on review; and was neither arbitrary nor capricious.

STANDARD OF REVIEW

Appeals from the district court under the Student Discipline Act are governed by the Administrative Procedure Act. On an appeal under the Administrative Procedure Act, an appellate court reviews the judgment of the district court for errors appearing on the record and will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Rainbolt v. State*, 250 Neb. 567, 550 N.W.2d 341 (1996); *Knowlton v. Harvey*, 249 Neb. 693, 545 N.W.2d 434 (1996); *Metro Renovation v. State*, 249 Neb. 337, 543 N.W.2d 715 (1996); *George Rose & Sons v. Nebraska Dept. of Revenue*, 248 Neb. 92, 532 N.W.2d 18 (1995).

A final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Val-Pak of Omaha v. Department of Revenue*, 249 Neb. 776, 545 N.W.2d 447 (1996).

ANALYSIS

The Student Discipline Act, Neb. Rev. Stat. § 79-4,169 et seq. (Reissue 1994), was passed to assure the protection of elementary and secondary school students' due process rights within the educational system. Section 79-4,201 gives a person aggrieved by a final decision under this act the right to seek judicial review. Section 79-4,204(2) gives the district court the power to

> affirm the decision of the school board or board of education, remand the case for further proceedings, or reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the board's decision is:
>
> (a) In violation of constitutional provisions;
>
> (b) In excess of the statutory authority or jurisdiction of the board;
>
> (c) Made upon unlawful procedure;

(d) Affected by other error of law;

(e) Unsupported by competent, material, and substantial evidence in view of the entire record as made on review; or

(f) Arbitrary or capricious.

Pursuant to this section, the district court is given the power to review the decision of the board of education. The power to affirm, reverse, modify, or remand the case for further proceedings, however, depends on whether the petitioner's substantial rights have been prejudiced. Thus, to determine whether the decision of the board should be altered in this case, we must first determine if Kolesnick was prejudiced.

First, Kolesnick argues that his substantial rights were prejudiced because his constitutional rights were violated. Education, however, has not been determined to be a fundamental right under the U.S. Constitution. See, *Plyler v. Doe*, 457 U.S. 202, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973); *Craig v. Selma City School Bd.*, 801 F. Supp. 585 (S.D. Ala. 1992). Article VII, § 1, of the Constitution of the State of Nebraska provides that "[t]he Legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years." We have not construed this language in the context of student discipline to mean that a fundamental right to education exists in this state, and we decline to do so today. Rather, we have construed the term "free instruction" in right to education cases as pertinent to the issue of the constitutionality of school financing, including collection of fees, tuition, and taxes. See, *Banks v. Board of Education of Chase County*, 202 Neb. 717, 277 N.W.2d 76 (1979); *Tagge v. Gulzow*, 132 Neb. 276, 271 N.W. 803 (1937); *State, ex rel. Baldwin, v. Dorsey*, 108 Neb. 134, 187 N.W. 879 (1922); *Martins v. School District*, 101 Neb. 258, 162 N.W. 631 (1917). See, also, *Doe v. Superintendent of Sch. of Worcester*, 421 Mass. 117, 653 N.E.2d 1088 (1995).

We decline to hold, in the context of student discipline, that a student has a fundamental right to education, which would trigger strict scrutiny analysis whenever a student's misconduct

results in expulsion for the interest of safety. See *Doe v. Superintendent of Sch. of Worcester, supra.* Therefore, in the context of student discipline cases, no fundamental right to education exists in Nebraska, nor does such a right exist under the federal Constitution. Accordingly, the appropriate level of scrutiny is the rational basis test. See *San Antonio School District v. Rodriguez, supra.*

Under the rational basis test, as long as the official action is directed to a legitimate purpose and is rationally related to achieving that purpose, it is not unconstitutional. See, *Plyler v. Doe, supra*; *Williamson v. Lee Optical Co.*, 348 U.S. 483, 75 S. Ct. 461, 99 L. Ed. 563 (1955). Applying this rational basis test to the facts of this case, we conclude that Kolesnick's expulsion was rationally related to the board and the school officials' interest in protecting other students and staff from violence. The board was aware that Kolesnick knowingly possessed a knife on school property and used the knife to poke holes in his coat and a bus seat. The board was also aware of Condon's mother's decision to keep her son out of school for fear of repercussions by Kolesnick. Both the use of the knife and Condon's mother's fear for her son's safety reinforce the school's interest in protecting students and staff from violence. Expulsion is a rationally related means of protecting students and staff from violence. Accordingly, Kolesnick's expulsion did not violate his rights under the Nebraska or federal Constitution.

While some courts have recognized substantive due process limitations on the severity of disciplinary sanctions imposed on students in the public education system, these courts have determined that a court may overturn a school district's ruling if there is a shocking disparity between the punishment and the offense. See, *New v. City of Minneapolis*, 792 F.2d 724, 726 (8th Cir. 1986) (stating that defendant-appellant's conduct must be " 'offensive to human dignity' "); *Fitzgerald v. Williamson*, 787 F.2d 403 (8th Cir. 1986); *Mitchell v. Board of Trustees of Oxford, etc.*, 625 F.2d 660 (5th Cir. 1980); *Lee v. Macon County Board of Education*, 490 F.2d 458 (5th Cir. 1974); *Petrey v. Flaugher*, 505 F. Supp. 1087 (1981); *Adams v. City of Dothan Bd. of Educ.*, 485 So. 2d 757 (Ala. App. 1986). We find this rationale persuasive. The fact that the board opted for consis-

tency of punishment rather than a tailoring of the punishment to the child does not implicate the Due Process Clause of the Constitution. *Mitchell v. Board of Trustees of Oxford, etc., supra.* Therefore, we do not find a shocking disparity between the expulsion sentence and the offense.

Kolesnick's next argument is that the discipline and sentence ordered by the board exceeded statutory authority. This argument is also without merit. Sections 79-4,175 to 79-4,180 delegate to local school boards the right to establish and promulgate rules and standards regarding student conduct. Section 79-4,179 specifically provides for an expulsion not to exceed the remaining semester and the following semester for knowingly possessing a weapon.

Kolesnick argues that the mandatory maximum sentence should not be given to all offenders and that §§ 79-4,179 and 79-4,180 clearly reflect legislative intent that alternate methods of punishment, including long-term suspensions and mandatory reassignments, be used. These sections, however, list only the grounds for which the above measures may be used. They in no way mandate use of any one form of punishment. We have held that "[t]he wisdom or expediency of a rule adopted by a school board and the motive prompting it are not open to judicial inquiry, where it is within the administrative power of that body." *Richardson v. Braham*, 125 Neb. 142, 145, 249 N.W. 557, 559 (1933).

We have also held that an appellate court will sustain the decision of an administrative body if there is evidence in the record to sustain its findings. *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994). Here, we find the decision of the board to be both within its power and supported by competent evidence. Therefore, the decision to assert the maximum punishment against Kolesnick was within the statutory authority of OPS.

Kolesnick next asserts that the board's assignment of the maximum sentence to him was arbitrary and capricious. An arbitrary action is one which is taken "in disregard of the facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion." *In re Application of Jantzen*, 245 Neb. at 100, 511 N.W.2d at 517.

A capricious action is one "guided by fancy rather than by judgment or settled purpose; such a decision is apt to change suddenly; it is freakish, whimsical, humorsome." *Id.* An agency's judgment must be based on a factual foundation and must give due consideration to all the essential elements involved. *Id.* If a school board acts within the power conferred upon it by the Legislature, courts cannot question the manner in which the board has exercised its discretion in regard to subject matter over which it has jurisdiction, unless such action is so unreasonable and arbitrary as to amount to abuse of the discretion reposed in it. *School Dist. of Waterloo v. Hutchinson*, 244 Neb. 665, 508 N.W.2d 832 (1993). Because of the express authority given OPS by §§ 79-4,175 to 79-4,180, OPS' adoption of a mandatory code cannot, by its very nature, be arbitrary or capricious.

The evidence is clear that Kolesnick brought a knife to school in violation of the OPS code. The penalty for that violation is expulsion. The board did not disregard the facts, nor was it guided by fancy in applying the stated penalty to Kolesnick. Accordingly, OPS was well within the authority given to it by the Student Discipline Act to expel Kolesnick for the semester in which the incident occurred and the following semester. Such action was neither arbitrary nor capricious.

Finally, Kolesnick asserts that the board's decision was not supported by competent, material, or substantial evidence. We disagree. The facts clearly establish that OPS had an expulsion policy for students who bring weapons, including knives, to school. Kolesnick brought the knife to King Science Center by way of OPS bus 686, showed the weapon to another student, and used it to cut his coat sleeve. The evidence clearly indicates that Kolesnick knowingly and voluntarily possessed the switchblade knife on the schoolbus and at school. Accordingly, the board's decision was supported by competent, material, and substantial evidence.

CONCLUSION

The appellants did not prejudice Kolesnick's substantial rights by ordering the two-semester expulsion. We reject Kolesnick's argument that the appellants violated his state and

federal constitutional right to an education, acted outside statutory authority, made an arbitrary or capricious decision, and meted out a penalty unsupported by competent, material, and substantial evidence. Therefore, the district court order was in error in modifying the decision of the ad hoc discipline committee of the board of education.

REVERSED.

CAPORALE, J., not participating.

FAHRNBRUCH, J., concurring in part, and in part dissenting.

I agree with the trial court and with the majority of this court that expulsion from school is an appropriate sanction when a student takes a weapon to school. It should be pointed out, however, that under the Omaha Public School District's rule, expulsion for the semester in which the violation occurs and the following semester is inherently inequitable.

Under the rule, if a weapons violation occurs the first week of the fall semester, the violator is expelled not only for the remainder of the fall semester, but also for the spring semester. On the other hand, if a violation occurs the last week before the end of the fall semester, the violator is expelled for only 1 week of the fall semester, plus the entire spring semester. Thus, the student violating the rule at the beginning of the fall semester is punished more severely than the student committing the same violation in the last week of the fall semester.

Fairness dictates that the length of Kolesnick's expulsion should have been reduced. In that regard, the decision of the trial judge should have been affirmed.

ALVIN PHILLIPS, APPELLANT, V. MONROE AUTO EQUIPMENT COMPANY, A CORPORATION, APPELLEE.

558 N.W.2d 799

Filed January 24, 1997. No. S-95-112.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a Workers' Compensation Court judgment, order, or award only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient compe-

tent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.

2. **Constitutional Law: Courts.** Article V, § 1, of the Nebraska Constitution vests in the Supreme Court the power of general administration over all courts in this state.
3. **Trial: Judgments: Time.** Appropriate judicial trial practice requires that trial judges rule on matters submitted to them in a timely fashion in order that the litigants be in a position to react to the ruling.
4. **Workers' Compensation.** The Nebraska Workers' Compensation Act is one of general interest, not only to the worker and his or her employer, but as well to the state, and it should be so construed that technical refinements of interpretation will not be permitted to defeat it.
5. **Workers' Compensation: Trial: Evidence.** The parties litigating before a compensation court shall be permitted to introduce evidence which is procedurally and substantively admissible in the trial courts of this state.
6. **Workers' Compensation.** The procedural, evidentiary, and discovery rules established by the compensation court may not be more restrictive or onerous than those of the trial courts in this state.
7. **Pretrial Procedure.** The primary purpose of the discovery process is the exploration of all available and properly discoverable information to narrow the fact issues in controversy so that a trial may be an efficient and economical resolution of a dispute.
8. ____. The purpose of the discovery process is to provide an adequate pretrial preparation as a basis for an informed cross-examiner and informative cross-examination. Further, the discovery process enables litigants to prepare for a trial without the element of an opponent's tactical surprise.
9. ____. Substantive sanctions regarding discovery and other pretrial procedural matters are designed to prevent a party who has failed to comply with discovery from profiting by such misconduct.

Appeal from the Nebraska Workers' Compensation Court. Judgment vacated, and cause remanded with directions.

Bernard J. Glaser, Jr., and Greg C. Harris for appellant.

James J. Paloucek and Royce E. Norman, of Norman & Paloucek Law Offices, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

GERRARD, J.

INTRODUCTION

In this workers' compensation case, the plaintiff-appellant, Alvin Phillips, claims entitlement to benefits because of bilateral carpal tunnel syndrome and lateral epicondylitis, resulting

from repetitive lifting arising out of and in the course of his employment with the defendant-appellee, Monroe Auto Equipment Company (Monroe). The dismissal of his petition on original hearing was affirmed by a review panel of the Nebraska Workers' Compensation Court, whereupon Phillips appealed to the Nebraska Court of Appeals. On our own motion, we removed this matter to our docket in order to regulate the caseloads of the Court of Appeals and this court. This case requires us to decide whether the compensation court acted in excess of its powers when it excluded certain expert medical testimony on the determinative issue of causation based solely or primarily on Workers' Comp. Ct. R. of Proc. 4 (1994) (hereinafter rule 4). For the reasons that follow, we specifically disapprove of the compensation court's application of rule 4D, and we therefore vacate the judgment of dismissal and remand with directions.

FACTUAL BACKGROUND

In the latter part of 1990, Phillips was employed by a company which cleaned the IBP plant in Lexington, Nebraska. His job involved the use of a high-pressure hose to wash out coolers. Phillips worked no more than 2 months for this employer, quitting just before Christmas 1990. It was at this time that Phillips first developed pain in his left elbow. Phillips sought treatment for this pain from his physician, Dr. Gregory Kloch. Dr. Kloch diagnosed Phillips' elbow pain as lateral epicondylitis, otherwise known as tennis elbow.

The cause of Phillips' lateral epicondylitis was thought to be a result of his employment, specifically, the use of a high-pressure hose. Dr. Kloch told Phillips to stop using the high-pressure hose, and within 2 months of leaving this job, Phillips testified that his elbow felt fine. Moreover, Dr. Kloch stated that at this time, February 1991, Phillips' lateral epicondylitis had resolved.

After Phillips' employment cleaning the IBP plant but before his employment with Monroe, Phillips worked for a commercial cleaning company, cleaning offices in Lincoln, Nebraska. This job lasted no longer than 2 months. He then worked for 2 months as a temporary employee operating an iron punch for

Orthman Manufacturing of Lexington. Phillips did not report experiencing any further problems with his elbow while working for either of these employers.

Phillips' employment with Monroe commenced in May 1991. Initially, Phillips packaged shock absorbers and later worked assembling various specialty shocks. On June 25, 1991, while working on Monroe's paint line hanging shocks, Phillips reported injuring his left elbow. Within 24 hours of the occurrence of this injury, Phillips sought medical attention from Dr. Kloch. Dr. Kloch diagnosed Phillips' injury as lateral epicondylitis.

In addition, on July 30, 1991, Phillips reported to his supervisor that he was having a problem with his hands swelling and going numb or falling asleep. Phillips claimed this injury first occurred 10 days to 2 weeks prior to his report. Phillips sought medical treatment for this injury from Dr. Kloch, who diagnosed the injury as bilateral carpal tunnel syndrome.

It was at this time that Dr. Kloch referred Phillips to Dr. Robert Urban, an orthopedic specialist located in Kearney, Nebraska. Dr. Urban treated Phillips' bilateral carpal tunnel syndrome in October 1991 by performing a surgical release procedure on each wrist separately within a 4-week period. In addition, Dr. Urban ultimately treated Phillips' lateral epicondylitis through two surgeries, the first performed on November 21, 1991, and the second on August 17, 1992. Phillips' employment with Monroe came to an end in early February 1992.

PROCEEDINGS IN WORKERS' COMPENSATION COURT

The trial of this matter was held on July 13, 1994. At trial, Phillips offered in evidence several exhibits, including exhibits 28 and 29, the depositions of Drs. Kloch and Urban respectively. The deposition of Dr. Kloch was taken on July 1, 12 days before trial. The deposition of Dr. Urban was taken on July 8, 5 days before trial. Counsel for Monroe did not object to the general offer of exhibits 28 and 29 at trial, but counsel did reserve all objections that he made at the time of the depositions based primarily on Phillips' failure to make timely rule 4 disclosures.

The trial court did not rule on Monroe's rule 4 objections at the time of trial. The trial court reserved ruling on the rule 4 objections until July 29, 1994, when the court entered an order of dismissal against Phillips. In its order of dismissal, the trial court sustained two of Monroe's objections to Dr. Kloch's testimony (both based on rule 4 failure to disclose) made when the physician was asked his professional opinion of the cause of Phillips' lateral epicondylitis and bilateral carpal tunnel syndrome. The trial court also sustained seven of Monroe's objections to Dr. Urban's testimony (all based in whole or primarily on rule 4 failure to disclose) made when this physician was asked his professional opinion of the cause of Phillips' lateral epicondylitis and bilateral carpal tunnel syndrome.

The trial court, in its order, noted that the primary issue in the instant case is one of causation. The court further noted that carpal tunnel syndrome and lateral epicondylitis are both medical conditions that require expert testimony regarding causation. After the trial court sustained Monroe's objections raised during the depositions of both Drs. Kloch and Urban, the court determined that Phillips failed to meet his burden of proof of showing, by a preponderance of the evidence, the causal connection between the alleged injury and employment, as required by law.

A three-judge review panel affirmed the trial court's order of dismissal. Phillips contends in his brief that, after filing his notice of appeal, he filed a motion to amend the bill of exceptions to have the record include the rule 4 disclosures and underlying discovery materials pursuant to Neb. Ct. R. of Prac. 5 (rev. 1996). Phillips claims that this motion was overruled after a hearing at the trial court level. There is no such motion contained in the record, nor is there an order from the trial court attached to the bill of exceptions, as required by rule 5B(5).

SCOPE OF REVIEW

An appellate court may modify, reverse, or set aside a Workers' Compensation Court judgment, order, or award only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the

record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996); *Hull v. Aetna Ins. Co.*, 249 Neb. 125, 541 N.W.2d 631 (1996); *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996). See Neb. Rev. Stat. § 48-185 (Reissue 1993).

ASSIGNMENTS OF ERROR

Summarized and restated, Phillips contends that the review panel erred in not finding (1) that the trial court's decision was contrary to law when it sustained Monroe's rule 4 objections to specific testimony contained within exhibits 28 and 29, (2) that the trial court's decision was clearly wrong on the evidence when it found that Phillips' injuries did not arise out of and in the course of his employment with Monroe and that Phillips' lateral epicondylitis was a condition that existed prior to Phillips' employment with Monroe, and (3) that the trial court was in error when it denied Phillips' motion to amend the bill of exceptions to include discovery-related pleadings filed with the compensation court. The disposition of this case requires that we review only Phillips' first assigned error.

ANALYSIS

Phillips first claims, somewhat unartfully, that the trial court acted in excess of its powers when it excluded the opinion testimony of Drs. Kloch and Urban regarding causation pursuant to Monroe's rule 4 objections. Neb. Rev. Stat. § 48-163(1) (Reissue 1993) provides:

> The Nebraska Workers' Compensation Court, by a majority vote of the judges thereof, may adopt and promulgate all reasonable rules and regulations necessary for carrying out the intent and purpose of the Nebraska Workers' Compensation Act and shall administer and enforce all of the provisions of such act, except such as are committed to the Supreme Court.

Pursuant to this legislative mandate, the Workers' Compensation Court has promulgated and adopted certain rules of procedure. At the outset, we are mindful that the Nebraska

Workers' Compensation Court was created pursuant to article V, § 1, of the Nebraska Constitution. See Neb. Rev. Stat. § 48-152 (Reissue 1993). Moreover, article V, § 1, of the Nebraska Constitution vests in this court the power of general administration over all courts in this state, including the Workers' Compensation Court.

The pertinent portions of rule 4 in effect at the time of trial were as follows:

> **A. Required Disclosures.**
>
> **1. Initial Disclosures.**
>
> Each party shall without awaiting a discovery request provide to every other party;
>
> a. the name and, if known, the address and telephone number of each individual likely to have information that bears significantly on any claim or defense, identifying the subjects of the information;
>
> b. a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are likely to bear significantly on any claim or defense . . . .
>
> . . . .
>
> These disclosures shall be made (1) by the plaintiff within 14 days after service of an answer to its petition; (2) by a defendant within 14 days after serving its answer to the petition . . . .
>
> **2. Disclosure of Expert Testimony.**
>
> a. In addition to the disclosures required in paragraph 1, each party shall disclose to every other party any evidence that the party may present at trial by or from any witness qualified as an expert.
>
> This disclosure shall be in the form of a written report prepared and signed by the witness which complies with Rule 10.
>
> b. Unless the court designates a different time, the disclosures shall be made at least 30 days before trial, or if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph 2,a, within 10 days after the disclosure made by such other party. . . .

3. Pretrial Disclosures. In addition to the disclosures required in the preceding paragraphs, each party shall provide to every other party the following information regarding the evidence that the disclosing party may present at trial:

a. the name, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises whether or not previously provided;

b. the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken by stenographic means, a transcript of the pertinent portions of such deposition testimony; and

c. an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

These disclosures shall be made at least 30 days before trial, or if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph 3, within 10 days after the disclosure made by such other party. Within 10 days thereafter, unless a different time is specified by the court, other parties shall serve and file (1) any objections that deposition testimony designated under subparagraph 3,b cannot be used and (2) any objection to the admissibility of the materials identified under subparagraph 3,c. Objections not so made shall be deemed waived unless excused by the court for good cause shown. Objections shall be heard at time of trial.

4. Form of Disclosures; Filing. The disclosures required by the preceding paragraphs shall be made in writing and signed by the party or counsel. The disclosures shall be served . . . and proof of service promptly filed with the court. Unless otherwise ordered by the court, disclosure materials shall not be filed with the court. Only the proof of service is to be filed with the court.

. . . .

> **D. Failure to Disclose.** Any witness not listed in timely pretrial disclosure shall not be allowed to testify. *An expert witness shall not be allowed to testify if a written report from such expert witness has not also been timely disclosed.* No party will be allowed to introduce documentary evidence not timely exchanged, or to amend forms, answers, medical reports or lists of witnesses within 30 days of the date of trial, unless the offering party shows good cause why the late offering of such evidence should be excused. Any party may use an exhibit or witness listed in the pretrial disclosure of any other party. Motions for extension of time or for continuances because evidence has not been timely exchanged shall be heard at time of trial.

(Emphasis supplied.)

The transcript in the present case reveals that Phillips filed his petition on December 30, 1993. Monroe filed its answer on January 10, 1994. Phillips then filed with the trial court a notice of service of his initial disclosures pursuant to rule 4A(1) on January 25, while Monroe filed a notice of service of its initial disclosures on February 4. Both parties supplemented their disclosures, with Monroe filing notices of service on February 9 and 25, and Phillips filing a notice of service on June 23. In addition, the transcript shows that Monroe served upon Phillips a set of interrogatories and request for production of documents on May 11.

Monroe filed a notice of service on June 13, 1994, regarding its pretrial disclosures pursuant to rule 4A(3). Phillips filed a notice of service on June 14 of his pretrial disclosures pursuant to rule 4A(3). The trial of this matter was set for July 13.

The problem that confronts us, and that must have confronted the review panel, is that the record does not reflect what documents were disclosed from one party to the other pursuant to rule 4. Even though the trial court sustained Monroe's objections to the expert witnesses' testimony on the dispositive issue of causation based primarily on rule 4, an exhaustive review of the record reveals no proof by either party of what disclosures were made to the opposing party prior to trial. There is not a scintilla of evidence of what disclosures were actually made or

what documents were exchanged between the parties prior to the July 13, 1994, trial. Even though the transcript contains the above-referenced notices of service of disclosure documents, these notices were not offered in evidence at trial, and, in any event, the notices contain no information regarding specific documents that may have been exchanged between the parties.

Both parties argue extensively in their briefs the effects of rule 4 disclosures upon their respective cases. Phillips asserts that Monroe was provided with detailed written medical reports by Drs. Kloch and Urban regarding causation in Phillips' initial and supplemental rule 4 disclosures. In addition, Phillips claims that Drs. Kloch and Urban were listed as witnesses for trial in *both* Phillips' and Monroe's pretrial disclosures and that the depositions of both physicians were taken in lieu of trial testimony. Monroe, on the other hand, urges that it was not given adequate disclosure of Phillips' causation evidence prior to the depositions. Even though Monroe did not file a motion to continue the trial based on an untimely disclosure of evidence (rule 4D), Monroe nevertheless claims that it was effectively precluded by time constraints from obtaining an independent medical evaluation to refute the expert opinions of Drs. Kloch and Urban.

The fact is that we do not have an adequate record to determine which, if either, of these claims is correct. The instant case is further complicated in that Phillips was confronted with a situation in which he could not complain of the trial court's error in sustaining Monroe's rule 4 objections because the court did not rule on the objections until entering its order of dismissal 16 days after the trial. In *Toombs v. Driver Mgmt., Inc.*, 248 Neb. 1016, 540 N.W.2d 592 (1995), we determined that appropriate judicial trial practice requires that trial judges rule on matters submitted to them in a timely fashion in order that the litigants be in a position to react to the ruling. While the trial in this case occurred prior to our decision in *Toombs*, we again take this opportunity to condemn the practice of deferring rulings on evidential, discovery, and like matters until deciding the cause on the merits—at a time when the litigants are no longer in a position to react to the ruling. See *id.*

Based on the record before us, we are asked to determine whether the compensation court acted in excess of its powers when it excluded the opinion testimony of Drs. Kloch and Urban regarding causation pursuant to Monroe's rule 4 objections. In order to answer that question, we must determine what power the compensation court possesses in adopting and promulgating reasonable rules necessary "for carrying out the intent and purpose of the Nebraska Workers' Compensation Act." § 48-163(1).

This court has repeatedly held that the Nebraska Workers' Compensation Act is one of general interest, not only to the worker and his or her employer, but as well to the state, and it should be so construed that technical refinements of interpretation will not be permitted to defeat it. See, *Fite v. Ammco Tools, Inc.*, 199 Neb. 353, 258 N.W.2d 922 (1977); *Speas v. Boone County*, 119 Neb. 58, 227 N.W. 87 (1929). As in *Fite*, we are concerned here with the refusal of the compensation court to admit evidence that would be admissible in virtually all the trial courts of this state; evidence which would directly tend to prove the principal issue of the case, i.e., whether there is a causal connection between the alleged injury and the employment of the worker.

We observed in *Fite* that given the beneficent purposes of the Nebraska Workers' Compensation Act, in its exemption from the rules of evidence, see Neb. Rev. Stat. § 27-1101(4)(d) (Reissue 1995), the compensation court is empowered to admit evidence not admissible in the trial courts of this state. Neither § 27-1101(4) nor § 48-163(1) grants the compensation court the right to establish rules of evidence, procedure, or discovery that are more restrictive than the rules applicable to the trial courts of this state. Rather, their purpose is to allow the compensation court to "make the investigation in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of the Nebraska Workers' Compensation Act." Neb. Rev. Stat. § 48-168(1) (Reissue 1993). See, also, *Fite v. Ammco Tools, Inc., supra.* In addition, due process requirements in many instances will "control the type of evidence [that is admissible] in a trial of a

workers' compensation case. . . . See, also, 3 A. Larson, The Law of Workmen's Compensation § 79.80 (1989) . . . ." *Sherard v. Bethphage Mission, Inc.*, 236 Neb. 900, 910, 464 N.W.2d 343, 350 (1991).

Therefore, we hold that, at a minimum, the parties litigating before a compensation court are permitted to introduce evidence which is procedurally and substantively admissible in the trial courts of this state. The procedural, evidentiary, and discovery rules established by the compensation court may not be more restrictive or onerous than those of the trial courts in this state. We can think of no principled reason why discovery or procedural rules in workers' compensation cases should serve a different purpose than in our civil courts.

The primary purpose of the discovery process is the exploration of all available and properly discoverable information to narrow the fact issues in controversy so that a trial may be an efficient and economical resolution of a dispute. See *Christianson v. Educational Serv. Unit No. 16*, 243 Neb. 553, 501 N.W.2d 281 (1993). The purpose of the discovery process is to provide an adequate pretrial preparation as a basis for an informed cross-examiner and informative cross-examination. Further, the discovery process enables litigants to prepare for a trial without the element of an opponent's tactical surprise, a circumstance which might lead to a result based more on counsel's legal maneuvering than on the merits of the case. *Norquay v. Union Pacific Railroad*, 225 Neb. 527, 407 N.W.2d 146 (1987).

Substantive sanctions regarding discovery and other pretrial procedural matters are designed to prevent a party who has failed to comply with discovery from profiting by such misconduct. See *id.* However, before the ultimate sanction of prohibiting a party from introducing otherwise admissible evidence is imposed in civil cases, the opposing party must file a motion requesting such a sanction with reasonable notice to all affected parties. See, e.g., Neb. Ct. R. of Discovery 37 (rev. 1996). Such a sanction is not even considered in this state's civil courts unless all affected parties have received notice and an opportunity to be heard on the merits. In the instant case, there was no showing by Monroe that (1) it had not received a written report

from the expert witnesses setting forth their respective opinions regarding causation, or (2) the experts' written reports were not disclosed on a timely basis. Rule 4D does not require such a showing before the compensation court may impose the sanction of prohibiting a witness' testimony based on a rule 4 objection by either party.

We conclude that substantive sanctions regarding discovery and other pretrial procedural matters in the compensation court should be subject to at least the same procedural safeguards as comparable sanctions for alleged discovery and pretrial procedural violations in Nebraska's civil courts. For the foregoing reasons, we specifically disapprove of the compensation court's application of rule 4D to prohibit expert testimony in the absence of adequate procedural safeguards equal to those utilized in the trial courts of this state.

Under the standard of review set forth in § 48-185, we are not permitted to make an independent determination of the merits of the instant case in this court. Rather, in our review, as set forth above, we conclude that the compensation court "acted without or in excess of its powers" when it excluded the opinion testimony of Drs. Kloch and Urban regarding causation pursuant to Monroe's rule 4 objections without the benefit of hearing both parties on the merits. We are unable to determine what the compensation court would have decided had the physicians' testimony regarding causation been admitted in the first instance.

CONCLUSION

Therefore, we vacate the compensation court's judgment of dismissal and remand the cause to the compensation court with the directions that the trial judge conduct such proceedings as are necessary to determine whether the requisites of due process have been met sufficient to admit the testimony of Drs. Kloch and Urban regarding causation and, upon such determination, conduct further proceedings consistent with this opinion.

JUDGMENT VACATED, AND CAUSE
REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. DON STENBERG, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, APPELLANT, V. SCOTT MOORE, SECRETARY OF STATE OF THE STATE OF NEBRASKA, APPELLEE.

558 N.W.2d 794

Filed January 24, 1997. No. S-96-697.

1. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court has an obligation to reach a conclusion independent of that of the inferior court.
2. **Constitutional Law: Initiative and Referendum.** The people of Nebraska may amend their Constitution in any way they see fit, provided the amendments do not violate the federal Constitution or conflict with federal statutes or treaties.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Don Stenberg, Attorney General, and L. Steven Grasz for appellant.

Michael F. Coyle, Special Assistant Attorney General, and Mary Kay Frank, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, WRIGHT, CONNOLLY, and GERRARD, JJ.

WRIGHT, J.

The relator, the Attorney General of the State of Nebraska, appeals from a district court order denying his request for declaratory relief.

SCOPE OF REVIEW

Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court has an obligation to reach a conclusion independent of that of the inferior court. *State v. Bundy,* 250 Neb. 213, 549 N.W.2d 122 (1996); *Bristol v. Rasmussen*, 249 Neb. 854, 547 N.W.2d 120 (1996).

FACTS

On March 25, 1988, the Legislature approved Legislative Resolution 248CA (hereinafter Amendment 3A), which provided in part as follows:

Sec. 2. The proposed amendments shall be submitted to the electors in the manner prescribed by Article XVI, section 1, of the Constitution of Nebraska. The proposition for the submission of the proposed amendments shall be placed upon the ballot in the following forms:

"A constitutional amendment to provide that only registered voters, instead of electors, may sign petitions for initiatives or referendums.

For

Against".

The apparent purpose of Amendment 3A was to change the terminology in article III, § 2, of the Nebraska Constitution from "electors" to "registered voters" when referring to those people who are eligible to sign an initiative or referendum petition. The Executive Board of the Legislative Council submitted an explanatory statement for Amendment 3A which stated as follows: "*A vote FOR this proposal would change from 'electors' to 'registered voters' those people who are eligible to sign an initiative or referendum petition. A vote AGAINST this proposal would retain the current requirement that one must be an elector to sign an initiative or referendum petition.*"

The Secretary of State prepared the proposed ballot initiative, and it was included on the November 8, 1988, ballot. Amendment 3A was subsequently approved by a majority of the voters. Thereafter, in *Duggan v. Beermann*, 245 Neb. 907, 515 N.W.2d 788 (1994), this court considered the effect of Amendment 3A on the number of petition signatures required in order to place an initiative on an upcoming ballot.

Prior to the passage of Amendment 3A, article III, § 2, of the Nebraska Constitution, read in conjunction with article III, § 4, provided that the number of signatures required for an initiative to be placed on the ballot was the number of "electors" equal to at least 10 percent of the number of votes cast in the preceding gubernatorial election if the initiative petition was for a constitutional amendment. Amendment 3A changed the signature requirement to 10 percent of the registered voters. Article III, § 4, which was not the subject of Amendment 3A, provided that the number of signatures would be based on the number of votes cast in the last gubernatorial election.

In *Duggan*, Nebraskans for Term Limits had filed with the Secretary of State a proposed initiative petition to amend the Nebraska Constitution to limit various state officials to a maximum number of consecutive terms in their respective offices. The proposed amendment also sought to amend the Nebraska Constitution to limit the number of consecutive elections in which certain candidates for the House of Representatives and the U.S. Senate would be eligible to file for election or have their names placed on an official Nebraska ballot. The Secretary of State certified the petition and ordered that the initiative question be placed on the ballot in the November 1992 general election. Timothy Duggan, a citizen and registered voter in the State of Nebraska, challenged the initiative petition and the number of signatures, claiming the number of signatures submitted by Nebraskans for Term Limits did not meet the requirements of the Nebraska Constitution for placing an initiative on the ballot. Duggan claimed that the Secretary of State could not compute the number of signatures required based upon the number of those who voted in the last gubernatorial election, but, rather, had to calculate the number of signatures required based upon the number of registered voters on the date upon which the signatures were due.

We noted that the plain language of article III, § 2, as amended by the voters in November 1988, required that a petition for the amendment of the Nebraska Constitution be signed by 10 percent of the registered voters. Thus, we concluded that article III, § 4, was repealed by implication in 1988, when article III, § 2, was amended. As a result, the number of signatures required to place an initiative on the ballot would no longer be calculated based upon the number of votes cast in the previous gubernatorial election. Instead, we held that because Amendment 3A repealed the relevant provisions of article III, § 4, the number of signatures required to place an initiative on the ballot would be calculated based on the number of registered voters at the time the initiative petition is submitted. Accordingly, we concluded in *Duggan* that the petition for term limits lacked the required number of signatures for placement of the measure on the ballot. Therefore, the amendments contained in the measure were not properly placed on the ballot,

and we declared the amendments void despite their approval by the voters in the November 1992 general election.

In the present case, the Attorney General filed a petition for declaratory judgment in Lancaster County District Court, alleging that Amendment 3A was not accompanied on the ballot by an explanatory statement advising voters of the effect its passage would have on their constitutional rights, as the Attorney General argues is required by Neb. Rev. Stat. § 32-707.01 (Reissue 1993). The Attorney General alleged that the explanatory statement did not describe the effect Amendment 3A would have upon article III, § 4, and the resulting increase in the number of signatures required for initiative or referendum petitions.

The Attorney General's petition claimed that the explanatory statement and ballot title accompanying Amendment 3A violated Neb. Const. art. I, § 22, by denying Nebraska electors their right to vote on a proposed constitutional amendment on a ballot free of misleading content or omission. The Attorney General also alleged that the explanatory statement and ballot title accompanying Amendment 3A violated Neb. Const. art. XVI, § 1, by failing to submit a proposed constitutional amendment to the electors for approval or rejection in a manner showing the true character and purpose of the amendment. Thus, the Attorney General requested a declaratory judgment finding that Amendment 3A was void and of no effect and determining that Neb. Const. art. III, §§ 2, 3, and 4, remain valid constitutional provisions as they existed prior to Amendment 3A, subject only to Amendment 3B as adopted on November 8, 1988.

On June 10, 1996, the district court dismissed the Attorney General's petition for declaratory judgment.

ASSIGNMENTS OF ERROR

The Attorney General assigns two errors to the district court: (1) The district court erred in not ordering relief consistent with its findings of fact, as required by applicable law, and (2) the district court erred in failing to follow controlling Supreme Court precedent regarding the adjudication of constitutional issues after an election has occurred.

ANALYSIS

The issue as framed by the Attorney General is whether Amendment 3A was properly submitted and adopted by the vote of the people of the State of Nebraska in the 1988 general election. The question presented is whether Amendment 3A was accompanied on the ballot by an explanatory statement that properly advised the voters in clear, concise language of the effect of a vote for or a vote against Amendment 3A, as required by § 32-707.01.

The Attorney General's concern regarding Amendment 3A is that the explanatory language that accompanied the corresponding ballot item did not clearly articulate the fact that the passage of the ballot item would result in increasing the number of signatures required to place an initiative or referendum measure on the ballot. The Attorney General argues that the explanatory language did not sufficiently warn the voters of this effect and that, as a result, the voters may have supported Amendment 3A without having any desire to increase the number of signatures required to place an initiative or referendum measure on the ballot.

The Attorney General's position that the voters did not want to increase the number of signatures required for initiative or referendum petitions is clearly undermined by the result of the November 5, 1996, election, of which we take judicial notice. Courts may take judicial notice of an election and the result of the election when the declaration is made as provided by law. See *State ex rel. Caldwell v. Peterson*, 153 Neb. 402, 45 N.W.2d 122 (1950). Courts will take judicial notice of an authorized election and its results, and of the number of votes cast thereat. *Kokes v. State*, 55 Neb. 691, 76 N.W. 467 (1898).

Initiative measure No. 410 (Initiative 410) was placed on the ballot for the November 5, 1996, election. The text of Initiative 410 is set forth as follows:

> III-2 "The first power reserved by the people is the initiative by which laws may be enacted and constitutional amendments adopted by the people independently of the Legislature. To initiate the enactment of a law or the adoption of a constitutional amendment, a petition shall be circulated which contains the entire proposed law or

constitutional amendment. The petition shall be filed with the Secretary of State. If the petition is signed by the required number of registered voters appropriately distributed, the Secretary of State shall submit the proposed law or constitutional amendment to the electors of the state at the first general election held not less than four months after the petition is filed. The required number of signatures for a law is seven percent of the votes which were cast for Governor at the general election next preceding the filing of the petition. The required number of signatures for a constitutional amendment is ten percent of the votes which were cast for Governor at the general election next preceding the filing of the petition. The distribution of the registered voters signing a petition for a law or a constitutional amendment shall include signatures equal in number to five percent of the votes cast for Governor at the general election next preceding the filing of the petition from each of two-fifths of the counties in the state. The same measure, either in form or in essential substance, shall not be submitted to the people by initiative petition, either affirmatively or negatively, more often than once in three years. If conflicting measures submitted to the people at the same election are approved, the one receiving the highest number of affirmative votes shall become law as to all conflicting provisions. The constitutional limitations as to the scope and subject matter of statutes enacted by the Legislature shall apply to those enacted by the initiative."

III-3 "The second power reserved is the referendum which may be invoked against any act or part of an act of the Legislature, except those making appropriations for the expense of the state government or a state institution existing at the time of the passage of such act. To refer an act or part of an act of the Legislature, a petition shall be circulated which sets out the title of the act against which the referendum is invoked and, if only a portion of the act is sought to be referred, the number of the e [sic] section or sections or portion of sections of the act designating such portion. The petition shall be filed with the Secretary

of State within ninety days after the Legislature at which the act sought to be referred was passed has adjourned sine die or for more than ninety days. If the petition is signed by the required number of registered voters appropriately distributed, the Secretary of State shall refer the act or the part of the act to the electors for approval or rejection at the first general election to be held not less than thirty days after the filing of the petition. The required number of signatures is five percent of the votes which were cast for Governor at the general election next preceding the filing of the petition. The distribution of the registered voters signing a referendum petition shall include signatures equal in number to five percent of the votes cast for Governor at the general election next preceding the filing of the petition from each of two-fifths of the counties in the state.

When the referendum is invoked as to any act or part of act, other than emergency acts or those for the immediate preservation of the public peace, health, or safety, by petition signed by registered voters equal in number to ten percent of the number of votes which were cast for Governor at the general election next preceding the filing of the petition distributed so as to include signatures equal in number to five percent of the votes cast for Governor at the general election next preceding the filing of the petition from each of two-fifths of the counties in the state, it shall suspend the taking effect of such act or part of act until the same has been approved by the electors of the state."

The ballot language for Initiative 410 is set forth as follows:

A vote "FOR" will amend the Constitution of Nebraska to return the number of signatures required on initiative and referendum petitions to ten percent of the votes cast for Governor at the most recent preceding general election if for a proposed Constitutional amendment; seven percent of such votes cast if for enactment of a law; ten percent of such votes cast if seeking to suspend the effect of an act of the Legislature pending a vote of the people;

and five percent of such votes cast if for a referendum on an act of the Legislature.

A vote "AGAINST" will not cause the Constitution of Nebraska to be amended in such a manner and the number of signatures required will be based on percentages of the total number of registered voters.

The ballot language that accompanied Initiative 410 articulated that the sole purpose of Initiative 410 was to return the number of signatures required on initiative and referendum petitions to the number required prior to the adoption of Amendment 3A. The ballot language stated that a vote against Initiative 410 would not amend the Nebraska Constitution in this fashion, and the number of signatures required will be based on percentages of the total number of registered voters.

Thus, Initiative 410 gave the voters in the November 5, 1996, election a clear opportunity to verify the Attorney General's concern that the passage of Amendment 3A was the result of a misinformed voting public. The passage of Initiative 410 would have established, in fact, that the voters preferred the lower signature requirement that prevailed prior to Amendment 3A and our decision in *Duggan v. Beermann*, 245 Neb. 907, 515 N.W.2d 788 (1994). However, the voters clearly rejected the proposed return to the lower signature requirement. As of December 11, 1996, the abstract of the number of votes stated that 242,537 votes were cast for and 329,946 votes were cast against Initiative 410.

The Attorney General claims to have initiated this petition for declaratory judgment in order to protect the constitutional right of Nebraska citizens "to vote on the proposed constitutional amendment on a ballot free of misleading content or omission . . . ." Brief for appellant at 2. If we were to now determine that Amendment 3A was void and of no effect, we would be required to ignore the vote of the people of Nebraska that most recently decided this issue. We decline to do this. There can be no doubt that the people clearly understood which rights were involved in Initiative 410.

A vote "FOR" will amend the Constitution of Nebraska to return the number of signatures required on initiative

> *and referendum petitions to ten percent of the votes cast for Governor at the most recent preceding general election . . . .*
>
> *A vote "AGAINST" will not cause the Constitution of Nebraska to be amended in such a manner and the number of signatures required will be based on percentages of the total number of registered voters.*

We have long recognized that a proposed amendment to the Nebraska Constitution could be submitted to the electorate, see, *Omaha Nat. Bank v. Spire*, 223 Neb. 209, 389 N.W.2d 269 (1986); *In re Senate File 31*, 25 Neb. 864, 41 N.W. 981 (1889), and that the people of Nebraska may amend their Constitution in any way they see fit, provided the amendments do not violate the federal Constitution or conflict with federal statutes or treaties, see *Omaha Nat. Bank v. Spire, supra.* The people may also choose not to amend their Constitution. In matters involving the people's amendment of their Constitution, we do not attempt to judge the wisdom or desirability of such amendments.

The initiative petition for Initiative 410 set forth what measure the signers of the petition desired to have submitted to the voters. To now ignore the results of the vote on Initiative 410 would be to deny such voters the same rights that the Attorney General seeks to protect.

In *Omaha Nat. Bank*, we considered how the court should approach the issue of determining the intent of the voters regarding the adoption of an initiative enactment. We concluded that with regard to an initiative enactment, there was no meaningful way to determine the intent which motivated voters to adopt the enactment. We held that the intent of the voters adopting an initiative enactment to the Nebraska Constitution must be determined from the words of the initiative amendment itself.

In the present case, we do not need to determine the intent of the voters as to Amendment 3A. Instead, the pronouncement of the voters in the November 5, 1996, election guides our decision in this case. The language of Initiative 410 is clear and unambiguous, and the intent of the people is determined by simply counting the votes.

Since this case involves a question of law, we have an obligation to reach a conclusion independent of that of the inferior court. See, *State v. Bundy*, 250 Neb. 213, 549 N.W.2d 122 (1996); *Bristol v. Rasmussen*, 249 Neb. 854, 547 N.W.2d 120 (1996). Therefore, for the reasons set forth in this opinion, we affirm the judgment of the district court which dismissed the Attorney General's petition for declaratory judgment.

AFFIRMED.

LANPHIER, J., not participating.
FAHRNBRUCH, J., concurs in the result.

GEORGE P. BURKE, APPELLEE, V. BLUE CROSS BLUE SHIELD OF NEBRASKA, A CORPORATION, ET AL., APPELLANTS.
558 N.W.2d 577

Filed January 31, 1997. No. S-94-777.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Declaratory Judgments: Appeal and Error.** When a declaratory judgment action presents questions of law, an appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court.
3. **Insurance: Contracts: Appeal and Error.** The interpretation and construction of an insurance contract or policy involve questions of law in connection with which an appellate court has an obligation to reach its conclusions independent of the determinations made by the court below.
4. **Final Orders: Words and Phrases: Appeal and Error.** To be final, an order must dispose of the whole merits of the case. When no further action of the court is required to dispose of a pending cause, the order is final. If the cause is retained for further action, the order is interlocutory.
5. **Liability: Damages: Appeal and Error.** An interlocutory summary adjudication of liability alone, which does not decide the question of damages, is not appealable.
6. **Insurance: Contracts: Intent: Appeal and Error.** In appellate review of an insurance policy, the policy must be construed as any other contract, and effect must be given to the parties' intentions at the time the contract was made. When the terms of such a contract are clear, they are to be accorded their plain and ordinary meaning.
7. **Employer and Employee: Words and Phrases.** Full-time employment does not mean full-time pay; it means being available for full employment. Full employment

does not mean a hand at the helm throughout the entire voyage; it means standing by to take over when the exigencies of the passage require the application of one's skill acquired over many journeys of the past.

8. **Public Officers and Employees.** A deputy county attorney who is on call 24 hours a day, 7 days a week, 52 weeks a year, is a full-time employee.

Appeal from the District Court for Kimball County: JOHN D. KNAPP, Judge. Affirmed.

James W. Ellison, of Holtorf, Kovarik, Ellison & Mathis, P.C., for appellants.

George P. Burke, pro se.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

The defendants have appealed a district court judgment awarding George P. Burke $17,727.67 as reimbursement for money Burke spent for family health insurance premiums while serving as a deputy county attorney in Kimball County.

We affirm the judgment of the Kimball County District Court.

ASSIGNMENTS OF ERROR

Restated, the defendants contend the district court erred in (1) granting summary judgment as to liability when a question of fact remained, (2) interpreting the insurance policy, (3) treating Burke the same as an elected official for insurance purposes, and (4) determining Burke had fulfilled the eligibility requirements of the insurance policy.

STANDARD OF REVIEW

Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Larkin v. Ethicon, Inc., ante* p. 169, 556 N.W.2d 44 (1996).

When a declaratory judgment action presents questions of law, an appellate court, regarding questions of law, has an obli-

gation to reach its conclusion independent from the conclusion reached by the trial court. *Hauserman v. Stadler, ante* p. 106, 554 N.W.2d 798 (1996); *Woodmen of the World Life Ins. Soc. v. Yelich*, 250 Neb. 345, 549 N.W.2d 172 (1996).

The interpretation and construction of an insurance contract or policy involve questions of law in connection with which an appellate court has an obligation to reach its conclusions independent of the determinations made by the court below. *Farm Bureau Ins. Co. v. Bierschenk*, 250 Neb. 146, 548 N.W.2d 322 (1996).

FACTS

At all relevant times herein, the defendant Kimball County provided group health insurance to its full- and part-time employees through the defendant Nebraska Association of County Officials (NACO), which contracted with the defendant Blue Cross Blue Shield of Nebraska (Blue Cross) as the insurer.

On May 15, 1989, Burke was appointed deputy county attorney for Kimball County. As a deputy county attorney, Burke received a monthly check for a fixed amount. He was on call 24 hours a day, 7 days a week, 52 weeks a year. During the time he was a deputy county attorney, he was permitted to maintain a private law practice.

On September 10, 1990, Burke applied for Blue Cross group health insurance coverage as a full-time employee of Kimball County. On October 15, Blue Cross denied Burke coverage, stating there was no proof that he was a full-time employee of Kimball County. On January 22, 1991, Burke filed another application for group health insurance coverage. Blue Cross denied the second application.

Thereafter, on August 3, 1992, Burke filed an amended declaratory judgment petition in the district court seeking to establish his right to health insurance coverage as a Kimball County employee. Burke contended that he and his family were entitled to group health insurance coverage because he was a full-time employee of Kimball County and that having been denied the requested coverage, he was forced to purchase, at his own expense, other health insurance from Blue Cross at comparatively unfavorable rates and terms.

On August 6, 1993, following a hearing, the district court granted Burke's motion for summary judgment on the issue of liability. Specifically, the district court concluded that Burke was a public official analogous to an elected county commissioner, serving as deputy county attorney 24 hours a day, 7 days a week, 52 weeks a year, and as such, Burke was entitled to full group health insurance coverage provided by Blue Cross at the expense of Kimball County. In its journal entry, the judge stated, "[T]he court will hold a further hearing for the determination of plaintiff's damages, costs, and attorneys fees, if any." On July 26, 1994, following a hearing, the court awarded Burke damages in the amount of $17,727.67 with interest, but denied him attorney fees.

On August 22, 1994, the defendants appealed the trial court's judgment to the Nebraska Court of Appeals. We removed the case to this court's docket pursuant to the authority granted to us by Neb. Rev. Stat. § 24-1106(3) (Reissue 1995) to regulate the dockets of the appellate courts of this state.

JURISDICTION

Before addressing the defendants' assignments of error, we address the threshold issue of whether this court has jurisdiction to consider the district court's August 6, 1993, partial summary judgment which holds the defendants liable to Burke for certain funds he expended to procure health insurance for himself and his family. Burke claims that the defendants should have filed an appeal regarding the summary judgment within 30 days of its entry. The defendants waited more than a year, until August 22, 1994, to appeal the district court's summary judgment. However, the appeal was filed within 30 days after the district court awarded Burke damages.

To be final, an order must ordinarily dispose of the whole merits of the case. When no further action of the court is required to dispose of a pending cause, the order is final. If the cause is retained for further action, the order is interlocutory. See, *Moulton v. Board of Zoning Appeals, ante* p. 95, 555 N.W.2d 39 (1996); *Currie v. Chief School Bus Serv.*, 250 Neb. 872, 553 N.W.2d 469 (1996). An interlocutory summary adjudication of liability alone, which does not decide the question of

damages, is not appealable. See, *Olsen v. Olsen*, 248 Neb. 393, 534 N.W.2d 762 (1995); *Jaramillo v. Mercury Ins. Co.*, 242 Neb. 223, 494 N.W.2d 335 (1993), *abrogated on other grounds by Powell v. American Charter Fed. Sav. & Loan Assn.*, 245 Neb. 551, 514 N.W.2d 326 (1994).

On August 6, 1993, at the time of entering summary judgment against the defendants on the issue of liability, the trial court retained the issue of damages for later disposition. The court entered a judgment of damages on July 26, 1994. Until that time, the summary judgment order remained interlocutory. Thus, the defendants' August 22, 1994, appeal was timely, and this court has jurisdiction in this matter. Burke's challenge to this court's jurisdiction is meritless.

ANALYSIS

In their first assignment of error, the defendants contend the district court erred by granting partial summary judgment when a question of material fact remained in dispute. We disagree.

The only material fact before the trial court was the number of hours per week that Burke worked as Kimball County's deputy county attorney. This fact was never in dispute. The record reflects that Burke admitted he actually worked fewer than 17½ hours each week as deputy county attorney. Neither is there any dispute that Burke, as a deputy county attorney, was on call or subject to call 24 hours a day, 7 days a week, 52 weeks a year.

Under the circumstances of this case, whether Burke was a full-time employee and, thereby, eligible for full group health insurance coverage is a question of law.

Under their second assignment of error, the defendants contend the district court erred in interpreting the insurance policy. On appeal, neither side in this lawsuit has contended that the insurance policy is ambiguous. Each side merely seeks to have the term "full time," as it applies to a county employee, interpreted to its benefit. There is no dispute that the insurance policy involved in this litigation does, in fact, cover Kimball County's full-time employees.

The defendants contend that Burke must actually work at least 17½ hours each week to qualify as a full-time employee of

Kimball County in order to be covered under the terms of the insurance policy between Blue Cross and NACO and Kimball County. In support of their contention, the defendants cite language from the insurance policy which states, in relevant part, "An employee will be eligible for coverage . . . for so long as such employee continues to work a minimum of _-_ hours per week (must be at least 17½ hours) on a regular calendar year basis," as well as language from the applicant's enrollment form which states, in relevant part, "Date Employed Full Time with Group (17½ Hours or more per week)."

In appellate review of an insurance policy, the policy must be construed as any other contract, and effect must be given to the parties' intentions at the time the contract was made. When the terms of such a contract are clear, they are to be accorded their plain and ordinary meaning. *Farm Bureau Ins. Co. v. Bierschenk*, 250 Neb. 146, 548 N.W.2d 322 (1996).

A review of the record demonstrates that the insurance policy involved here does not contain an explicit, limiting definition of full-time employee. Since the class of full-time employees is not limited by the plain language of the insurance policy, the deputy county attorney's job does not prevent Burke from qualifying for insurance coverage.

Under their third assignment of error, the defendants contend the district court erred by finding that Burke should be treated the same as an elected official for insurance purposes. Whether a deputy county attorney who is on call 24 hours a day, 7 days a week, 52 weeks a year, is a full-time employee is a question of first impression in this state.

Typically, a full-time employee is a person engaged in work for a designated period each day, each week, or each year. The expression "full-time employee" is also used to distinguish certain workers from others, e.g., full-time employees from part-time, migrant, seasonal, or temporary employees.

In *Harlan v. Washington Nat. Ins. Co.*, 388 Pa. 88, 92, 130 A.2d 140, 143 (1957), the Pennsylvania Supreme Court, discussing whether a seasonal or transitory employee was a full-time employee within the context of a group insurance policy, stated:

> *Full-time employment* does not mean full-time pay. It *means being available for full employment*; and full employment does not mean a hand at the helm throughout the entire voyage; it means standing by to take over when the exigencies of the passage require the application of one's skill acquired over many journeys of the past.

(Emphasis supplied.) See *Bakkensen v. Hancock M. Life Ins. Co.*, 222 Or. 484, 353 P.2d 558 (1960). See, also, *Great-West Life Assurance Company v. Levy*, 382 F.2d 357, 360 (10th Cir. 1967) (question of regular, full-time, and active employment must be judged with reference to duties or services of employee in question).

We adopt this definition with reference to a deputy county attorney who is on call 24 hours a day, 7 days a week, 52 weeks a year. Although a deputy county attorney's duties may not be limited to the hours between 8 a.m. and 5 p.m., he is not automatically a full-time employee upon assuming office. See, e.g., Neb. Rev. Stat. § 23-1212 (Reissue 1991) (envisioning existence of part-time deputy county attorney). We hold, however, as a matter of law, that a deputy county attorney who is on call 24 hours a day, 7 days a week, 52 weeks a year, is a full-time employee.

The record reveals, and the defendants admitted during oral argument before this court, that Burke was on call or subject to call 24 hours a day, 7 days a week, 52 weeks a year, even though his services might go unused. Although Burke concurrently held a job in the private sector, he received a monthly check in a fixed amount for his services as deputy county attorney without regard to the number of hours he worked. As the *Harlan* court stated, "An employee may not actually appear on the premises of his employer for a protracted period of time and still be a full-time employee." 388 Pa. at 90, 130 A.2d at 142. We, therefore, hold, as a matter of law, that Burke was a full-time employee of Kimball County.

Under their fourth assignment of error, the defendants contend the district court erred by finding that Burke fulfilled the eligibility requirements of the insurance policy. We disagree.

As a full-time Kimball County employee, Burke was eligible under the terms of the insurance policy to receive full group

health insurance coverage. The district court did not err in so concluding.

CONCLUSION

As a matter of law, at all relevant times involved in this litigation, Burke has been a full-time employee of Kimball County and, therefore, eligible for full group health insurance coverage under the terms of the insurance policy involved here. The judgment of the district court is affirmed.

AFFIRMED.

IN RE INTEREST OF JOSHUA M. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. LONA F., APPELLANT.

558 N.W.2d 548

Filed January 31, 1997. Nos. S-94-1239, S-94-1240, S-95-761, S-95-762.

1. **Parental Rights: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, the appellate court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by the lower courts.
3. **Juvenile Courts: Parental Rights: Proof.** In order to demonstrate that a preadjudication detention should continue, the State must prove by a preponderance of the evidence that the custody of a juvenile should remain in the Department of Social Services pending adjudication.
4. **Juvenile Courts: Parental Rights: Final Orders: Appeal and Error.** A detention order issued under Neb. Rev. Stat. §§ 43-247(3)(a) and 43-254 (Reissue 1993) after a hearing which continues to withhold the custody of a juvenile from the parent pending an adjudication hearing to determine whether the juvenile is neglected is a final order and thus appealable.
5. **Courts: Jurisdiction: Appeal and Error.** Once an appeal has been perfected to an appellate court, the trial court is without jurisdiction to hear a case involving the same matter between the same parties.
6. **Juvenile Courts: Parental Rights: Final Orders: Appeal and Error.** A judicial determination made following adjudication in a special proceeding which affects the substantial right of parents to raise their children is a final, appealable order.

7. **Final Orders: Time: Appeal and Error.** Where an order from a court is already in place and a subsequent order merely extends the time for which the previous order is applicable, the subsequent order does not extend the time in which the original order may be appealed.
8. **Collateral Attack: Jurisdiction.** Collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's lack of jurisdiction over the parties or subject matter.
9. **Parental Rights: Evidence: Proof.** Under Neb. Rev. Stat. § 43-292(6) (Reissue 1993), the State must prove by clear and convincing evidence that (1) the parent has willfully failed to comply, in whole or in part, with a reasonable provision material to the rehabilitative objective of the plan and (2) in addition to the parent's noncompliance with the rehabilitative plan, termination of parental rights is in the best interests of the child.
10. **Statutes.** In construing a statute, a court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
11. **Juvenile Courts: Parental Rights.** While there is no requirement that the juvenile court must institute a plan for rehabilitation of a parent, where the failure of a parent to comply with a rehabilitation plan is an independent ground for termination of parental rights, the rehabilitation plan must be conducted under the direction of the juvenile court and must be reasonably related to the plan's objective of reuniting parent with child.
12. ____: ____. A juvenile court has broad discretion to prescribe a reasonable plan to rehabilitate a parent whose child has been adjudicated to be within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993).
13. **Pleadings: Appeal and Error.** A trial court may conform the pleadings to the facts proved when an amendment does not change substantially the claim or defense. The decision to allow such an amendment rests with the discretion of the trial court and will not be error unless prejudice resulted. Prejudicial error results when a pleading is allowed to be amended where the amendment changes the issues and affects the quantum of proof as to any material fact.
14. **Evidence: Words and Phrases.** Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
15. **Parental Rights.** Where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the child require termination of the parental rights.
16. ____. Children cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity.
17. ____. A parent's unwillingness to comply with a rehabilitation program directed at reuniting the parent with his or her child and designed to secure the continued long-term health and well-being of the child compels the conclusion that termination of that parent's rights is in the best interests of the child.
18. **Evidence: Appeal and Error.** The improper admission of evidence by the trial court does not, by itself, constitute reversible error.

Petition for further review from the Nebraska Court of Appeals, MILLER-LERMAN, Chief Judge, and IRWIN and MUES, Judges, on appeal thereto from the Separate Juvenile Court of Douglas County, DONALD J. HAMILTON, District Judge, Retired. Judgments of Court of Appeals in Nos. S-94-1239 and S-95-761 affirmed. Judgment of Court of Appeals in No. S-94-1240 affirmed in part and in part vacated, and appeal dismissed in part. Judgment of Court of Appeals in No. S-95-762 affirmed in part and in part reversed, and cause remanded with directions.

Julie A. Frank, of Frank & Gryva, P.C., for appellant.

Margaret A. Badura, Deputy Douglas County Attorney, and Christine P. Costantakos, guardian ad litem, for appellee.

Kimberley Taylor Riley for amicus curiae Foster Care Review Board.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

WRIGHT, J.

I. NATURE OF CASE

These appeals arose from the Douglas County Separate Juvenile Court's decisions in four separate cases involving five children: Gloria F., born May 5, 1985; Tabitha M., born August 13, 1987; T.J. M., born February 21, 1990; Amanda M., born October 27, 1991; and Joshua M., born September 6, 1993.

Case No. S-94-1239 is an appeal from the juvenile court order directing that Joshua be removed from the care of the mother, Lona F., and that custody be placed in the Department of Social Services (DSS). Case No. S-94-1240 is an appeal from an identical order with respect to the remaining four children. Case No. S-95-761 is an appeal from the juvenile court's termination of Lona's parental rights regarding Joshua. Case No. S-95-762 is an appeal from the juvenile court's termination of Lona's parental rights regarding the remaining four children.

II. SCOPE OF REVIEW

Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of

the trial court's findings; however, where the evidence is in conflict, the appellate court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *In re Interest of Jorius G. & Cheralee G.*, 249 Neb. 892, 546 N.W.2d 796 (1996); *In re Interest of J.T.B. and H.J.T.*, 245 Neb. 624, 514 N.W.2d 635 (1994); *In re Interest of J.A.*, 244 Neb. 919, 510 N.W.2d 68 (1994).

When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by the lower courts. *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996).

III. FACTS

Lona was 13 years old when she gave birth to Gloria. Gloria's biological father, Walter R., was apparently 36 years old at the time. At age 15, Lona began living with Thomas M. and Barbara C. Lona, Thomas, and Barbara lived as one family unit, and Thomas fathered at least seven children between the two women. Thomas is the biological father of Tabitha, T.J., Amanda, and Joshua.

On March 26, 1993, the Douglas County Attorney filed a petition regarding Gloria, Tabitha, T.J., and Amanda, alleging that they were within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993) and requesting that they be placed in the temporary custody of DSS. Joshua was not yet born at this time. The juvenile court ordered that the immediate custody of the children be retained in DSS. On June 8, Thomas was charged with two counts of first degree sexual assault on a child. The charges alleged that Thomas had sexually assaulted Gloria and a second child fathered by Thomas and born to Barbara. Thomas was ultimately convicted and sentenced to consecutive sentences of 8 to 12 years' imprisonment on each count.

On August 23, 1993, Gloria, Tabitha, T.J., and Amanda were adjudicated to be within the meaning of § 43-247(3)(a). This order retained temporary custody of the children with DSS for appropriate care and placement. On October 6, the children

were ordered to remain in the temporary custody of DSS and Lona was ordered to comply with a plan designed to correct the conditions leading to their adjudication. Among other proscriptions, Lona was ordered to avoid any association with Thomas. On November 18, the juvenile court again ordered Lona to refrain from contact with Thomas.

A review of the detention order was held on April 22, 1994, and the juvenile court found that it was still not in the children's best interests to be returned to Lona's home. The court continued their temporary custody with DSS. A review hearing was again held on October 19. The court found that T.J. and Amanda should remain in the custody of DSS for appropriate care and placement, but modified the initial order such that the placement of T.J. and Amanda could "include the home of Lona." Gloria and Tabitha remained in foster care. T.J. and Amanda were eventually returned to Lona's home as provided for in the October 19 modification.

The October 19, 1994, order also reiterated the prohibition on Lona's having any contact with Thomas:

> [Lona must] [n]ot engage in any contact or communication or visitation in ANY FORM WHATSOEVER, (including but not limited to telephon[e] or letter) with Thomas . . . and Lona F[.] shall not permit, allow, or in any manner facilitate any visitation, contact or communication in ANY FORM WHATSOEVER (including but not limited to telephone or letters) between Thomas . . . and any of the above-named minor children.

(Emphasis in original.)

On December 6, 1994, the county attorney filed a motion for immediate temporary custody regarding T.J. and Amanda. The juvenile court granted the motion and held that pending a further hearing, T.J. and Amanda should immediately be removed from Lona's home. The court entered a separate order for the immediate removal of Joshua from Lona's care. That same day, the county attorney filed a motion to terminate Lona's parental rights to Gloria, Tabitha, T.J., and Amanda. The county attorney alleged that these four children had been adjudicated to be within the meaning of § 43-247(3)(a) and that the children were within the meaning of Neb. Rev. Stat. § 43-292(6) (Reissue

1993). The county attorney also alleged that Lona had knowingly and intentionally violated court orders forbidding contact with Thomas. The motion was later amended to allege that Gloria and Tabitha were also within the meaning of § 43-292(7). Also on December 6, a similar petition was filed in a separate proceeding regarding Joshua. The county attorney alleged that Joshua was within the meaning of §§ 43-247(3)(a) and 43-292(6). The petition was later amended to allege that Joshua was also within the meaning of § 43-292(2).

A detention hearing was held on December 15, 1994, at which evidence was taken regarding Lona's contact with Thomas and Walter, and the children's health and behavior. Thereafter, on December 16, the juvenile court ordered that it would be in the best interests of Gloria, Tabitha, T.J., and Amanda to place them in the temporary custody of DSS for appropriate care and placement until further order of the court, subject to supervised visitation with Lona. A similar order was entered with respect to Joshua. Lona timely appealed both of these orders.

In spite of the appeals, the juvenile court considered the petition for termination of Lona's parental rights to the five children, over Lona's objection that the court lacked jurisdiction because of the appeals. On June 28, 1995, the court adjudicated Joshua as being within the meaning of § 43-247(3)(a) and terminated Lona's parental rights to him. By a separate order that same day, the court terminated Lona's parental rights to the remaining four children. Lona timely appealed these orders.

The Nebraska Court of Appeals affirmed the juvenile court's detention orders in cases Nos. S-94-1239 and S-94-1240. *In re Interest of Joshua M. et al.*, 4 Neb. App. 659, 548 N.W.2d 348 (1996). The Court of Appeals held that the juvenile court did not have jurisdiction to consider whether Lona's parental rights to all five of the children should be terminated because the appeals from the detention orders were pending, and the Court of Appeals dismissed cases Nos. S-95-761 and S-95-762 for lack of jurisdiction and remanded the causes to the juvenile court with directions to cancel the juvenile court's orders terminating Lona's parental rights. We granted the State's petition for further review.

IV. ASSIGNMENTS OF ERROR

In summary, Lona argued to the Court of Appeals that the juvenile court committed the following errors: (1) The court erred in finding that it had jurisdiction to terminate Lona's parental rights despite her pending appeals; (2) the court erred by finding a sufficient basis for removing T.J., Amanda, and Joshua from her home; and (3) the court made numerous errors with respect to the termination of Lona's parental rights.

In its petition for further review, the State assigns the following errors: (1) The Court of Appeals erred in its determination that the order entered by the juvenile court on December 16, 1994, regarding Gloria, Tabitha, T.J., and Amanda was a final, appealable order, and (2) the Court of Appeals erred by finding that the juvenile court did not have jurisdiction to terminate Lona's parental rights to the five children.

V. ANALYSIS

1. Detention Orders

On December 6, 1994, the county attorney filed a petition alleging that Joshua was within the meaning of §§ 43-247(3)(a) and 43-292(6). The petition was later amended to also allege that Joshua was within the meaning of § 43-292(2). The juvenile court issued a temporary custody order regarding Joshua, and he was removed from Lona's home and placed in the care of DSS. On December 15, a hearing was held regarding Joshua's detention and also addressing the detention of the other four children. The detention hearing focused on Lona's relationships and contact with Thomas and Walter, as well as the health and general behavior of the children while in Lona's care.

Previously, in orders issued by the juvenile court on October 6 and November 18, 1993, and April 22 and October 19, 1994, the court repeatedly ordered Lona not to have any contact with Thomas. For example, the October 19, 1994, order directed that Lona was

> [n]ot [to] engage in any contact or communication or visitation in ANY FORM WHATSOEVER, (including but not limited to telephon[e] or letter) with Thomas . . . and Lona F[.] shall not permit, allow, or in any manner facili-

> tate any visitation, contact or communication in ANY FORM WHATSOEVER (including but not limited to telephone or letters) between Thomas . . . and any of the above-named minor children.

Nevertheless, at the December 15 hearing, Lona admitted to numerous violations of these orders. Lona admitted receiving a number of letters from Thomas and sending a number as well. Lona admitted reading letters from Thomas to T.J. She admitted attempting to obtain a fake identification card in order to visit Thomas in prison and using aliases to avoid detection. At one point, Lona apparently attempted to obtain security clearance for all the children to visit Thomas in prison. Lona also admitted talking to Thomas on the telephone.

Lona indicated at the December 15, 1994, hearing that she permitted Thomas to maintain contact with the children, in violation of the juvenile court's order, because she did not believe she needed to protect the children from communicating with Thomas. She claimed this despite the fact that she knew of Thomas' conviction for sexually assaulting Gloria and despite the fact that Lona admitted she thought Thomas might have "done something" to Tabitha as well.

The evidence at the December 15, 1994, hearing also focused on Lona's homelife. Lisa Mathouser, who supervised some of Lona's visitations with Gloria and Tabitha, testified Lona and the children had told her that on some visits, Walter, Gloria's biological father, was present. According to Lona, Walter and Lona began having sexual relations when Lona was about 12 years old. Walter was 35 at the time. Mary Harris, a DSS protective services caseworker, testified that in view of Walter's history of sexual relations with Lona when she was 12 years of age, Harris was concerned because Walter was in the house with Gloria, who was approaching the age of 12. In addition, Harris testified that at the time the children were removed from Lona's home, Joshua had a severe case of diaper rash and Amanda and Joshua had diarrhea.

We must address whether Joshua should remain in the custody of DSS pending final adjudication. In order to demonstrate that a preadjudication detention should continue, the State must prove by a preponderance of the evidence that the custody of a

juvenile should remain in DSS pending adjudication. See *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991). As both the juvenile court and the Court of Appeals held, the above evidence is sufficient to demonstrate that allowing Joshua to remain in Lona's home would be contrary to his welfare.

Lona argues that because the juvenile court orders that she violated were not entered in Joshua's case, but were instead entered in the other children's case, evidence of violation of those court orders cannot be considered as a basis for continuation of Joshua's detention. However, as the Court of Appeals held, the issue is not whether Lona violated a court order in Joshua's case. The issue is whether allowing Joshua to remain in her home would be contrary to his welfare. See *In re Interest of R.G., supra*. The above evidence of repeated and unrelenting violations of court orders forbidding Lona from maintaining contact with a person convicted of two counts of sexual assault—including a sexual assault on one of Lona's own children—is certainly sufficient to establish by a preponderance of the evidence that keeping Joshua in Lona's care would be contrary to his welfare. Cf. *In re Interest of B.B. et al.*, 239 Neb. 952, 479 N.W.2d 787 (1992) (failure to protect children from two men whom mother had previously accused of sexually abusing her children was sufficient to justify termination of her parental rights). It was reasonable for the juvenile court to assume that Joshua would be harmed unless he was removed from Lona's care.

Lona also argues that the above evidence is insufficient to support the juvenile court's detention order with respect to Joshua because there is no specific evidence of harm or risk of harm to Joshua. However, as the Court of Appeals in *In re Interest of Joshua M. et al.*, 4 Neb. App. 659, 678, 548 N.W.2d 348, 360 (1996), noted, there is no requirement that a juvenile court " 'wait until disaster has befallen a minor child before the court may acquire jurisdiction. If it is reasonable to assume that injury will occur absent action by the court, then the court may assume jurisdiction and act accordingly.' " Accord *In re Interest of W.C.O.*, 220 Neb. 417, 370 N.W.2d 151 (1985). See, also, *In re Interest of M.B. and A.B.*, 239 Neb. 1028, 480 N.W.2d 160 (1992) (holding that State was not required to show daughters

had actually been sexually abused where father had been convicted of sex crimes against other children and mother continued to leave daughters in his care).

Finally, Lona points out that the last paragraph of Neb. Rev. Stat. § 43-254 (Reissue 1993) requires the State to show that reasonable efforts have been made to prevent the need for the children's removal. Lona argues that the State failed to show that such efforts were made.

The pertinent portion of § 43-254 provides:

> If a juvenile has been removed from his or her parent, guardian, or custodian pursuant to subdivision (3) of section 43-248, the court may enter an order continuing detention or placement only upon a written determination that continuation of the juvenile in his or her home would be contrary to the welfare of such juvenile and that reasonable efforts were made, prior to placement, to prevent or eliminate the need for removal and to make it possible for the juvenile to return to his or her home.

As the Court of Appeals correctly held, the provision in § 43-254 that Lona refers to by its own terms only applies when a juvenile is taken into temporary custody without a court order under the authority of Neb. Rev. Stat. § 43-248(3) (Reissue 1993). Joshua was taken into custody pursuant to the juvenile court's December 6, 1994, order. Therefore, this alleged error is without merit.

As a result, the juvenile court's detention order in case No. S-94-1239 should be affirmed. Lona's appeal of the detention order with respect to the remaining four children in case No. S-94-1240 raises the identical issues addressed above. In view of our analysis regarding these issues, the juvenile court's detention order in case No. S-94-1240 should also be affirmed with respect to T.J. and Amanda. However, for the reasons discussed below, the Court of Appeals did not have jurisdiction to consider Lona's appeal of the detention order in case No. S-94-1240 with respect to Gloria and Tabitha, and therefore, that portion of the appeal must be dismissed.

2. Jurisdiction to Terminate Lona's Parental Rights to Joshua

We must address whether the Court of Appeals erred by finding that the juvenile court did not have jurisdiction to terminate Lona's parental rights with respect to Joshua. Joshua was removed from Lona's home pursuant to a court order issued on December 6, 1994, and was placed in the temporary custody of DSS. On that same day, the county attorney filed a petition alleging that Joshua was a child within the meaning of §§ 43-247(3)(a) and 43-292(6). A detention hearing was held on December 15, and the juvenile court found that temporary custody of Joshua should continue in DSS for appropriate care and placement.

As the Court of Appeals correctly held, the December 16, 1994, order regarding Joshua was clearly appealable. We held in *In re Interest of R.R.*, 239 Neb. 250, 475 N.W.2d 518 (1991), that a detention order issued under §§ 43-247(3)(a) and 43-254 after a hearing which continues to withhold the custody of a juvenile from the parent pending an adjudication hearing to determine whether the juvenile is neglected is a final order and thus appealable. Once an appeal has been perfected to an appellate court, the trial court is without jurisdiction to hear a case involving the same matter between the same parties. *WBE Co. v. Papio-Missouri River Nat. Resources Dist.*, 247 Neb. 522, 529 N.W.2d 21 (1995). Thus, the Court of Appeals correctly held that the juvenile court did not have jurisdiction to terminate Lona's parental rights until resolution of her appeal from the original detention order regarding Joshua, and the Court of Appeals correctly vacated the juvenile court order in case No. S-95-761 terminating Lona's parental rights to Joshua.

3. Jurisdiction to Terminate Lona's Parental Rights to Gloria, Tabitha, T.J., and Amanda

On March 23, 1993, Gloria, Tabitha, T.J., and Amanda were removed from Lona's home for the first time. Their custody was placed in DSS and has remained in DSS at all relevant times. However, prior to the December 16, 1994, order regarding these children, T.J. and Amanda were returned by DSS to Lona's home. T.J. and Amanda stayed with Lona until December 6,

1994, when the juvenile court ordered that they be removed from Lona's home.

On December 16, 1994, the juvenile court entered a preadjudication order retaining temporary custody of Gloria, Tabitha, T.J., and Amanda in DSS for appropriate care and placement. Lona appealed this order, which appeal was docketed as case No. S-94-1240. Lona argues that her appeal from the preadjudication detention order divested the juvenile court of jurisdiction and that, therefore, the court did not have jurisdiction to address whether Lona's parental rights regarding these four children should be terminated while her appeals were pending.

The State argues that the December 16, 1994, order was merely a change in placement pursuant to Neb. Rev. Stat. § 43-285(3) (Reissue 1993) and that, therefore, the only proper avenue for Lona's appeal was through a juvenile review panel, pursuant to Neb. Rev. Stat. § 43-287.04 (Reissue 1993). The State argues that because Lona did not utilize this avenue for appeal, she has waived her right to appeal the December 16, 1994, order. As a result, Lona's attempt to appeal this order without utilizing the juvenile review panel was improper and should not have divested the juvenile court of the jurisdiction necessary to adjudicate the termination of Lona's parental rights.

The Court of Appeals held that the December 16, 1994, order was "dispositional" in nature because the order changed the terms of the juvenile court's original disposition regarding Gloria, Tabitha, T.J., and Amanda in such a way as to eliminate the possibility that the children could be placed with Lona by DSS and was a final, appealable order. *In re Interest of Joshua M. et al.*, 4 Neb. App. 659, 667, 548 N.W.2d 348, 354 (1996).

As we will explain, this holding was correct with respect with T.J. and Amanda, but was incorrect with respect to Gloria and Tabitha.

(a) T.J. and Amanda

A judicial determination made following adjudication in a special proceeding which affects the substantial right of parents to raise their children is a final, appealable order. See *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991). See,

also, *In re Interest of R.A. and V.A.*, 225 Neb. 157, 403 N.W.2d 357 (1987), *overruled on other grounds, State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993). We noted in *In re Interest of R.G.* that the definition of a "special proceeding" for purposes of litigation under the Nebraska Juvenile Code includes any "'statutory remedy which is not in itself an action.'" 238 Neb. at 413, 470 N.W.2d at 787. This definition includes the juvenile court's December 16, 1994, order. Prior to December 16, Gloria, Tabitha, T.J., and Amanda were all within the jurisdiction of the juvenile court. The December 16 order was the court's modification of its prior dispositional orders, and this modification was made pursuant to the authority provided by Neb. Rev. Stat. § 43-284 (Reissue 1993). The December 16 order removed T.J. and Amanda from Lona's home, thereby effectively eliminating her right to raise these children. Thus, the Court of Appeals was correct to determine that the December 16 order was a final, appealable order.

The State claims that even if the December 16, 1994, order was a final order, the juvenile court nevertheless retained concurrent jurisdiction to adjudicate whether Lona's parental rights should be terminated. As the Court of Appeals correctly noted, however, this argument offends a basic principle of jurisdiction: Once an appeal has been perfected to an appellate court, the trial court is divested of its jurisdiction to hear a case involving the same matter between the same parties. *WBE Co. v. Papio-Missouri River Nat. Resources Dist.*, 247 Neb. 522, 529 N.W.2d 21 (1995).

Finally, the State argues that even if the December 16, 1994, order was a final order, consideration of whether Lona's parental rights should be terminated was independent of the issues involved in the December 16 order and that, therefore, the juvenile court retained jurisdiction to address this issue. However, as the Court of Appeals held, under Nebraska law, a dispositional order removing children from the care of parents and a subsequent proceeding adjudicating the termination of that parent's parental rights are both governed under the juvenile code and involve the same basic subject matter. In fact, the dispositional status of a juvenile is itself potentially a basis for

termination. See § 43-292(6) and (7). Clearly, such matters are not independent.

Once an appeal from the dispositional order was perfected, the juvenile court lost jurisdiction to address the issue of terminating Lona's parental rights while that appeal was pending. Therefore, the Court of Appeals' holding that the December 16, 1994, order was a final, appealable order was correct with respect to T.J. and Amanda.

(b) Gloria and Tabitha

The Court of Appeals' holding that the December 16, 1994, order regarding Tabitha and Gloria was dispositional, however, was incorrect. Tabitha and Gloria had originally been adjudicated to be within § 43-247(3)(a) in an order on August 23, 1993, and they were placed in the custody of DSS for appropriate placement. Lona did not appeal the August 23, 1993, order. In *Federal Land Bank v. McElhose*, 222 Neb. 448, 384 N.W.2d 295 (1986), we held that where an order from a court is already in place and a subsequent order merely extends the time for which the previous order is applicable, the subsequent order does not extend the time in which the original order may be appealed.

The disposition of Gloria and Tabitha was not changed by the December 16, 1994, order. That order merely extended the orders already in place. The juvenile court had never previously modified its original order as to Gloria and Tabitha in such a way as to permit them to be placed with Lona. Thus, the December 16 order was merely a continuation of the court's original determination that the custody of Gloria and Tabitha should be in DSS, with no provision that placement could be with Lona. As such, the December 16 order was not a final order and was not appealable.

Because Lona could not appeal the December 16, 1994, order with respect to Gloria and Tabitha, Lona's appeal in case No. S-94-1240 must be dismissed with respect to Gloria and Tabitha. Because there was no appeal properly pending with respect to Gloria and Tabitha, the juvenile court had jurisdiction to consider the termination of Lona's parental rights regarding these two children.

4. Termination of Parental Rights to Gloria and Tabitha

Lona assigns several errors regarding the juvenile court's termination of her parental rights, to wit: (1) The court erred when terminating Lona's parental rights because the rehabilitation plan in place was not a valid plan, as it had not been approved and therefore could not form the basis for termination of parental rights pursuant to § 43-292(6); (2) the court erred when terminating Lona's parental rights based on her noncompliance with the court's plan when her noncompliance was involuntary; (3) the court violated Lona's right to procedural due process when the court allowed the county attorney to amend the petition for termination of Lona's parental rights to conform to the evidence after the parties had rested; (4) the court erred in terminating Lona's parental rights because there was insufficient evidence to do so under § 43-292(7); (5) the court erred in terminating Lona's parental rights because there was insufficient evidence to show that termination was in the best interests of Gloria and Tabitha; and (6) the court erred by admitting evidence of referrals regarding Lona and her children to DSS prior to the initiation of the termination proceedings.

Because we have held that the juvenile court did not have jurisdiction to terminate Lona's parental rights with respect to T.J., Amanda, and Joshua, we need not address the assigned errors with respect to them. However, because we have held that the court did have jurisdiction to consider the petition to terminate Lona's parental rights to Gloria and Tabitha, we must address Lona's alleged errors with respect to these two children.

(a) Validity of Rehabilitation Plan

Lona argues that the rehabilitation plan in place prior to the termination proceedings was not a valid plan. Lona insists that the plan was invalid because it did not comply with our instruction in *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 273, 417 N.W.2d 147, 161 (1987), that "[t]he juvenile court's specific findings of facts supporting the provisions contained in the parental rehabilitative plan shall be stated in the record."

The rehabilitation plan Lona challenges was adopted by the juvenile court in a hearing on October 5, 1993, directly follow-

ing the court's adjudication of the children as within § 43-247(3)(a). As we have articulated above, such dispositional orders are final and appealable. Lona agreed to the plan at the hearing and did not appeal from the October 5 dispositional order. Lona cannot now collaterally attack the rehabilitation plan adopted in that order. Collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's lack of jurisdiction over the parties or subject matter. *In re Interest of J.H.*, 242 Neb. 906, 497 N.W.2d 346 (1993); *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992).

(b) Compliance With Rehabilitation Plan

Lona argues that the juvenile court erred by terminating her parental rights to Gloria and Tabitha pursuant to § 43-292(6), because the county attorney failed to establish by clear and convincing evidence that Lona's failure to comply with the court-ordered rehabilitation plan was willful. Lona insists that Thomas coerced her into not complying with the rehabilitation plan.

Section 43-292 gives the juvenile court power to terminate parental rights under the following conditions:

> The court may terminate all parental rights between the parents or the mother of a juvenile born out of wedlock and such juvenile when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that one or more of the following conditions exist:
>
> . . . .
>
> (6) Following a determination that the juvenile is one as described in subdivision (3)(a) of section 43-247, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination . . . .

Lona points out that in *In re Interest of J.S., A.C., and C.S.*, 227 Neb. at 267, 417 N.W.2d at 158, we held that under § 43-292(6), the State must prove by clear and convincing evidence that "(1) the parent has willfully failed to comply, in whole or in part, with a reasonable provision material to the rehabilitative objective of the plan and (2) in addition to the parent's noncompliance with the rehabilitative plan, termination of parental rights is in the best interests of the child."

However, our case law is unclear as to whether noncompliance with a rehabilitation plan must be "willful." We have at times repeated the formula from *In re Interest of J.S., A.C., and C.S.* stated above, including the willfulness element. See *In re Interest of L.H. et al.*, 241 Neb. 232, 487 N.W.2d 279 (1992). At other times, however, we have stated that in order to terminate a person's parental rights, "[t]here is no requirement that the parent's failure to comply with the plan for rehabilitation be willful." *In re Interest of A.B. et al.*, 236 Neb. 220, 223, 460 N.W.2d 114, 116 (1990). As we reasoned in *In re Interest of V.M.*, 235 Neb. 724, 727, 457 N.W.2d 288, 291 (1990), "when a parent is unable or unwilling to rehabilitate herself within a reasonable period of time, the best interests of the child require termination of parental rights."

Thus, it is necessary that we clarify the law as to whether the State must prove that a parent's failure to comply with a court-ordered rehabilitation plan is willful in an action to terminate parental rights under § 43-292(6).

Again, § 43-292 states:

> The court may terminate all parental rights between the parents or the mother of a juvenile born out of wedlock and such juvenile when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that one or more of the following conditions exist:
>
> . . . .
>
> (6) Following a determination that the juvenile is one as described in subdivision (3)(a) of section 43-247, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination . . . .

In construing a statute, a court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *In re Interest of Jaycox*, 250 Neb. 697, 551 N.W.2d 9 (1996); *Goolsby v. Anderson*, 250 Neb. 306, 549 N.W.2d 153 (1996).

By its own terms, the purpose of § 43-292(6) is to advance the best interests of the child by giving the juvenile court power to terminate parental rights where the grounds for adjudicating the child within § 43-247(3)(a) have not been corrected.

Whether a parent is willful or not in his or her noncompliance with a rehabilitation plan is not directly relevant to this purpose. In some situations, the conditions that led to the § 43-247(3)(a) adjudication may not be corrected *in spite of* the intentions of the parent whose child has been adjudicated under this section. Indeed, § 43-247(3)(a) gives juvenile courts jurisdiction over a child who is "without proper support *through no fault* of his or her parent, guardian, or custodian." (Emphasis supplied.)

The purpose of § 43-292(6) is to protect the child from such conditions, whether they are caused willfully or not. Requiring the State to show that the failure to correct the conditions leading to the adjudication under § 43-247(3)(a) was willful would clearly defeat this purpose in those situations where the conditions persist in spite of the desire or the will of the parent to correct them. Thus, we hold that the State is not required to show that noncompliance with a court-ordered rehabilitation plan is willful in order to prove that termination of parental rights should be ordered under § 43-292(6).

Lona also argues that even if the State was not required to prove that she willfully failed to comply with the rehabilitation plan, the provisions of the plan which the State alleged that Lona violated were not material to the rehabilitation objectives of the plan. Lona points out that in *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 267, 417 N.W.2d 147, 158 (1987), we held that under § 43-292(6), the State must prove by clear and convincing evidence that "(1) the parent has willfully failed to comply, in whole or in part, with a reasonable provision *material to* the rehabilitative objective of the plan . . . ." (Emphasis supplied.)

Lona insists that she has not violated a material provision of the plan and cannot have her parental rights terminated under § 43-292(6). Lona draws our attention to the definition of "materiality" in *In re Interest of L.H. et al.*, 241 Neb. 232, 245, 487 N.W.2d 279, 289 (1992):

> "Materiality of a provision in a court-ordered rehabilitative plan is determined by a cause-and-effect relationship: Does a provision in the plan tend to correct, eliminate, or ameliorate the situation or condition on which the adjudication has been obtained under the Nebraska

> Juvenile Code?" [Citation omitted.] Materiality regarding a rehabilitative plan exists when a parent's noncompliance results in a continued condition which was the basis for the adjudication and which is deleterious to a child expected to benefit from parental compliance with the rehabilitative plan.

Lona emphasizes that at the time the county attorney originally filed the petition for adjudication under § 43-247(3)(a), the portions regarding her failure to protect the children from Thomas were struck from the petition. After this deletion, she insists, the only remaining basis for the § 43-247(3)(a) adjudication with respect to her was the fact that she had failed to maintain a healthy home environment for the children. Lona argues that, therefore, the restrictions on her contact with Thomas were not material provisions of the rehabilitation plan, because they did not tend to correct or ameliorate conditions which were the basis for the original § 43-247(3)(a) adjudication.

However, Lona misunderstands the scope and purpose of a rehabilitation plan which is adopted by a juvenile court following an adjudication that a child is within § 43-247(3)(a). While it is true that one purpose of a rehabilitation plan is to ameliorate the particular conditions that serve as the basis for an allegation supporting the adjudication that a child is within the meaning of § 43-247(3)(a), a rehabilitation plan also has the larger goal of reuniting the child with the parent. Thus, we have explained that

> [w]hile there is no requirement that the juvenile court must institute a plan for rehabilitation of a parent, where the failure of a parent to comply with a rehabilitation plan is an independent ground for termination of parental rights, the rehabilitation plan must be conducted under the direction of the juvenile court *and must be reasonably related to the plan's objective of reuniting parent with child.*

(Emphasis supplied.) *In re Interest of C.D.C.*, 235 Neb. 496, 500, 455 N.W.2d 801, 805 (1990). To advance this goal, the juvenile court has broad discretion to prescribe a reasonable plan to rehabilitate a parent whose child has been adjudicated to be within the meaning of § 43-247(3)(a).

It is clear from the petition and the adjudication order that Gloria and Tabitha were adjudicated to be within the meaning of § 43-247(3)(a) on the basis of a wide variety of threats to their well-being, not limited to the allegations specifically directed toward Lona. A major emphasis of the allegations in the petition supporting the finding that Gloria and Tabitha were within the meaning of § 43-247(3)(a) was the fact that Gloria had accused Thomas of sexually assaulting her and had stated that Thomas sexually assaulted her sisters. It was certainly not an abuse of discretion for the juvenile court in constructing a rehabilitation plan which has the goal of reuniting Gloria and Tabitha with Lona to forbid her from maintaining an association with a person convicted of sexually assaulting one of her children.

(c) Amendment of Pleadings

The petition regarding the termination of Lona's parental rights stated several grounds for termination of those rights, including an allegation pursuant to § 43-292(6) that Lona had failed to correct the conditions that led to the previous § 43-247(3)(a) adjudication. After each party to the termination hearing had rested, the State requested leave to amend the pleadings to conform to the evidence by adding an additional count to the petition, count V, alleging that Gloria and Tabitha were within the meaning of § 43-292(7). The juvenile court granted leave, and the following text was written into the pleadings:

> [T]hat Gloria F[.] and Tabitha M[.] have been in an out-of-home placement for 18 or more consecutive months and the mother has failed to correct the conditions leading to the juvenile's [sic] out-of[-]home placement in spite of reasonable efforts and services to the parents ordered by the court or offered by the Dept. of Soc. Services or other designated agency.

In its order terminating Lona's parental rights, the juvenile court found, among other things, that the allegations in count V were true and that Gloria and Tabitha were within the meaning of § 43-292(7). Lona argues that the court prejudiced Lona by permitting the State to amend the pleading to add the

§ 43-292(7) claim after the parties had rested, because in so doing, Lona was not given notice that whether her children were within the meaning of § 43-292(7) would be an issue at the termination hearing.

A trial court may conform the pleadings to the facts proved when an amendment does not change substantially the claim or defense. The decision to allow such an amendment rests with the discretion of the trial court and will not be error unless prejudice resulted. *McCook Nat. Bank v. Myers*, 243 Neb. 853, 503 N.W.2d 200 (1993). Prejudicial error results when a pleading is allowed to be amended where the amendment changes the issues and affects the quantum of proof as to any material fact. *Id.*

The juvenile court's granting leave to the State to amend the pleadings to conform to the evidence did not substantially change the subject matter or issues that would be addressed at the termination hearing. The general issue at the hearing was whether there was sufficient grounds to terminate Lona's parental rights. To this end, the State pled a variety of theories and presented evidence to support these claims. Lona participated in the hearing and had ample opportunity to address and rebut all the evidence presented. The issues and evidence relating to whether the children were within the meaning of § 43-292(6) were virtually identical to the issues and evidence relating to the allegation included in the amendment. We see no prejudice in permitting the State to add a claim to the pleadings which would conform to the evidence the parties presented and had ample opportunity to address.

(d) Sufficiency of Evidence Under § 43-292(7)

Lona argues that the juvenile court erred by finding that Lona's parental rights should be terminated pursuant to § 43-292(7). Section 43-292 states as follows:

> The court may terminate all parental rights between the parents or the mother of a juvenile born out of wedlock and such juvenile when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that one or more of the following conditions exist:
>
> . . . .

> (7) The juvenile has been in an out-of-home placement for eighteen or more consecutive months and the parents have failed to correct the conditions leading to the juvenile's out-of-home placement in spite of reasonable efforts and services to the parents ordered by the court or offered by the Department of Social Services or other designated agency.

Lona argues that the State did not present sufficient evidence to establish that Lona had failed to correct the conditions leading to the juveniles' out-of-home placement. Lona claims that the conditions leading to the out-of-home placement were limited to the allegations in the § 43-247(3)(a) petition specifically addressed to her—that she had failed to maintain a healthy home environment.

As discussed with respect to the earlier assignment of error regarding Lona's failure to substantially comply with her rehabilitation plan, the conditions leading to the detention of Gloria and Tabitha were also related to the relationship between Lona and Thomas. The juvenile court included as a condition of her rehabilitation plan that Lona was required to not have any contact with Thomas. The evidence presented at the hearing clearly established that Lona failed to accomplish this aspect of her rehabilitation. Such a failure precludes the return of Gloria and Tabitha from out-of-home placement, and therefore, § 43-292(7) applies.

(e) Best Interests of Children

Lona next argues that the State has failed to offer any evidence as to why it was in the best interests of Gloria and Tabitha to have Lona's parental rights terminated. Lona again requests this court to ignore the substantial amount of evidence regarding Lona's repeated violation of the juvenile court orders directing that Lona not communicate with Thomas. Lona suggests the only evidence that is relevant to an assessment of the children's best interests is that evidence directly related to the allegations in the § 43-247(3)(a) petition which originally led to the adjudication.

An order terminating parental rights must be based on clear and convincing evidence. *In re Interest of C.P.*, 235 Neb. 276,

455 N.W.2d 138 (1990). Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *Id.*

We have held that where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the child require termination of the parental rights. *In re Interest of C.D.C.*, 235 Neb. 496, 455 N.W.2d 801 (1990). Children cannot, and should not, be suspended in foster care, nor be made to await uncertain parental maturity. *Id.*

In *In re Interest of B.B. et al.*, 239 Neb. 952, 479 N.W.2d 787 (1992), the court addressed a situation similar to the present case. In that case, the juvenile court terminated the parental rights of a mother regarding her four children. The evidence in that case included the fact that the mother maintained ongoing relationships with two men whom she had previously accused of physically and sexually abusing her children. The court had included in the mother's rehabilitation plan an instruction that the mother was to disassociate with one of the men. Nevertheless, the mother persisted in maintaining a relationship with both of these men and expressed a desire for the children to maintain contact with both of them. A psychologist who had treated the mother testified that the mother lacked insight as to the seriousness of the children's suffering and that she lacked motivation to protect them from further abuse. On appeal, we affirmed the court's termination of the mother's parental rights, because she failed to reasonably comply with the rehabilitation plan and did not correct the conditions that led to the initial adjudication of the children.

The present case is similar to *In re Interest of B.B. et al.* The State clearly established that despite repeated court orders to avoid contact with Thomas, Lona persistently rebuffed the juvenile court's rehabilitation plan and maintained contact with Thomas. Thomas, again, was the man who was convicted of first degree sexual assault on Gloria and who Lona admits she believes sexually molested Tabitha.

On one occasion, Lona actually attempted to obtain security clearance for the children, including Gloria and Tabitha, to visit Thomas in prison. Lona persisted in defying the court order,

despite admitting she knew that "if I want my kids, I have to obey [the order]." In addition, a counselor who engaged in therapy with Lona for more than 1 year testified that it did not appear Lona had made any progress in her sexual abuse therapy. A second therapist stated that "Lona is unable to see the impact that [sexual abuse] has on the children," that she would not be able to protect her children from sexual abuse, and that even now "sexual molestation is not seen by Lona as abusive."

One of the psychologists who treated Lona during her rehabilitation period expressed concern that Lona might again be living with Walter, the man who impregnated Lona when he was 36 and she was 13. The psychologist stated that she was concerned for the safety of Lona's daughters because Walter was having significant contact with the children. Lona testified, for example, that Walter had a practice of arriving at her home each night in time to check on the family at bedtime. The psychologist stated that she was concerned because Lona's daughters were approaching the age that Lona was when Walter had sexual contact with her. Lona's renewed relationship with Walter confirms the psychologist's concern that Lona does not understand the destructiveness of sexual abuse. In view of Lona's inappropriate perspective on sexual abuse and her history with Walter, the psychologist's concerns for the safety of the children are certainly warranted.

A parent's unwillingness to comply with a rehabilitation program directed at reuniting the parent with his or her child and designed to secure the continued long-term health and well-being of the child compels the conclusion that termination of that parent's rights is in the best interests of the child. See, *In re Interest of L.H. et al.*, 241 Neb. 232, 487 N.W.2d 279 (1992); *In re Interest of C.D.C.*, 235 Neb. 496, 455 N.W.2d 801 (1990).

There was clear and convincing evidence to terminate Lona's parental rights to Gloria and Tabitha.

(f) Preadjudication Referrals

Lona contends that the juvenile court improperly admitted evidence of referrals to DSS regarding Lona and her children. The referrals occurred prior to the adjudication that the children were within the meaning of § 43-247(3)(a) and the adoption of

the rehabilitation plan. Lona argues that such evidence was irrelevant to the determination of whether Lona had complied with the rehabilitation plan or whether termination of her parental rights would be in the best interests of the children and that such evidence should not have been admitted. We agree.

Referrals to DSS which occurred prior to the adjudication are not relevant to a determination of whether Lona complied with the rehabilitation plan after adjudication. However, the improper admission of evidence by the trial court does not, by itself, constitute reversible error. See *In re Interest of J.H.*, 242 Neb. 906, 497 N.W.2d 346 (1993). As long as an appellant properly objected at trial, an appellate court will not consider any such evidence in its de novo review of the record. *Id.* This evidence was not considered in our de novo review of the record.

VI. CONCLUSION

The decisions of the Court of Appeals are affirmed with respect to cases Nos. S-94-1239 and S-95-761. The decision of the Court of Appeals in case No. S-94-1240 with respect to T.J. and Amanda is also affirmed. The decision of the Court of Appeals in case No. S-94-1240 with respect to Gloria and Tabitha is vacated, and the appeal is dismissed with regard to Gloria and Tabitha. The decision of the Court of Appeals in case No. S-95-762 with respect to T.J. and Amanda is also affirmed. The decision of the Court of Appeals in case No. S-95-762 with respect to Gloria and Tabitha is reversed, and the cause is remanded with directions that the Court of Appeals affirm the holding of the juvenile court.

JUDGMENTS IN NOS. S-94-1239 AND S-95-761 AFFIRMED.
JUDGMENT IN NO. S-94-1240 AFFIRMED IN PART AND IN PART VACATED, AND APPEAL DISMISSED IN PART.
JUDGMENT IN NO. S-95-762 AFFIRMED IN PART AND IN PART REVERSED, AND CAUSE REMANDED WITH DIRECTIONS.

HEYE FARMS, INC., A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT AND CROSS-APPELLEE.

558 N.W.2d 306

Filed January 31, 1997. No. S-95-054.

1. **Motions for New Trial: Appeal and Error.** A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred; such a motion is addressed to the discretion of the trial court, whose decision will be upheld on appeal in the absence of an abuse of that discretion.
2. **Jury Instructions: Appeal and Error.** It is the duty of the trial court to instruct on the proper law of the case, and failure to do so constitutes prejudicial error; in determining whether such has been done, all the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal.
3. **Eminent Domain: Damages.** The measure of damages for partial takings of land is the market value of the land taken and the difference in the value of the remainder before and after the taking.
4. ____: ____. In considering the effect of the severance on the market value of the remainder, account must be taken of all of the inconveniences caused by the severance as they might affect a prospective purchaser and the effect of the severance upon every available, reasonable, and probable future use of the property, as it relates to the market value of the remainder of the property considered as a unitary whole.
5. **Motions to Strike.** The consideration of a belated motion to strike testimony, no objection having been previously made, is discretionary with the trial court.
6. **Eminent Domain: Evidence.** Generally, evidence as to the sale of comparable property is admissible as evidence of market value, provided there is adequate foundation to show the evidence is material and relevant; the foundation evidence should show the time of the sale, the similarity or dissimilarity of market conditions, the circumstances surrounding the sale, and other relevant factors affecting the market conditions at the time.

Appeal from the District Court for Otoe County: RANDALL L. REHMEIER, Judge. Reversed and remanded with direction.

Don Stenberg, Attorney General, and Robert G. Avey for appellant.

Otto H. Wellensiek, of Wellensiek Law Offices, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ.

CAPORALE, J.

I. STATEMENT OF CASE

In this eminent domain action, the district court granted a new trial to the plaintiff-appellee condemnee, Heye Farms, Inc., which had obtained a verdict and judgment in its favor against the defendant-appellant condemner, State of Nebraska, Department of Roads, in the amount of $56,635. The State appealed to the Nebraska Court of Appeals, asserting that the district court abused its discretion in ordering a new trial in that, in summary, the district court erroneously concluded that it had (1) improperly instructed the jury concerning the matter of severance damages and (2) wrongly struck certain of Heye Farms' evidence. Heye Farms then cross-appealed, asserting that the district court erred in (1) refusing to instruct the jury on severance damages in accordance with the instruction Heye Farms tendered and (2) failing to strike certain of the State's evidence. Under our authority to regulate the caseloads of the Court of Appeals and this court, we, on our own motion, removed the matter to our docket. We now reverse, and remand with the direction that the verdict and judgment thereon be reinstated.

II. SCOPE OF REVIEW

A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred, *Farmers & Merchants Bank v. Grams,* 250 Neb. 191, 548 N.W.2d 764 (1996); such a motion is addressed to the discretion of the trial court, whose decision will be upheld on appeal in the absence of an abuse of that discretion, *Menkens v. Finley, ante* p. 84, 555 N.W.2d 47 (1996).

III. FACTS

Heye Farms raises corn, soybeans, wheat, and cattle. The State condemned 30.15 acres of Heye Farms' Otoe County land for the construction of a highway, leaving Heye Farms with 414.79 acres. The new highway cuts off the northwest quarter of the farm from the south half, blocking Heye Farms' access to the 98.4-acre northwest area. There is evidence that as a result, Heye Farms will have to haul cattle from the south portion of its land to the north portion by truck and, approximately 15 or 16

times per year, will have to drive an extra 3 miles each way to farm part of its land.

The crossing now used is subject to periodic flooding in wet years. Evidence suggests that correcting the field crossing problem would cost about $650. However, the parties stipulated that the State will construct a drainage ditch on both sides of the new highway for the purpose of carrying water from existing terraces and will make necessary corrections if the ditch overflows. The highway also boxed in a small area of farmland lying between the highway and the existing waterway. Evidence suggests that this will cause a problem, with terraces being too close to the highway, leaving too little room for harvesting vehicles to turn around. Moving the existing waterway and correcting the terrace would cost $1,020.

Craig Harris testified as an expert on behalf of Heye Farms. He determined the value of the farm before the taking by considering the sales of comparable land in the surrounding area. He initially testified that the value of the farm prior to the taking was $713,000 and that the value of the area taken was $45,000. He also testified that the value of the remainder before the taking was $668,000 and after the taking was $613,350, taking into account $1,950 for conservation work, making the total damages $99,650 ($45,000 for the land taken and $54,650 for damages to the remainder).

When asked how he determined the difference in value of the remainder before and after the taking, Harris stated, "I used a — an income approach, the valuation process that would either be a loss of income to the farm or an increase in expense and determined the value of the remainder." He explained further that the right-of-way cut off the water supply to the northwest quarter, thus diminishing the grazing land value. Establishing a new water source would cost $2,190 annually. Harris "capitalized" this expense at 6 percent because it is a recurring expense, and thus concluded that the total expense for establishing a new water source at the northwest quarter is $36,500. Harris also considered the additional labor and equipment required to haul grain to the bin site and valued it at $505. Again, Harris capitalized this expense at 6 percent, arriving at a total expense of $8,420.

The State moved to strike from Harris' opinion of the damages to the remainder the $36,500 and $8,420 amounts, arguing that these two figures are improperly based on an income approach. The district court sustained the State's motion to strike and advised the jury to disregard that testimony.

Harris then testified that based on his experience in the sale of severance property versus nonseverance property, every remaining acre was damaged in the amount of $125 by the severance, making the total value of the remainder of the subject property after the taking $611,500. Thus, in Harris' opinion, the revised damages to the remainder are $56,500 ($668,000 less $611,500). That, together with the value of the property taken ($45,000), makes the total revised damages $101,500.

Darrell Smith testified as an expert for the State. Using a comparable sales approach, he testified that the value of Heye Farms' land prior to the taking was $571,900. He further testified that the value of the property taken by the State is $32,953 and that the value of the remaining property before the taking was $538,947 and $529,364 after the taking, a difference of $9,583, making the total damages $42,536. In arriving at the amount of damages to the remainder, Smith considered the newly restricted access to a particular 98.4-acre area, increased difficulties in farming a particular 3.3-acre area (costing $2,723), easements on .27 acres, the need to erect a fence, the need for a new waterway (costing $1,275), and the need to level four terraces. Smith also testified that due to the parties' stipulation about the waterways, there will no longer be a problem with farming the 3.3-acre area; thus, $2,723 and $1,275 should be subtracted from his damages estimate. Therefore, Heye Farms' total damages, according to Smith's final estimate, are $38,538.

On cross-examination, Smith admitted that he was not familiar with Neb. Rev. Stat. § 39-1331 (Reissue 1993), which provides:

> Whenever the location, relocation, establishment, construction, or reconstruction of a highway causes the severance of real property, which is being used for farm or other agricultural purposes and title thereto is held under one owner, the department [of Roads] shall make provision for

crossing the highway from one tract to the other, or compensation for the severance of the tract shall be paid . . . .

Heye Farms then unsuccessfully moved to strike Smith's testimony because he made his appraisal without knowledge of § 39-1331. On redirect examination, Smith stated that in making his appraisal, he considered the fact that there was no access between the northwest quarter and the south quarters.

After the jury viewed the property, the district court instructed, in relevant part, as follows:

> [Heye Farms] is entitled to recover:
>
> 1. The fair market value of the property taken . . . .
>
> 2. Any decrease in the fair market value of the remaining property, to the extent that the decrease was proximately caused by the taking . . . .
>
> . . . .
>
> The "fair market value" of a piece of property is the price that someone ready to sell, but not required to do so, would be willing to accept in payment for the property, and that someone ready to buy, but not required to do so, would be willing to pay for the property.
>
> In determining fair market value you may consider uses to which the property has been put and uses to which it might reasonably be put in the immediate future.
>
> . . . .
>
> In arriving at the reduction in the fair and reasonable market value of the property remaining after the taking, you may consider . . . every non-speculative element of inconvenience, annoyance and disadvantage which the taking has caused the plaintiffs as the owners of the remainder and which would influence a purchaser's decision to buy the property or pay a certain amount for it.
>
> . . . .
>
> Whenever the location, relocation, establishment, construction, or reconstruction of a highway causes the severance of real property which is being used for farm or other agricultural purposes and the title is held under one owner, the Department of Roads shall make provision for crossing of the highway from one tract to the other or compensation for the severance of the tract shall be paid.

IV. ANALYSIS OF STATE'S APPEAL

Ordinarily, it is more logical to deal with evidential issues prior to analyzing issues concerning a trial court's instructions to the jury. However, here, the analysis of the evidential issues requires an understanding of the law concerning severance damages. Since such a study is also required in dealing with the State's claim in regard to the district court's instructions to the jury, it is more efficient to address the instruction issues first, and we thus do so.

1. INSTRUCTIONS

The State contends that the district court abused its discretion in ordering a new trial based on the court's mistaken thought that it had erroneously instructed the jury. The district court concluded that it should have given more specific instructions on the elements to be considered in assessing severance damages.

We begin by noting that it is the duty of the trial court to instruct on the proper law of the case, and failure to do so constitutes prejudicial error. *Wilson v. Misko*, 244 Neb. 526, 508 N.W.2d 238 (1993). In determining whether such has been done, all the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal. *Traphagan v. Mid-America Traffic Marking, ante* p. 143, 555 N.W.2d 778 (1996); *Sedlak Aerial Spray v. Miller, ante* p. 45, 555 N.W.2d 32 (1996); *Hamernick v. Essex Dodge Ltd.*, 247 Neb. 392, 527 N.W.2d 196 (1995).

The measure of damages for partial takings of land is the market value of the land taken and the difference in the value of the remainder before and after the taking. *Lantis v. City of Omaha*, 237 Neb. 670, 467 N.W.2d 649 (1991). Neb. Rev. Stat. § 76-710.01 (Reissue 1996) provides:

> Where any condemner shall have taken or attempts to take property for public use, the damages for taking such property . . . shall include all compensable damages suffered by the condemnee including but not limited to reasonable severance damages and condemnee's abstracting

> expenses. In determining the amount of such severance damages, account shall be taken, together with other relevant factors, of the economic effect, if any, caused by the severance therefrom of the part taken or sought to be taken upon the whole of such property as a going concern as it will be and remain after the severance. Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than due to physical deterioration within the reasonable control of the owner, shall be disregarded in determining the compensation for the property.

In considering the effect of the severance on the market value of the remainder, account must be taken of all of the inconveniences caused by the severance as they might affect a prospective purchaser and the effect of the severance upon every available, reasonable, and probable future use of the property, as it relates to the market value of the remainder of the property considered as a unitary whole. *Pieper v. City of Scottsbluff*, 176 Neb. 561, 126 N.W.2d 865 (1964).

In *Rose v. City of Lincoln*, 234 Neb. 67, 449 N.W.2d 522 (1989), Rose claimed that the trial court had failed to adequately instruct the jury on loss of access damages. We wrote:

> Although the court's instruction did not specifically refer to loss of access as a factor in Roses' damages, the jury was told to determine damages on the basis of an award which would "justly compensate" Roses in view of every "non-speculative element of inconvenience, annoyance, and disadvantage" which would "influence a purchaser's decision to buy [Roses'] property or pay a certain amount for it."
>
> Under the circumstances, when the instructions given by the trial court are read conjunctively, especially in the light of the jury's viewing of Roses' real estate and the city's water main site, we find no prejudicial error in the trial court's refusal to give Roses' tendered instruction regarding loss of access as a factor affecting damages

> recoverable by Roses in their inverse condemnation proceeding.

Id. at 75-76, 449 N.W.2d at 529.

In *Lansman v. State*, 177 Neb. 119, 128 N.W.2d 569 (1964), the state built a highway through Lansman's farm, dividing the land into two sections. Lansman and others testified as to the necessity and impossibility of getting cattle to cross the highway. Lansman contended that he would have to incur the additional expense of hauling his cattle back and forth as a result of the new highway. Lansman argued, on appeal, that the trial court improperly failed to include "the cost of access from one part of the land to the other" in the jury instructions. *Id.* at 127, 128 N.W.2d at 574. We held that

> the jury viewed the premises and could see the condition that existed there with reference to getting back and forth between the two pieces of land. The jury obviously was apprised of all factors which tended to cause damage to the remainder of the plaintiffs' property, and rendered its judgment in accordance with the law relating to condemnation.

Id. at 128, 128 N.W.2d at 575. In reference to Lansman's argument that the trial court improperly failed to include the burden of additional fencing in the jury instructions, we stated that individual itemized damages

> "are elements to be considered, not by adding them together item by item and allowing them, or by allowing such item or items as such, but, together with the amount of plaintiffs' land taken * * * such elements should be considered in determining the extent that, taken as a whole, defendant damaged plaintiffs' land by detracting from and reducing the market value thereof."
>
> . . . "'. . . Nothing can be allowed for fence, as fence. The allowance should be for the depreciation of the land in consequence of the burden thus cast upon it. Evidence of the cost of suitable fencing is competent as affording a means of arriving at the extent of the burden.' [Citation omitted.]"

Id. at 128, 128 N.W.2d at 574-75. We held that the trial court fairly and correctly stated the law applicable under the evi-

dence; while the condemnee may testify to and the jury may consider itemized burdens, the trial court is not required to instruct the jury on each individual item making up the condemnee's damages.

Accordingly, the district court in the instant case adequately instructed the jury on severance damages, as set forth in part III above.

2. Striking of Evidence

The State next contends that the district court wrongly concluded it erred in striking Harris' testimony concerning the capitalized value of the additional costs required to haul grain and obtain a new source of water.

Before reaching the State's arguments in that regard, we address Heye Farms' contention that the State's objection was untimely and, thus, if for no other reason, that the evidence was improperly stricken. In so urging, Heye Farms relies on *Lincoln Branch, Inc. v. City of Lincoln*, 245 Neb. 272, 512 N.W.2d 379 (1994) (failure to object to admission of evidence in trial court precludes one from raising objection for first time on appeal). However, Heye Farms' reliance on *Lincoln Branch, Inc.* is misplaced.

The consideration of a belated motion to strike testimony, no objection having been previously made, is discretionary with the trial court. *Kohler v. Ford Motor Co.*, 187 Neb. 428, 191 N.W.2d 601 (1971); *Western Plastics Corp. v. Westinghouse Electric Corp.*, 184 Neb. 498, 169 N.W.2d 1 (1969). The procedural facts in the instant case are similar to those in *Western Plastics Corp., supra*, wherein we wrote:

> It is the contention of Western Plastics that the failure of Westinghouse to object to the testimony of McCarty constituted a waiver of objections to it and that the trial court erred in sustaining the motion to strike. The cases cited by Western Plastics hold that a failure to object to the admission of evidence in the trial court precludes one from raising the objection for the first time on appeal. [Citations omitted.] But this is not the question before us. While there is a division in the authorities in other jurisdictions, we think the proper rule is: The entertainment of a belated

> motion to strike testimony, no objection having been previously made thereto, is discretionary with the trial court.

184 Neb. at 507, 169 N.W.2d at 6.

Accordingly, the district court did not abuse its discretion in entertaining the State's motion.

We thus move on to the State's contention that the questioned testimony was properly stricken. When testifying as to the diminished value of Heye Farms' remainder property, Harris stated that he

> considered . . . the effect that the right-of-way would have on cutting the northwest quarter section away from the rest of the farm. I had a loss of grazing land value and some additional labor and equipment expense that would be involved in increased travel and time of farming that northwest quarter . . . .

According to Harris:

> The land north of the new right-of-way will be cut off from the main building site, and there is at this — at the present time is not a reliable water source on that northwest quarter.
>
> And the process I used was to take the 146 acres of grazing land north of that right-of-way and a cost factor of $15 per acre for either renting additional stock land to replace that ground of the cost it would take to get that water source reestablished, additional labor for hauling, loading and checking the cattle. And when I multiplied the $15 per acre times 146 acres, came up with a value or an expenses [sic] of $2,190. That $2,190 of expense was capitalized at six percent to give a total value change of $36,500.

As for the additional expense in hauling grain, Harris testified that he

> computed that on the basis of eight cents per bushel for 100 bushels per acre times 50 percent of the cropland acres north of that new right-of-way. That came to an expense of $505, again, capitalizing that at six percent, arrived at a value decrease of $8,420. And I used 50 percent of that value, then, as additional labor or/and time

required for checking crops, planting crops, and checking livestock on that northwest quarter of land.

Because they were recurring, Harris capitalized these expenses.

We note as an initial matter that we need not and do not decide whether an income approach would be an appropriate means of determining damages in the instant case; notwithstanding Harris' statement that he used an "income approach," it is clear from the description of what he did that Harris did not attempt to determine the value of the land based on income. Rather, he determined the value of the remainder immediately before the taking by using a comparable sales approach and then considered specific factors which would cause a decrease in the value of that property, including the increased expense in farming the land. It is true that a properly qualified witness may be permitted to use and to testify as to the various factors a well-informed buyer would use in arriving at the price such a buyer would pay for the remaining land. However, as we have seen from the analysis concerning the district court's instructions to the jury, while it is appropriate to consider such items in forming an opinion as to the value of the remaining land, nothing can be allowed for the individual items as individual items. See *Lansman v. State*, 177 Neb. 119, 128 N.W.2d 569 (1964).

Accordingly, it was wrong for Harris to have capitalized the costs of establishing a new water source or the additional costs of hauling grain. The district court therefore properly struck the portion of Harris' testimony in question.

V. ANALYSIS OF HEYE FARMS' CROSS-APPEAL

1. Severance Damages Instruction

That brings us to Heye Farms' cross-appeal and its contention that the district court erred in refusing to give its proposed jury instruction concerning severance damages. Having determined in part IV above that the district court properly instructed in this regard, there can be no merit to Heye Farms' claim.

2. Striking of Evidence

Left remaining is Heye Farms' position that the district court erred in refusing to strike Smith's testimony. Heye Farms argues

that because Smith made his appraisal "without knowledge that [Heye Farms] was entitled to a crossing or compensation[,] his testimony is without proper foundation." Brief for appellee on cross-appeal at 22. However, on redirect examination, Smith stated that in making his appraisal, he considered the fact that there was no access between the northwest quarter and the south quarters. Thus, in reaching his conclusion as to Heye Farms' damages, Smith used a comparison of sales of similar property.

Generally, evidence as to the sale of comparable property is admissible as evidence of market value, provided there is adequate foundation to show the evidence is material and relevant. The foundation evidence should show the time of the sale, the similarity or dissimilarity of market conditions, the circumstances surrounding the sale, and other relevant factors affecting the market conditions at the time. *Patterson v. City of Lincoln*, 250 Neb. 382, 550 N.W.2d 650 (1996); *McArthur v. Papio-Missouri River NRD*, 250 Neb. 96, 547 N.W.2d 716 (1996); *Wear v. State of Nebraska*, 215 Neb. 69, 337 N.W.2d 708 (1983). As such was done, the State laid the proper foundation for Smith's evidence. The fact that Smith was not familiar with § 39-1331 goes to the weight, not the admissibility, of his valuation opinion.

VI. JUDGMENT

For the foregoing reasons, the order of the district court is, as first noted in part I above, reversed and the cause remanded with the direction that the verdict and judgment thereon be reinstated.

REVERSED AND REMANDED WITH DIRECTION.

LARRY ZESSIN, APPELLEE, V. SHANAHAN MECHANICAL & ELECTRIC, INC., AND EMPLOYERS MUTUAL COMPANIES, APPELLANTS.

558 N.W.2d 564

Filed January 31, 1997. No. S-95-737.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1993), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. **Workers' Compensation.** The compensation court does not have the right to establish rules of evidence, procedure, or discovery that are more restrictive or onerous than the rules applicable to the trial courts in this state.
4. ____. When a workers' compensation claimant has suffered a heart attack, the foremost and essential problem is causation, that is, whether the employment caused an employee's injury or death from a heart attack.
5. **Workers' Compensation: Appeal and Error.** The issue in regard to causation of an injury or disability is one for determination by the fact finder, whose findings will not be set aside unless clearly erroneous.
6. **Workers' Compensation.** In workers' compensation cases, the heart injury causation issue consists of two elements: (1) legal causation and (2) medical causation. Under the legal test, the law must define what kind of exertion satisfies the test of "arising out of the employment." Under the medical test, the doctors must say whether the exertion (having been held legally sufficient to support compensation) in fact caused the collapse.
7. **Workers' Compensation: Proof.** When a preexisting disease or condition is present, the Nebraska Supreme Court has adopted the following test for legal causation: An exertion- or stress-caused heart injury to which the claimant's preexisting heart disease or condition contributes is compensable only if the claimant shows that the exertion or stress encountered during employment is greater than that experienced during the ordinary nonemployment life of the employee or any other person.
8. ____: ____. If it is claimed that an injury was the result of stress or exertion in the employment, medical causation is established by a showing by the preponderance of the evidence that the employment contributed in some material and substantial degree to cause the injury.
9. **Workers' Compensation.** As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given their testimony.

10. **Workers' Compensation: Expert Witnesses.** It is the role of the compensation court as the trier of fact to determine which, if any, of the expert witnesses to believe.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Walter E. Zink II and Allan E. Wallace, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellants.

Joseph E. Andres and Terrence J. Salerno for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CONNOLLY, J.

Shanahan Mechanical & Electric, Inc. (Shanahan), and Employers Mutual Companies (Employers) appeal the determination of the Nebraska Workers' Compensation Court that Larry Zessin sustained a work-related injury on June 22, 1992, when he suffered a heart attack while hauling plumbing supplies up scaffolding at Bryan Memorial Hospital in Lincoln, Nebraska. Furthermore, Shanahan and Employers assert that the Workers' Compensation Court erred in admitting certain deposition testimony of Zessin's medical expert to establish causation because the testimony went beyond the scope of Zessin's required disclosure under Workers' Comp. Ct. R. of Proc. 10 (1994). We affirm the judgment of the Workers' Compensation Court.

FACTUAL BACKGROUND

On June 22, 1992, Zessin was employed by Shanahan as a journeyman plumber. While working on an addition to Bryan Memorial Hospital, Zessin hauled 10-foot lengths of cast iron pipe, weighing up to 80 pounds, up six levels of scaffolding from 7 to 10 a.m. At approximately 10 a.m., he took a 15-minute break. After resuming work, he was found lying unconscious on a scaffold. After paramedics revived Zessin, doctors performed cardiac catheterization, which revealed a 70-percent narrowing of the artery which supplies the left, or anterior, side of the heart and a 99-percent narrowing of the right coronary artery. Zessin was diagnosed as having suffered an acute myocardial infarction, which occurs when circulation to a

region of the heart is obstructed, resulting in the death of cells in the muscular wall of the heart. See Dorland's Illustrated Medical Dictionary 837 (28th ed. 1994). Hospital records indicated that in 1989, while living in Georgia, Zessin had suffered a prior inferior myocardial infarction, involving a different area of the heart.

On July 9, 1992, Zessin underwent coronary bypass surgery and implantation of an automatic implantable cardioverter-defibrillator (AICD). One of the treating cardiologists, Dr. Kyong T. Turk, noted in his surgical report that "[s]ince the patient has multiple history of syncope [fainting caused by loss of blood to the brain] in the past, patient is now undergoing coronary artery bypass graft surgery in addition to implantation of AICD." See Dorland's Illustrated Medical Dictionary at 1622. However, Dr. Turk also noted in a December 15, 1992, letter that "[b]ecause of sudden cardiac death, the patient underwent electrophysiologic evaluation by Dr. Krueger at which time he had an easily-induced ventricular tachycardia [an abnormally rapid heart rhythm]. For the treatment of this, patient underwent implantation of an [AICD] and one-vessel coronary artery bypass graft surgery . . . ." See Dorland's Illustrated Medical Dictionary at 1655.

Based on Zessin's medical reports, Shanahan and Employers assert that Zessin's cardiac arrest was the result of his previous myocardial infarction and ongoing ischemia (deficiency of blood supply to the heart muscle due to obstruction or constriction of the coronary arteries). See Dorland's Illustrated Medical Dictionary at 861. However, Zessin argues that the heavy physical exertion in which he engaged prior to the cardiac arrest, combined with his preexisting condition, was the cause of the myocardial infarction.

In the hearing before the Workers' Compensation Court, Zessin presented the deposition testimony of Dr. John R. Windle, a cardiologist, to establish that the heavy physical exertion in which Zessin engaged caused the heart attack. Shanahan and Employers argue that Dr. Windle's testimony violated Workers' Comp. Ct. R. of Proc. 4 (1994). Specifically, Shanahan and Employers argue that Dr. Windle's testimony was beyond the scope of the opinions expressed in Dr. Windle's rule

10 report filed on August 31, 1994. The trial court overruled Shanahan and Employers' objection, finding good cause for receipt of the deposition testimony because of the existence of a prior agreement between Shanahan and Employers' and Zessin's counsel.

The trial court relied upon Dr. Windle's deposition testimony to establish that Zessin's injury was caused by the work he was performing. Additionally, the court found that carrying the heavy pipes up scaffolding was a greater physical exertion than that occasioned during nonemployment life; therefore, Zessin's injury arose during the course of his employment. In addition, the court found that all of Zessin's medical expenses should be paid by Shanahan and Employers, including those for the bypass surgery and the implantation of the AICD. Shanahan and Employers applied for review, and the Workers' Compensation Court review panel affirmed the trial court's order.

ASSIGNMENTS OF ERROR

Shanahan and Employers assign as error that the Workers' Compensation Court erred as a matter of law and was clearly wrong in (1) overruling Shanahan and Employers' objection to those portions of the deposition testimony of Dr. Windle on September 30, 1994, that expressed opinions beyond those contained in his August 31, 1994, report; (2) finding that Zessin suffered an accident or injuries arising out of and in the course and scope of his employment with Shanahan on June 22, 1992; (3) finding that Zessin provided sufficient expert medical evidence to establish a causal relationship between Zessin's cardiac arrest and his employment; and (4) finding that Zessin's medical bills, particularly those for implantation of the AICD and the coronary bypass surgery, were compensable because they arose out of and in the course of his employment with Shanahan.

STANDARD OF REVIEW

Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1993), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment,

order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996); *Hull v. Aetna Ins. Co.*, 249 Neb. 125, 541 N.W.2d 631 (1996); *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996).

Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Cords v. City of Lincoln, supra*; *Scott v. Pepsi Cola Co.*, 249 Neb. 60, 541 N.W.2d 49 (1995).

ANALYSIS

Shanahan and Employers first assert that the Workers' Compensation Court erred in overruling their objection to portions of the deposition testimony of Dr. Windle that violated rule 4. Specifically, Shanahan and Employers argue that the trial court should have excluded from evidence portions of Dr. Windle's deposition testimony that expressed opinions beyond those contained in his previously submitted written report. Rule 4A(2)(a) states in pertinent part that

> each party shall disclose to every other party any evidence that the party may present at trial by or from any witness qualified as an expert.
>
> This disclosure shall be in the form of a written report prepared and signed by the witness which complies with Rule 10.

Shanahan and Employers do not allege that Zessin failed to comply with any of the requirements of rule 10. Rule 10, in addition to setting forth the requirements for written reports, states in pertinent part:

> Any party against whom the report may be used shall have the right, at the party's own initial expense, of cross examination of the physician or surgeon . . . either by deposition or by arranging the appearance of the physician or surgeon . . . at the hearing. Nothing in this rule shall prevent deposition or live testimony of the physician or surgeon . . . .

Shanahan and Employers argue that the remedy for introducing deposition testimony that expresses opinions beyond those contained in the written report is the exclusion of that evidence. However, in *Phillips v. Monroe Auto Equip. Co., ante* p. 585, 597, 558 N.W.2d 799, 807 (1997), we concluded that "substantive sanctions regarding discovery and other pretrial procedural matters in the compensation court should be subject to at least the same procedural safeguards as comparable sanctions for alleged discovery and pretrial procedural violations in Nebraska's civil courts." The compensation court does not have the right to establish rules of evidence, procedure, or discovery that are "more restrictive or onerous than [the rules applicable to] the trial courts in this state." *Id.* at 596, 558 N.W.2d at 806.

Under the discovery rules of this state, the remedy for introducing deposition testimony that is beyond that previously discovered, via interrogatories or otherwise, is not the exclusion of the additional testimony. Thus, even if we were to assume arguendo that Shanahan and Employers are correct in their assertion that a rule 4 violation has occurred, the compensation court does not have the right to adopt the exclusion of evidence as a remedy, because such rule would be more onerous than the rules applicable to the trial courts of this state. As a result, we conclude that Shanahan and Employers' claim that the Workers' Compensation Court erred by admitting the deposition testimony of Dr. Windle is meritless.

We will consider two of Shanahan and Employers' remaining assigned errors together. First, Shanahan and Employers contend that the court erred as a matter of law and was clearly wrong in finding that Zessin's injury arose out of and in the course and scope of his employment with Shanahan. Second, Shanahan and Employers argue that Zessin introduced insufficient medical evidence to establish causation.

In evaluating the determinations of the Workers' Compensation Court, we must be guided by our statutory standard of review provided in § 48-185. Pursuant to § 48-185, an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment,

order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996); *Hull v. Aetna Ins. Co.*, 249 Neb. 125, 541 N.W.2d 631 (1996); *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996).

When a workers' compensation claimant has suffered a heart attack, the foremost and essential problem is causation, that is, whether the employment caused an employee's injury or death from a heart attack. *Rosemann v. County of Sarpy*, 237 Neb. 252, 466 N.W.2d 59 (1991). See, also, *Toombs v. Driver Mgmt., Inc.*, 248 Neb. 1016, 540 N.W.2d 592 (1995). The issue in regard to causation of an injury or disability is one for determination by the fact finder, whose findings will not be set aside unless clearly erroneous. *Cox v. Fagen Inc.*, 249 Neb. 677, 545 N.W.2d 80 (1996); *Leitz v. Roberts Dairy*, 237 Neb. 235, 465 N.W.2d 601 (1991).

In workers' compensation cases, the heart injury causation issue consists of two elements: (1) legal causation and (2) medical causation. *Toombs v. Driver Mgmt., Inc., supra*; *Leitz v. Roberts Dairy, supra*. Under the legal test, the law must define what kind of exertion satisfies the test of "arising out of the employment." *Id.* Under the medical test, the doctors must say whether the exertion (having been held legally sufficient to support compensation) in fact caused the collapse. *Id.* See, also, 1A Arthur Larson & Lex K. Larson, The Law of Workmen's Compensation § 38.83(a) (1996).

Legal Causation

When a preexisting disease or condition is present, this court has adopted the following test for legal causation: An exertion- or stress-caused heart injury to which the claimant's preexisting heart disease or condition contributes is compensable only if the claimant shows that the exertion or stress encountered during employment is greater than that experienced during the ordinary nonemployment life of the employee or any other person. *Toombs v. Driver Mgmt., Inc., supra*; *Leitz v. Roberts Dairy, supra*.

Zessin testified that on June 22, 1992, during the hours of 7 to 10 a.m., he carried 10-foot lengths of cast iron pipe which weighed, depending on the diameter of the pipe, between 20 and 80 pounds, on up to six flights of scaffolding in hot and humid weather. The trial court relied upon Dr. Windle's testimony that carrying such a load in a repetitive and high-volume fashion exceeded what is normally done in recreational activities. Also, the trial court acknowledged:

> We do not decide cases unaware of the world around us. Certainly the physical stress associated with repeatedly walking 6 flights of scaffolding steps for 2-1/2 to 3 hours is greater than the physical stress of nonemployment life for the great majority of us. But add to that scenario, hoisting an eight foot long, 80 lb., cast iron pipe over a shoulder, or even carrying a 20 lb. pipe fitting on alternating trips, and all but the Arnold Schwarzeneggers of the world have to admit that the physical stress of our routine lawn mowing, golfing or four mornings per week two mile jog do not stress our cardiovascular system to the level associated with the activity described by plaintiff.

We determine that the trial court was not clearly wrong in concluding that this activity constituted an exertion or stress greater than that experienced during the ordinary nonemployment life of Zessin or any other person. Thus, we find that Zessin established that his employment was the legal cause of his injury.

Medical Causation

While legal causation is established by satisfying the "stress greater than nonemployment life" test, a claimant must still demonstrate medical causation. If it is claimed that an injury was the result of stress or exertion in the employment, medical causation is established by a showing by the preponderance of the evidence that the employment contributed in some material and substantial degree to cause the injury. *Leitz v. Roberts Dairy, supra.* See, also, *Toombs v. Driver Mgmt., Inc., supra.*

In order to establish medical causation, Zessin introduced the deposition testimony of Dr. Windle, the cardiologist who had provided follow-up treatment for Zessin. The following exchange occurred between Dr. Windle and Zessin's attorney:

> Q. Doctor, after having reviewed all the medical records and examining Larry Zessin, have you been able to reach an opinion that you can express with a reasonable degree of medical probability, as to whether the activity described to you by Larry Zessin that he was performing on the jobs in the hours immediately preceding the cardiac arrest contributed to a material and substantial degree to the heart attack?
>
> . . . .
>
> A. Yes.
>
> Q. What is that opinion?
>
> [Objection omitted.]
>
> [A.] I think that there is a high degree of probability that there was a — an association between the very heavy exertion which he was undergoing, which stresses the heart both in terms of its ability to consume oxygen, aggravating any circumstances, it was further mitigated [sic] by lifting which increases the aerobic requirements of the heart and the rest of the body, and was temporally associated with his collapse.

The trial court found that Zessin's "very heavy and repetitive physical exertion combined with his preexisting condition to cause the myocardial infarction of June 22, 1992." As previously stated, causation is a factual issue to be determined by the trier of fact, whose determination should not be reversed unless it is clearly erroneous. See *Leitz v. Roberts Dairy*, 237 Neb. 235, 465 N.W.2d 601 (1991).

We hold that the compensation court did not clearly err in finding that the deposition testimony of Dr. Windle, when considered in the context of his entire testimony, establishes medical causation.

The remaining assigned error concerns the liability of Shanahan and Employers for Zessin's medical bills arising from his surgery for a coronary artery bypass and the implantation of an AICD. Shanahan and Employers argue that the bypass surgery and the implantation of the AICD resulted from Zessin's preexisting heart condition. Shanahan and Employers point to Dr. Turk's notation on a surgical report dated July 9, 1992, that "[s]ince the patient has multiple history of syncope

in the past, patient is now undergoing coronary artery bypass graft surgery in addition to implantation of AICD." However, Dr. Turk was not consistent in his characterization of the impetus for the surgery. In a letter to Employers, he stated that "[b]ecause of sudden cardiac death, the patient underwent electrophysiologic evaluation by Dr. Krueger at which time he had an easily-induced ventricular tachycardia. For the treatment of this, patient underwent implantation of an [AICD] and one-vessel coronary artery bypass graft surgery . . . ."

In addition, Dr. Windle testified that "the indications for the defibrillator were his cardiac arrest not his syncopal episodes, that he had what's called an electrophysiology study, albeit abbreviated, that they felt suggested that he was at risk for a recurrence of his cardiac arrest."

As the trier of fact, the Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given their testimony. *Leitz v. Roberts Dairy, supra.* It is the role of the compensation court as the trier of fact to determine which, if any, of the expert witnesses to believe. *Surratt v. Watts Trucking*, 249 Neb. 35, 541 N.W.2d 41 (1995). The trial judge found that the implantation of the defibrillator was necessary as a result of Zessin's myocardial infarction of June 22, 1992, which the trial judge had already concluded arose within the scope of Zessin's employment. This determination was not clearly erroneous.

The trial court did not make an explicit finding regarding the bypass surgery, but ordered Shanahan and Employers to pay the bills relating to the bypass procedure. Dr. Windle testified that Zessin's previous minor heart attack was in another area of the heart. Although the trial court did not specify its factual finding regarding bypass surgery, we determine that in finding that Shanahan and Employers should pay, the trial court impliedly found that the bypass procedure was necessary as a result of Zessin's June 22 injury. We conclude that the judge was not clearly wrong in finding that the bypass surgery was necessary as a result of Zessin's June 22 myocardial infarction.

CONCLUSION

As the findings of fact of the Workers' Compensation Court that Zessin's injury was caused by his employment and arose in

the course of his employment are supported by sufficient evidence in the record and support the award, we affirm the findings of the Workers' Compensation Court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT E. LEE, APPELLANT.
558 N.W.2d 571

Filed January 31, 1997. No. S-95-821.

1. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Licenses and Permits: Revocation: Prior Convictions: Proof.** In a prosecution for driving when one's operator's license has been suspended under Neb. Rev. Stat. § 60-6,196(6) (Reissue 1993), proof of the prior conviction under § 60-6,196(2)(c) is an essential element of the offense. As an element of the offense, the State has the burden to prove the prior conviction under § 60-6,196(2)(c).
3. **Prior Convictions: Collateral Attack.** The challenge of a prior plea-based conviction based on the lack of the type of colloquy required by *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), constitutes a collateral attack on the judgment.
4. **Prior Convictions: Pleas.** Unlike a lack-of-counsel challenge, which automatically makes a conviction unreliable, a challenge under *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), requires a review of the record and a determination of whether a plea was knowing, intelligent, and voluntary.
5. **Collateral Attack: Judgments.** A collateral attack on a previous judgment is impermissible unless the attack is grounded upon lack of jurisdiction over the parties or subject matter.
6. **Constitutional Law: Due Process: States.** States are free to afford their citizens greater due process protection under their state constitutions than is granted by the federal Constitution.
7. **Prior Convictions: Collateral Attack.** A collateral attack based on *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), if it may be made at all, must be raised in a separate proceeding commenced expressly for the purpose of setting aside the prior conviction.
8. **Prior Convictions: Sentences: Statutes.** A charge under a recidivist statute, such as those used in enhancement proceedings, does not state a separate offense, but goes to punishment only.

Petition for further review from the Nebraska Court of Appeals, HANNON, SIEVERS, and INBODY, Judges, on appeal thereto from the District Court for Lancaster County, BERNARD

J. McGINN, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Brett McArthur for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, WRIGHT, CONNOLLY, and GERRARD, JJ., and CASSEL, D.J.

WRIGHT, J.

Robert E. Lee was convicted in the district court for driving while his operator's license was suspended, in violation of Neb. Rev. Stat. § 60-6,196(6) (Reissue 1993). On appeal, the Nebraska Court of Appeals reversed the conviction, *State v. Lee*, 4 Neb. App. 757, 550 N.W.2d 378 (1996), and we granted the State's petition for further review.

SCOPE OF REVIEW

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. See, *Smith v. State*, 250 Neb. 291, 549 N.W.2d 149 (1996); *State v. Bowers*, 250 Neb. 151, 548 N.W.2d 725 (1996).

FACTS

On December 16, 1994, Lee was stopped by a Lincoln police officer after the officer observed that Lee's car had an expired in-transit tag. When Lee was asked for his operator's license, he responded that he did not have one because it had been suspended. Lee was arrested and charged under § 60-6,196(6) for operating a motor vehicle on the highways or streets of this state while his operator's license was suspended pursuant to § 60-6,196(2)(c).

Lee entered a plea of not guilty. Prior to trial, Lee filed a petition in Lancaster County Court seeking to set aside his third-offense driving while under the influence of alcohol (DUI) conviction on the grounds that it was constitutionally infirm because he had not been advised of his right to a trial by jury. Lee had not previously appealed or otherwise challenged this

third-offense DUI conviction. On March 15, 1995, Judge Gale Pokorny entered an order stating:

> The record of the Court's plea taking on May 17, 1991 clearly does not inform Mr. Lee of his right to a trial by jury.
>
> As such the Court does not believe the May 17[,] 1991 plea may be used for purposes of enhancement.
>
> So Ordered.
>
> /s/ Gale Pokorny
> Lancaster County Judge

At trial, Lee made a motion in limine asking the district court to preclude the State from presenting any evidence of Lee's prior conviction for third-offense DUI. In support of his motion, Lee offered Judge Pokorny's March 15, 1995, order, and the State made no objection. Lee's motion in limine was overruled. The State then offered a copy of Lee's prior plea of guilty to the third-offense DUI charge, as well as Judge Pokorny's order suspending Lee's privilege to operate a motor vehicle for a period of 15 years. The court admitted this evidence. Lee was found guilty of driving with a suspended license and sentenced to a period of imprisonment of not less than 2 nor more than 4 years.

Lee appealed, assigning as error the district court's admission of evidence of his allegedly invalid prior conviction to support a conviction for driving during a 15-year suspension. The Court of Appeals reversed the order, concluding that because the prior conviction had been voided in a separate proceeding, it should not have been received into evidence against Lee to support a conviction for driving during a 15-year suspension. We granted the State's petition for further review.

ASSIGNMENT OF ERROR

In summary, the State's petition for further review asserts that the Court of Appeals erred in finding that Lee's third-offense DUI conviction had been set aside and voided in a separate proceeding and in subsequently reversing Lee's conviction for driving during a 15-year suspension.

ANALYSIS

The issue is whether Lee's third-offense DUI conviction may be used to support his conviction for driving during a 15-year

suspension. Lee alleges that the district court erred in admitting evidence of his prior conviction for third-offense DUI to support a conviction for driving during a 15-year suspension, because the prior conviction had been held, in a separate proceeding, to be constitutionally infirm.

Section 60-6,196(6) provides: "Any person operating a motor vehicle on the highways or streets of this state while his or her operator's license has been revoked pursuant to subdivision (2)(c) of this section shall be guilty of a Class IV felony." Section 60-6,196(2)(c) declares that if a person who operates a motor vehicle under the influence

> (i) has had two or more convictions under this section in the eight years prior to the date of the current conviction . . . such person shall be guilty of a Class W misdemeanor, and the court shall, as part of the judgment of conviction, order such person not to drive any motor vehicle in the State of Nebraska for any purpose for a period of fifteen years . . . .

In a prosecution for driving when one's operator's license has been suspended under § 60-6,196(6), proof of the prior conviction under § 60-6,196(2)(c) is an essential element of the offense. See *State v. Watkins*, 4 Neb. App. 356, 543 N.W.2d 470 (1996). As an element of the offense, the State has the burden to prove the prior conviction under § 60-6,196(2)(c). See *State v. Linn*, 248 Neb. 809, 539 N.W.2d 435 (1995). Such proof must, with some trustworthiness, reflect a court's act of rendering judgment. See *id.* See, also, Neb. Rev. Stat. § 27-901 (Reissue 1995).

In this case, the evidence offered by the State to prove the third-offense DUI conviction reflected that Lee was represented by counsel. Lee alleged, however, that the third-offense DUI conviction was void because he was not advised, as mandated by *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), of his right to a trial by jury.

The challenge of a prior plea-based conviction based on the lack of a *Boykin*-type colloquy constitutes a collateral attack on the judgment. See *State v. Crane*, 240 Neb. 32, 480 N.W.2d 401 (1992). In *State v. Wiltshire*, 241 Neb. 817, 827, 491 N.W.2d 324, 330 (1992), we stated: "Unlike a lack-of-counsel chal-

lenge, which automatically makes the conviction unreliable, a *Boykin* challenge requires a review of the record and a determination of whether the plea was knowing, intelligent, and voluntary." Therefore, the question is whether Lee had the right to mount a collateral attack upon such conviction.

In the present case, Lee could have sought a direct review of his third-offense DUI conviction. Avenues of relief outside a direct review are necessarily limited because of the State's interest in the finality of convictions. The U.S. Supreme Court has stated: "'"[A]n error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment."'" *Brecht v. Abrahamson*, 507 U.S. 619, 634, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993). In fact, states have no obligation to provide many of these avenues of relief at all. See, *Pennsylvania v. Finley*, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987); *Ricker v. Leapley*, 25 F.3d 1406 (8th Cir. 1994). It is the general rule that a collateral attack on a previous judgment is impermissible unless the attack is grounded upon lack of jurisdiction over the parties or subject matter. *State v. Yelli*, 247 Neb. 785, 530 N.W.2d 250 (1995).

The U.S. Supreme Court, while holding that *uncounseled* convictions cannot be used against a person to either support guilt or enhance punishment for another offense, has expressed "a willingness to uphold, under the Due Process Clause, a variety of state procedures for implementing otherwise valid recidivism statutes." *Parke v. Raley*, 506 U.S. 20, 27, 113 S. Ct. 517, 121 L. Ed. 2d 391 (1992). In *Parke*, the Court addressed the use of an alleged constitutionally invalid guilty plea under *Boykin* in an enhancement hearing and held that the defendant's motion to suppress the plea was properly overruled. The Court explained:

> *Boykin* involved direct review of a conviction allegedly based upon an uninformed guilty plea. Respondent, however, never appealed his earlier convictions. They became final years ago, and he now seeks to revisit the question of their validity in a separate recidivism proceeding. To import *Boykin*'s presumption of invalidity into this very different context would, in our view, improperly ignore another presumption deeply rooted in our jurisprudence: the "presumption of regularity" that attaches to final judg-

> ments, even when the question is waiver of constitutional rights.

Parke, 506 U.S. at 29.

Parke indicates that the Due Process Clause may not demand a right to mount a *Boykin*-type collateral attack on a prior conviction. However, states are free to afford their citizens greater due process protection under their state constitutions than is granted by the federal Constitution. See *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983).

In *State v. LeGrand*, 249 Neb. 1, 541 N.W.2d 380 (1995), we did, in fact, provide a limited avenue through which a defendant can mount a *Boykin* challenge to a prior offense sought to be used for enhancement. However, we carefully circumscribed the procedures by which a defendant could mount a *Boykin* challenge in enhancement proceedings. A collateral attack based on *Boykin*, if it may be made at all, must be raised in a separate proceeding commenced expressly for the purpose of setting aside the prior conviction. See *State v. Oliver*, 230 Neb. 864, 434 N.W.2d 293 (1989). In *LeGrand*, we held that the separate proceeding challenging the previous conviction must be brought in the court which rendered the judgment, otherwise the records of one court would be under the control of other courts of coordinate jurisdiction.

We have not previously addressed a defendant's right to present a *Boykin* challenge in a special proceeding in order to invalidate the prior conviction for purposes of its use as an element of a subsequent offense. Clearly, an important distinction lies between recidivist proceedings and crimes where a prior conviction is an essential element. A charge under a recidivist statute, such as those used in enhancement proceedings, does not state a separate offense, but goes to punishment only. See, *Parke v. Raley, supra*; *State v. Oliver, supra*. See, also, *Oyler v. Boles*, 368 U.S. 448, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962). As such, the issue in an enhancement proceeding is not whether the defendant should be punished at all, but whether the defendant should be punished more harshly for his or her repetitious criminal nature. In contrast, a separate offense which has as an element a prior conviction is still a separate offense, and the only issue is whether the defendant is guilty of that offense or not.

While we chose to grant defendants a limited right to collaterally mount a *Boykin* attack on a prior conviction used for purposes of enhancing their punishment because of the repetitive nature of their conduct, we decline to extend such a right further. We do not grant defendants a right to collaterally attack a prior conviction used as an element of a subsequent offense where such attack is based on the lack of a *Boykin*-type colloquy.

In addition, we note that recidivist statutes are different from statutes which include as a necessary element of the crime a prior offense, insofar as the Legislature, in creating the offense, may have legitimate objectives other than simply punishing a repeated pattern of behavior. Thus, in *State v. Greaser*, 207 Neb. 668, 300 N.W.2d 197 (1981), we held that it was no defense to a charge of escape from official detention that the charge for which the defendant was being held was unfounded for lack of probable cause. In so holding, we looked to the statutory language and noted that unlike a previous escape statute, the charge did not state that the defendant had to be in legal custody, but only that the defendant be "in custody."

In *Lewis v. United States*, 445 U.S. 55, 100 S. Ct. 915, 63 L. Ed. 2d 198 (1980), the U.S. Supreme Court more specifically addressed whether a constitutionally flawed extant prior conviction could constitute the predicate for a subsequent conviction. The Court held that a prior uncounseled conviction for the felony of breaking and entering was properly introduced as an element of the offense of being a felon in possession of a firearm, despite any constitutional infirmities. In so holding, the Court looked to the language of the statute itself and saw that the language revealed unambiguously that its proscription was directed simply at any person who had been convicted. The Court explained that "[n]o modifier is present, and . . . '[n]othing on the face of the statute suggests a congressional intent to limit its coverage to persons [whose convictions are not subject to collateral attack].' " *Lewis*, 445 U.S. at 60 (quoting *United States v. Culbert*, 435 U.S. 371, 98 S. Ct. 1112, 55 L. Ed. 2d 349 (1978)). Thus, the Court concluded:

> The statutory language is sweeping, and its plain meaning is that the fact of a felony conviction imposes a firearm

> disability until the conviction is vacated or the felon is relieved of his disability by some affirmative action, such as a qualifying pardon or a consent from the Secretary of the Treasury.

Lewis, 445 U.S. at 60-61.

Recognizing the apparent inconsistency with its prior holdings in *Burgett v. Texas*, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967); *United States v. Tucker*, 404 U.S. 443, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972); and *Loper v. Beto*, 405 U.S. 473, 92 S. Ct. 1014, 31 L. Ed. 2d 374 (1972), the Court in *Lewis* first clarified that it "has never suggested that an uncounseled conviction is invalid for all purposes." 445 U.S. at 66-67. The Court distinguished *Lewis* from prior cases holding that an uncounseled conviction cannot be used for enhancement purposes:

> In each of those cases, this Court found that the subsequent conviction or sentence violated the Sixth Amendment because it depended upon the reliability of a past uncounseled conviction. The federal gun laws, however, focus not on reliability, but on the mere fact of conviction, or even indictment, in order to keep firearms away from potentially dangerous persons. Congress' judgment that a convicted felon, even one whose conviction was allegedly uncounseled, is among the class of persons who should be disabled from dealing in or possessing firearms because of potential dangerousness is rational. Enforcement of that essentially civil disability through a criminal sanction does not "support guilt or enhance punishment," . . . on the basis of a conviction that is unreliable when one considers Congress' broad purpose.

445 U.S. at 67.

Likewise, the language of § 60-6,196, under which Lee was convicted, does not limit the use of the prior third-offense DUI conviction as an element of driving with a suspended license. At the time Lee chose to drive with a suspended operator's license, his third-offense DUI conviction had stood as a final order for over 3 years. Lee, knowing that his license was suspended, bought a car and proceeded to drive it. The fact that the suspension of Lee's license may have been in violation of his *Boykin*

rights does not change the fact that he voluntarily proceeded to defy the order of suspension, in violation of § 60-6,196(6).

The case before us is not an enhancement proceeding. Therefore, the district court had no jurisdiction to consider the merits of the alleged invalidity of the third-offense DUI conviction, and the court was correct to rely on it for purposes of a conviction under § 60-6,196(6). Lee's attempted collateral attack was impermissible.

CONCLUSION

We decline to extend our holdings in *State v. LeGrand*, 249 Neb. 1, 541 N.W.2d 380 (1995); *State v. Wiltshire*, 241 Neb. 817, 491 N.W.2d 324 (1992); and *State v. Oliver*, 230 Neb. 864, 434 N.W.2d 293 (1989), to permit a defendant to collaterally attack in a special proceeding a prior conviction that is an element of a subsequent offense.

Therefore, we reverse the decision of the Court of Appeals, and we remand the cause to that court with directions to affirm the district court's judgment finding Lee guilty of driving with a suspended license.

REVERSED AND REMANDED WITH DIRECTIONS.

RODNEY BOSS, APPELLANT, V. FILLMORE COUNTY SCHOOL DISTRICT NO. 19, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

559 N.W.2d 448

Filed February 7, 1997. No. S-94-712.

1. **Schools and Schools Districts: Termination of Employment: Teacher Contracts: Evidence: Appeal and Error.** The standard of review in a proceeding in error from an order of a school board terminating the contract of a tenured teacher is whether the school board acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision.
2. **Schools and School Districts: Evidence.** The evidence is sufficient as a matter of law if the school board could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it.
3. **Evidence: Words and Phrases.** Evidence is "substantial" or "sufficient as a matter of law," or constitutes "some competent evidence," if a judge could not, were the trial to a jury, direct a verdict.

4. **Schools and School Districts: Termination of Employment: Teacher Contracts.** Neb. Rev. Stat. § 79-12,110(1) (Reissue 1994) confers upon a school board the authority to cancel the contract of any certificated employee by a majority vote of its members.
5. **Words and Phrases.** Incompetency is defined as demonstrated deficiencies or shortcomings in knowledge of subject matter or administrative skills.
6. **Termination of Employment: Evidence.** Evidence that a particular duty was not competently performed on certain occasions, or evidence of an occasional neglect of some duty of performance, in itself, does not ordinarily establish incompetency or neglect of duty sufficient to constitute just cause for termination.
7. **Termination of Employment.** Unprofessional conduct must be conduct directly related to one's fitness to act in his or her professional capacity.
8. **Schools and School Districts: Termination of Employment: Teacher Contracts.** Insensitivity alone does not justify a finding of unprofessional conduct sufficient to justify termination of a school superintendent's contract.
9. **Schools and School Districts: Termination of Employment.** Errors committed by a superintendent in draft budget documents, where those errors are corrected in the final budget document, do not in and of themselves constitute incompetence or neglect of duty.
10. **Statutes: Legislature: Intent.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
11. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning. In addition, an appellate court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and MUES and INBODY, Judges, on appeal thereto from the District Court for Fillmore County, ORVILLE L. COADY, Judge. Judgment of Court of Appeals affirmed.

Beverly Evans Grenier, of Scudder Law Firm, P.C., for appellant.

Daniel J. Alberts, of DeMars, Gordon, Olson, Recknor & Shively, for appellee.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

WHITE, C.J.

Fillmore County School District No. 19 (district) petitioned this court for further review of the decision of the Nebraska Court of Appeals which determined that the evidence was insuf-

ficient to support a finding that superintendent Rodney Boss engaged in unprofessional conduct, incompetency, and neglect of his duties, and that Boss was entitled to periodic evaluations twice during his first year of employment and at least once annually thereafter. See *Boss v. Fillmore Cty. Sch. Dist. No. 19*, 4 Neb. App. 624, 548 N.W.2d 1 (1996). We affirm.

On July 31, 1992, Boss entered into a 3-year employment contract with the district. The contract provided that Boss could be discharged "if he materially breaches any provision of this Contract or performs any action which substantially inhibits his ability to discharge his duties, including . . . (a) incompetence . . . (f) neglect of duty, (g) general neglect of the business of the District, [or] (h) unprofessional conduct . . . ."

On July 30, 1993, Boss was notified that the school board (board) was considering cancellation of his contract due to his incompetence in managing the financial affairs of the district, his mishandling of various special education complaints such that complaints were subsequently filed against the district with the "Office of Civil Rights," and his unprofessional conduct in relation to staff, students, parents, and a board member. The alleged unprofessional conduct included violations of the district's sexual harassment policy (Policy GAAB).

On August 9, the board failed to hold a scheduled budget hearing, and consequently, Boss was without information as to certain budget items needed before completion of the budget documents for 1993-94. On Sunday, August 15, the board president gave Boss oral direction as to some of the needed information. The next day, Monday, August 16, Boss began preparation of the budget notice for publication in the local newspaper, believing he had until Wednesday to complete this task; at 10 o'clock that Monday morning, Boss was directed to have this notice completed and published by noon that day. Boss met this deadline, but the notice contained an error which required republication.

On August 17, the board placed Boss on administrative leave, refused him entry to his office until after office hours, and prohibited Boss from contacting his staff. Despite these limitations, Boss delivered completed budget documents to the board on August 20, 1993, and additional documents to the board on the

night of the budget hearing, August 23. The board did not act to adopt the budget at that hearing.

The hearing concerning the termination of Boss' contract convened on August 24 at 7:30 p.m. At this hearing, testimony was presented on several issues. Regarding errors made in the budget documents, the district's own expert, former district superintendent Don Pieper, testified that the majority of alleged errors committed by Boss occurred in draft budget documents, these errors were corrected of Boss' own accord in the finalized documents, there was only one "not real significant error" in the finalized documents, and sometimes changes had to be made in budget worksheets and draft documents. Boss testified that haste was a direct factor in the errors made in the budget documents and that he had had difficulty preparing these documents due to the board's own indecision.

Joe Reinhart, a superintendent for the neighboring Exeter school district, testified that there had been "instances when I transposed a number or something" and that at times he had difficulty understanding the instructions for preparing budget documents. One of Boss' witnesses, Marge Melroy—administrative assistant of the Phelps County superintendent of schools—stated that she regularly reviews budget documents filed by superintendents and must frequently call these superintendents and ask them to make changes on submitted documents.

Another issue involving Boss' alleged neglect of duty involved his failure to file a "Chapter 1" form on time. This failure, to which Boss admitted, cost the district $250 to $3,000, and the evidence indicated that this money would have been used to send teacher Julie Johnson to a Chapter 1 conference in Hawaii.

The hearing also involved allegations by certain parents that Boss neglected his duty by failing to address their complaints. One parent testified concerning an incident in which her child received a bruise at school. Due to Boss' failure to respond promptly or satisfactorily in this parent's opinion, she filed a complaint with the Office of Civil Rights. The parent stated that the matter was never resolved in any way by Boss. However, the record clearly indicates that Boss acted immediately to discuss the situation with the children and the parents, the parents gave

Boss only one weekend to resolve the situation to their satisfaction before filing a complaint, the issue of discipline was primarily the principal's duty and not the superintendent's, and the parents received four responses by the principal in addition to Boss' actions regarding this complaint.

This same parent also complained that she was not allowed to view telephone records at the superintendent's office after having been given permission to do so at a board meeting. The record clearly indicates that Boss was not present at the office to give the staff permission to turn those records over to the parent the day she arrived to view the records; that the principal delayed providing her with the records in order to contact the school attorney; and that once the situation was clarified, both Boss and the principal made several efforts to allow the parent to view the records, all of which efforts were rebuffed.

Finally, the board heard testimony concerning Boss' allegedly unprofessional conduct. First, board member Elizabeth Long testified that she was told that Boss had made an unflattering and undisclosed remark about her at a staff meeting. Boss denied making this statement. Long also testified that prior to hearing of the alleged statement, "[Boss had] never been rude to me, nor me to him. And that's the crux of wherein lies our problem, his and mine. Because I feel that he always minimizes my concern."

The testimony regarding Boss' alleged unprofessional conduct included a charge that Boss violated the district's sexual harassment policy, Policy GAAB. The evidence consisted of allegations that Boss on occasion touched male and female employees on the knee or shoulder when speaking with them; that on one occasion he introduced teacher Julie Johnson as "our Julie" to another administrator who also employed a teacher named Julie; that at a conference with Johnson, he told a salesclerk in a store that she was "with me"; that Boss jokingly offered to act as a male model at a lingerie party hosted by Johnson; that Boss would greet Johnson with "[H]i, Julie and how are you" when she entered the teachers' lounge; and that Boss told Johnson in the context of a budgetary request that the song "What Part of No Don't You Understand" reminded him of her.

The record unequivocally demonstrates that Johnson, the primary complainant regarding alleged violations of Policy GAAB, never verbally protested what she perceived as inappropriate conduct on Boss' part and never asked that Boss alter his behaviors prior to this action by the board. When asked by Boss' counsel, even Johnson stated, "At the time I didn't know how to take it, so yeah, it could have been [that I was misconstruing Boss' congeniality.]" The record also clearly establishes that Boss never asked Johnson for sexual favors or touched her in a sensitive location such as her breast. The record also indicates that Boss touched men and women in the same manner when speaking with them, and that most of the district's teachers and students liked and respected Boss and believed his nonverbal communication to demonstrate genuine caring and concern.

The hearing before the board lasted until approximately 7:30 a.m. on August 25, 1993, despite a motion for continuance offered by Boss at 5 a.m. At approximately 8:30 a.m., the board rendered its opinion, finding the evidence sufficient to constitute just cause to cancel Boss' contract. Boss filed a petition in error with the district court for Fillmore County, and the district court affirmed the board's finding.

The Nebraska Court of Appeals reversed, holding that the evidence was insufficient as a matter of law to support cancellation of Boss' contract due to unprofessional conduct, incompetency, or neglect of duty. The Court of Appeals noted that to cancel Boss' contract without any formal evaluations and without other evidence to support the board's finding was both arbitrary and capricious. The Court of Appeals remanded the cause with directions to enter a judgment in favor of Boss and to undertake further proceedings consistent with the court's opinion, including those necessary to address Boss' damages.

The district petitioned this court for further review, and we granted that petition. We hereby affirm the decision of the Court of Appeals.

On petition for further review and as summarized, the district alleges the following errors: (1) The Court of Appeals set forth an improper standard of review for proceedings in error from an administrative body; (2) the Court of Appeals incorrectly con-

cluded that the admitted incompetence of a superintendent from a different district, and evidence that other school district budgets had been changed due to errors, should excuse Boss' incompetence in performing budgeting duties under an erroneous construction and application of this court's decision in *Sanders v. Board of Education*, 200 Neb. 282, 263 N.W.2d 461 (1978); (3) the Court of Appeals misconstrued the evaluation obligation placed on the district by Neb. Rev. Stat. § 79-12,111 (Reissue 1994); and (4) even if notice of a deficiency is required, the Court of Appeals erred by failing to find that the board had satisfied such a requirement as to Boss by conducting evaluations and communicating deficiencies at regular board meetings.

The standard of review in a proceeding in error from an order of a school board terminating the contract of a tenured teacher is whether the school board acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision. *Drain v. Board of Ed. of Frontier Cty.*, 244 Neb. 551, 508 N.W.2d 255 (1993); *Stephens v. Board of Ed. of Sch. Dist. No. 5*, 230 Neb. 38, 429 N.W.2d 722 (1988); *Nuzum v. Board of Ed. of Sch. Dist. of Arnold*, 227 Neb. 387, 417 N.W.2d 779 (1988); *Sanders, supra*. The evidence is sufficient as a matter of law if the school board could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it. *Drain, supra*; *Nuzum, supra*; *Sanders, supra*.

The district first assigns as error that the Court of Appeals set forth an improper standard of review for proceedings in error from an administrative body. The district argues that the court must affirm the board's decision if there is some competent evidence to support the board's findings, rather than if the evidence is sufficient as a matter of law to support those findings.

We have articulated the standard of review in cases involving the termination of teacher contracts in two different ways—the first is as set forth in the Court of Appeals' decision and reiterated above; the second, as argued by the district, is whether there is some competent evidence to sustain the administrative body's findings. See *Clarke v. Board of Education*, 215 Neb. 250, 338 N.W.2d 272 (1983). This court addressed these differ-

ent articulations of the applicable standard of review in *Eshom v. Board of Ed. of Sch. Dist. No. 54*, 219 Neb. 467, 364 N.W.2d 7 (1985). In *Eshom*, we resolved any differences in vocabulary when we stated:

> Taken together, these statements mean that we review the record in teacher termination cases to determine whether there is sufficient evidence as a matter of law to support the board's decision. . . . Stated another way, the evidence is "substantial" or "sufficient as a matter of law," or constitutes "some competent evidence," if a judge could not, were the trial to a jury, direct a verdict . . . .

219 Neb. at 471, 364 N.W.2d at 11.

We find that the Court of Appeals correctly articulated and applied the standard of review reiterated above. Neb. Rev. Stat. § 79-12,110(1) (Reissue 1994) confers upon the board the authority to cancel the contract of any certificated employee by a majority vote of its members. Thus, the board did act within its jurisdiction in this case and satisfied the first part of the applicable standard of review.

Regarding the second part of the standard of review, the evidence in this case is clearly insufficient as a matter of law to support findings of incompetency, neglect of duty, or unprofessional conduct so as to constitute just cause to terminate Boss' contract. Nebraska statutes permit the cancellation of a probationary certificated employee (which Boss is in this case) for reasons including incompetency, neglect of duty, unprofessional conduct, or reasons set forth in the employee's contract. § 79-12,110(1).

"Incompetency" is defined by the applicable Nebraska statute as "demonstrated deficiencies or shortcomings in knowledge of subject matter or . . . administrative skills." Neb. Rev. Stat. § 79-12,107(4)(a) (Reissue 1994). "Neglect of duty" is not defined in § 79-12,107(4), but our cases have noted: "Evidence that a particular duty was not competently performed on certain occasions, or evidence of an occasional neglect of some duty of performance, in itself, does not ordinarily establish incompetency or neglect of duty sufficient to constitute just cause for termination." *Sanders v. Board of Education*, 200 Neb. 282, 290, 263 N.W.2d 461, 465 (1978). "Unprofessional conduct" is

also undefined in § 79-12,107(4); however, as noted by this court in other contexts, it is clear that unprofessional conduct must be conduct directly related to Boss' fitness to act in his professional capacity. See *Scott v. State ex rel. Board of Nursing*, 196 Neb. 681, 244 N.W.2d 683 (1976) (defining unprofessional conduct in context of nursing licensure act).

The board found that Boss neglected his duty as superintendent and acted incompetently with regard to the preparation of budget documents. Clearly, the record does not establish that the board could reasonably find as it did that Boss' errors on *draft* budget documents or his failure to file a single Chapter 1 funding request demonstrate shortcomings or deficiencies in knowledge or administrative skills or neglect of duty. The district's own expert, Pieper, admitted that the only error in the final budget documents presented to the board was an insignificant one. Furthermore, Melroy and Reinhart stated that errors in budget preparation often occur. As well, Boss testified that any errors that may have occurred arose because of the haste with which he had to prepare the documents due to the delay in board instruction, the fact that he was barred from entering his office during business hours, and the ban on any contact with his office personnel up to the time of the budget hearing. Despite these limitations, Boss presented a complete and final budget for the board 3 days prior to the budget hearing, and that document contained only one insignificant error.

We have stated that "evidence of an occasional neglect of some duty of performance, in itself, does not ordinarily establish incompetency or neglect of duty sufficient to constitute just cause for termination." *Sanders*, 200 Neb. at 290, 263 N.W.2d at 465. Boss admitted that he failed to file a Chapter 1 funding request on time; however, the evidence establishes that this failure resulted in a one-time loss of $250 to $3,000 for the district's program and that this money would have been used to send Johnson to Hawaii for a conference. The record is void of any indication that this failure on Boss' part materially harmed the district or the students in the school system in any way. We have not found, prior to this case, nor will we now find, that a superintendent's failure to file one funding form can constitute neglect of duty or unprofessional conduct sufficient to justify

terminating his contract, given the absence of any harm related to that failure.

The board also found that Boss' unprofessional conduct toward Johnson constituted a violation of district Policy GAAB and that he also conducted himself unprofessionally toward Long and some parents. Again, the record does not, as a matter of law, support this finding.

The district's Policy GAAB specifically prohibits:

> Unwelcome advances, requests for sexual favors, verbal or physical conduct of a sexual nature, submission to which is demanded by any employee of the District against any other person as a term or condition of obtaining employment . . .
>
> . . . [or] is used a [sic] basis for any employment decision . . . .
>
> [The policy also prohibits c]onduct of a sexual nature by an employee . . . directed against another employee . . . which has the purpose or effect of unreasonably interfering with work performance or creating an intimidating, hostile, or offensive working environment.

The dissent suggests that the issue of whether Boss violated the school district's sexual harassment policy in relation to Johnson is not dispositive in this case. However, the board specifically found that it was Boss' violation of this policy which constituted unprofessional conduct toward Johnson sufficient to cancel his contract. The record clearly demonstrates that Boss did not violate the district's sexual harassment policy and is devoid of any reasonable indication that Boss' conduct was sufficient to support the board's findings or the interpretation of the record advocated by the dissent.

The board found that Boss' behavior toward Johnson violated Policy GAAB. However, the record is devoid of any indication that Boss' actions were sexual in nature or created the kind of work environment Policy GAAB was designed to prevent. The record indicates that Johnson was offended by the fact that Boss greeted her when she entered the teachers' lounge; that he introduced her as "our Julie" to a fellow administrator who also employed a teacher named Julie; that he told a salesclerk that Johnson was with him when the clerk left Boss to inquire if

Johnson needed assistance; that, in the context of a budgetary request, Boss told Johnson that the song "What Part of No Don't You Understand" reminded him of her; that he jokingly offered to act as a male model at her lingerie party; and that he occasionally touched her on the knee or shoulder (as he did both men and women) when speaking with her.

The dissent states that four teachers characterized the touching of a person on the knee as "offensive or inappropriate." These characterizations are irrelevant; the question is not whether these teachers found Boss' conduct to be "offensive," but rather whether, as the board found, his conduct violated the district's sexual harassment policy so as to constitute unprofessional conduct. Clearly, the evidence is insufficient as a matter of law to support this finding.

Johnson never complained to Boss about the actions that bothered her. Boss testified that he would have altered his behavior immediately if he had known it was troublesome to Johnson. Melroy testified that when she asked Boss to not touch her when he spoke with her, he altered his behavior immediately, and continued to work well with her. Additionally, Johnson testified that Boss never made sexual advances toward her or touched her in any sensitive location and that even she did not interpret these actions as sexual. Johnson stated, "At the time I didn't know how to take it, so, yeah, it could have been [that I was misconstruing Boss' congeniality.]"

The board found that Boss' actions toward Long also constituted unprofessional conduct. Again, there is nothing in the record to reasonably support a finding that Boss' undisclosed comment about Long renders him unfit to act in his capacity as superintendent. His statement may have been insensitive, but insensitivity alone does not justify a finding of unprofessional conduct sufficient to justify termination of his contract.

The board found, as well, that Boss' conduct toward students and some parents was unprofessional. In this regard, the record demonstrates an opposite finding. No students complained of any inappropriate conduct on Boss' part; instead, teachers and parents testified that the students appreciated Boss' interest and concern for them and perceived his nonverbal communication to be simple caring. As for the complaining parents, the record

demonstrates that Boss acted promptly and professionally to address concerns and complaints; that principal Kent McLellan was the administrator responsible for any disciplinary actions; that the pertinent complaints were investigated promptly; that parents received thorough and prompt notice from either the principal or Boss after lodging any complaints; and that the confusion about allowing a parent to view the phone records was quickly clarified, but that the parent subsequently refused to examine those records.

There is a complete absence of evidence to support the board's decision in this case. The Court of Appeals accurately stated and applied the applicable standard of review in this case, and we find the district's first assignment of error to be without merit.

The district next argues that the Court of Appeals erred in construing and applying *Sanders v. Board of Education*, 200 Neb. 282, 263 N.W.2d 461 (1978), so as to evaluate Boss' conduct in comparison to what the evidence shows others charged with similar duties have done and with respect to the impact of his actions on the district. We have consistently held that "[i]ncompetency or neglect of duty are not measured in a vacuum nor against a standard of perfection, but, instead, must be measured against the standard required of others performing the same or similar duties." *Hollingsworth v. Board of Education*, 208 Neb. 350, 360-61, 303 N.W.2d 506, 512-13 (1981). Accord, *Schulz v. Board of Education*, 210 Neb. 513, 315 N.W.2d 633 (1982); *Sanders, supra.*

In *Hollingsworth*, we held that the principal's evaluation of the plaintiff teacher was suspect because the principal failed to compare the plaintiff's performance with the performance of other staff members. In *Schulz*, we found insufficient evidence to support a teacher's termination where the record was silent as to the performance of any other teachers in the school. In *Eshom v. Board of Ed. of Sch. Dist. No. 54*, 219 Neb. 467, 364 N.W.2d 7 (1985), we upheld the termination of a teacher's contract where the evidence was sufficient to show that the teacher's performance fell below the standard of performance of other teachers in the school. In *Sanders*, we overturned the termination of a teacher's contract when the evidence indicated

that she performed her particular duties at or above the standard of performance required of other teachers performing the same or similar duties in the high school.

In the instant case, the Court of Appeals considered the testimony of the district's witness, former superintendent Pieper, who stated that he found only one insignificant error in the final budget documents submitted by Boss to the board. The Court of Appeals also considered the testimony of Melroy and Reinhart. Melroy stated that it was not uncommon for a budget document to be republished if later amended due to a school board's failure to adopt the budget. Reinhart, superintendent at Exeter, testified that he sometimes had difficulty understanding budget document directions and that he had occasionally inaccurately transposed numbers when preparing budgets.

We have consistently held that "[e]vidence that a particular duty was not competently performed on certain occasions, or evidence of an occasional neglect of some duty of performance, in itself, does not ordinarily establish incompetency or neglect of duty sufficient to constitute just cause for termination." *Sanders*, 200 Neb. at 290, 263 N.W.2d at 465. We will not measure incompetency or neglect of duty in a vacuum. The Court of Appeals correctly weighed evidence of other school district superintendents' conduct in preparation of budget documents and found that Boss' conduct in performing his budgetary duties did not fall to the level of incompetence or neglect of duty. Thus, we find that the district's second assignment of error is also without merit.

In its last two assignments of error, the district argues that the Court of Appeals misconstrued § 79-12,111(2), which mandates that a superintendent who has served under a contract with a school district for less than three successive school years "shall be evaluated twice during the first year of employment and at least once annually thereafter." In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *In re Interest of Jaycox*, 250 Neb. 697, 551 N.W.2d 9 (1996); *County Cork v. Nebraska Liquor Control Comm.*, 250 Neb. 456, 550 N.W.2d 913 (1996).

The district first argues that the Court of Appeals misconstrued the statutory directive in this case, pointing to the following language:

> All probationary certificated employees . . . shall . . . be evaluated at least once each semester, unless the probationary certificated employee is a superintendent, in accordance with the procedures outlined below:
>
> . . . Should deficiencies be noted in the work performance of any probationary employee, the evaluator shall provide the teacher or administrator at the time of the observation with a list of deficiencies, a list of suggestions for improvement and assistance in overcoming the deficiencies, and followup evaluations and assistance when deficiencies remain.
>
> If the probationary certificated employee is a superintendent, he or she shall be evaluated twice during the first year of employment and at least once annually thereafter.

§ 79-12,111(2).

The district suggests that the language "unless the probationary certificated employee is a superintendent" exempts superintendents from the specific evaluation procedures in the statute. Statutory language is to be given its plain and ordinary meaning. *Rauert v. School Dist. 1-R of Hall Cty., ante* p. 135, 555 N.W.2d 763 (1996). In addition, an appellate court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results. *Kuhlmann v. City of Omaha, ante* p. 176, 556 N.W.2d 15 (1996).

Clearly, this argument is without merit in that the specific evaluation procedures state that the evaluator shall provide the administrator with a list of deficiencies and suggestions for improvement, and the next paragraph provides that superintendents must be evaluated on a regular basis. The "exemption of superintendents" language clearly goes to the number of times the employee is to be evaluated and not to the procedures to be used in the evaluation process. To interpret the plain language of the statute in any other way would yield an absurd result.

The district also argues that the Court of Appeals' decision results in a finding that if a deficiency set forth as a ground for cancellation had not been previously disclosed to the employee

through a specified evaluation process, such deficiency must be discounted in the assessment of the sufficiency of the evidence. The district argued before this court that to require a school board of six laypeople to evaluate a superintendent with at least 6 years of postsecondary education was an inappropriate burden to place on the board. The district also suggested that the board should not have to inform the superintendent that his actions and comments to Johnson and Long were unprofessional and inappropriate, because he should be well aware of that fact. The Legislature did not see fit to include any exceptions to the evaluation requirement, and we therefore find these arguments to be without merit in the instant case.

The plain language of the statute requires that the board evaluate Boss at least twice during his first year of employment. We have held that "[a]t the very least [a tenured teacher] should be given an opportunity to take whatever action is necessary to avoid giving offense in the future." *Hollingsworth v. Board of Education*, 208 Neb. 350, 360, 303 N.W.2d 506, 512 (1981). In *Nuzum v. Board of Ed. of Sch. Dist. of Arnold*, 227 Neb. 387, 417 N.W.2d 779 (1988), we stated that a principal who had been given regular and repeated instruction from his superintendent and was provided with an oral list of deficiencies could be terminated in compliance with § 79-12,111. We also held in *Nuzum* that the evaluation does not have to be in writing, but the employee must have notice of any deficiencies and must be given the opportunity to correct those deficiencies.

In application to the instant case, the plain language of the statute requires that the board provide Boss with notice in the form of a biannual evaluation his first year of employment as to any deficiencies in his work. The record clearly reflects that no such evaluations were given and that Boss had no notice of any quarrel with his work or conduct until the July 30 letter. Boss was given no opportunity to correct any deficiencies and testified that had he known of any problems he would have immediately modified his behavior. In violation of clearly statutory directives, the board gave Boss no evaluation and no opportunity to correct deficiencies.

Additionally, we note that the district misconstrues the Court of Appeals' decision by stating that the court discounted any

deficiencies not disclosed in a regular evaluation when assessing the sufficiency of the record. Clearly, the Court of Appeals in its opinion weighed each alleged deficiency and determined that the evidence was insufficient to support a finding of just cause to terminate Boss' contract.

The district argues that Boss should have known that his conduct was inappropriate. We stated in *Nuzum* that the evaluator does not have to tell the employee specifically that failure to correct the deficiencies will lead to dismissal. Instead, "one sufficiently educated to hold a teaching certificate . . . should reasonably expect that the failure to remove a deficiency will result in the termination of employment; that, after all, is the very purpose of probationary employment." *Nuzum*, 227 Neb. at 395, 417 N.W.2d at 785.

The distinction in this case is that Boss was never evaluated or given a list of deficiencies to correct. The plain statutory language does not give the board the latitude to assume that an administrator should know certain conduct is unacceptable—the statute instead requires that the board inform the administrator of any deficiencies and give that administrator the opportunity to correct or modify his conduct.

The district argues that the board satisfied the evaluation requirement by conducting such evaluations and communicating deficiencies at regular school board meetings. There is no evidence in the record to support this statement. If such evaluations occurred, they do not appear in the record, and thus, this last assignment of error is also without merit.

Since we find that the Court of Appeals correctly stated and applied the standard of review in this case, the evidence is insufficient as a matter of law to support the board's findings, the Court of Appeals correctly construed *Sanders v. Board of Education*, 200 Neb. 282, 263 N.W.2d 461 (1978), and the board did not comply with the statutory evaluation requirement pertinent to this case, we affirm the Court of Appeals' decision reversing the trial court's judgment and remanding with directions to enter a judgment in favor of Boss and to undertake further proceedings consistent with the court's opinion, including those necessary to address Boss' damages.

AFFIRMED.

GERRARD, J., dissenting.

I respectfully dissent. The majority, citing *Drain v. Board of Ed. of Frontier Cty.*, 244 Neb. 551, 508 N.W.2d 255 (1993), correctly sets forth our standard of review in an error proceeding as the determination of whether the school board acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision. The evidence is "sufficient as a matter of law" if a judge could not, were the trial to a jury, direct a verdict; it is something less than the weight of the evidence and can be such as to permit the drawing of two inconsistent conclusions. *Stephens v. Board of Ed. of Sch. Dist. No. 5*, 230 Neb. 38, 429 N.W.2d 722 (1988); *Eshom v. Board of Ed. of Sch. Dist. No. 54*, 219 Neb. 467, 364 N.W.2d 7 (1985). In order to support a board decision, the record must be such that on the basis of all the testimony and exhibits, the board could fairly and reasonably find the facts as it did. See *Eshom, supra.*

However, rather than determining whether the board "could fairly and reasonably find the facts as it did," *id.* at 471, 364 N.W.2d at 11, and reviewing the record to ascertain whether there is "sufficient evidence as a matter of law," *id.*, to support the board's decision, the majority conducts what more closely resembles a de novo review, substituting its own inferences for the legitimate findings and conclusions of the board.

After hearing and observing the testimony of 28 witnesses and reviewing 51 exhibits, the board found, among other things, that Boss had acted in an unprofessional manner by (1) touching a staff teacher, Julie Johnson, in an inappropriate manner; (2) making inappropriate comments toward Johnson; and (3) placing his arm around female students in a way that some teachers, who observed the incidents, considered unprofessional. From these and other findings, the board concluded that Boss' actions constituted a material breach of his contract with the school district and substantially interfered with Boss' ability to discharge his duties as superintendent of schools. Thus, the board canceled Boss' employment contract based, in part, on the foregoing findings and conclusions.

I particularly disagree with the majority's characterization of the evidence regarding Boss' unprofessional conduct as an occasional touching of male and female employees on the knee

or shoulder when speaking with them. The record, when reviewed in its entire context under a sufficiency of evidence standard, reveals something quite different. Johnson, a kindergarten and "Chapter 1" teacher, testified at length about her professional relationship with Boss. Johnson testified that whenever Boss was around her, he seemed to need to touch her in some way; for example, by putting his arm around her or rubbing her neck. She said she "thought maybe my body language would let him know to sort of stay away . . . ." Instead of getting the message, Johnson said, Boss "would just [laugh] in a matter of fact way." Johnson testified that Boss would come up to her while she was at the copy machine and rub her neck. Johnson said that she told Boss to get away and that Boss' conduct made her uncomfortable.

Johnson testified that she and another teacher cohosted a lingerie party and invited all the women faculty members. When Johnson went to Boss' office for some unrelated reason, Boss, on his own, brought up Johnson's upcoming party and asked whether she needed a male model for it. Boss said that when he was a football coach his "muscles . . . were this big," gesturing to his arms and thighs.

On April 15, 1993, Johnson was scheduled to attend a Chapter 1 conference in Lincoln. Boss, who administers the Chapter 1 program, initially could not attend the same conference due to a previous commitment. However, Boss' commitment required him to attend a meeting which was also in Lincoln.

Johnson did not want to travel to Lincoln with Boss. In order to avoid traveling with Boss, Johnson told him she wanted to drive to Lincoln on her own so that during the conference lunch break, she could run some errands. Johnson said that when she told Boss of her travel plans, he became visibly upset, as evidenced by the fact that his mouth started to quiver, and he began grabbing the change in his pocket. Boss overruled Johnson and requested that she ride with him to Lincoln in a school district car.

Boss' meeting was not scheduled until the afternoon, so he elected to attend the morning session of the Chapter 1 conference with Johnson. When the conference broke for lunch,

Boss dropped Johnson off at a shopping mall and promised to return by 1 p.m. so that she could attend the conference's afternoon session. Boss was 45 minutes late returning from lunch. Boss apologized and suggested that since they had already missed most of the afternoon session, it would not be worthwhile to return for what remained of the conference.

Johnson responded that they could either go back to the conference or back to Fairmont, the location of the school. Johnson testified that Boss just started laughing and suggested they go for a drink. Johnson repeated herself and said, "[E]ither the meeting or Fairmont." Boss chose to return to Fairmont.

Johnson testified that during the return trip to Fairmont, she sat as far away from Boss as she could. However, on at least five occasions, Boss reached over, grabbed her knee, and shook it. Johnson was so offended by this unwanted touching that she ended up sitting as close to the passenger door as possible, with her knees tilted toward the door away from Boss. Upon their arrival at the Fairmont school, Johnson saw another teacher, Mary Lundberg, in the hallway of the school. Lundberg testified that when she saw Johnson on this occasion, she looked white and physically ill. Johnson told Lundberg what had just happened.

Later in the school year, Boss wrote a note to Johnson suggesting that just the two of them attend a Chapter 1 conference in South Dakota. Johnson, wanting no part of another trip with Boss, showed the note to Lundberg and suggested that Johnson would write back and say that she and Lundberg "would love to go." When Johnson delivered her reply note to Boss, he objected and asked "[w]ho invited Mary." In front of two male teachers, Johnson then asked Boss if he wanted just the two of them to go away for 3 days by themselves. Johnson testified that Boss just hung his head and reluctantly said no.

Johnson testified that Boss' conduct caused her to avoid him whenever possible and interfered with her responsibilities in regard to the Chapter 1 program. Johnson answered affirmatively when asked whether she considered Boss' ongoing approaches as offensive and whether she was being provided a hostile working environment.

In addition, four teachers (two male, two female) that testified on behalf of Boss shared the opinion that touching the leg of a staff member of the opposite sex in a work setting was either offensive or inappropriate.

One other male teacher testifying on behalf of Boss related an incident wherein Boss hugged a female student in a manner that the teacher considered unprofessional.

Suffice it to say that there was more than sufficient basis to conclude that the board could fairly and reasonably find the facts as it did. It is not for this court to determine credibility of witnesses, retry issues of fact, or decide whether this court would have reached the same conclusion as the board.

As the majority notes, unprofessional conduct must be directly related to Boss' fitness to act in his professional capacity. Unprofessional conduct must also be conduct palpably below the standards of accepted professional behavior. See *Scott v. State ex rel. Board of Nursing*, 196 Neb. 681, 244 N.W.2d 683 (1976).

This is not a sexual harassment case, and the dispositive issue is not whether Boss violated the district's sexual harassment policy. The dispositive issue is whether Boss' actions were unprofessional, and, if so, did such actions interfere with Boss' ability to discharge his duties as superintendent of schools?

Boss' conduct toward Johnson was palpably below that which is expected from a school district superintendent and, without question, directly implicated Boss' fitness to act in his professional capacity. Boss, as superintendent, is charged with *administering* and *enforcing* the sexual harassment policy in the school district. In spite of this, Johnson's testimony revealed that Boss' ongoing actions and comments were offensive and provided a hostile working environment for at least one female staff member.

There was evidence, sufficient as a matter of law, to support the board's conclusion that Boss' actions toward Johnson and certain female students constituted unprofessional conduct directly related to the administration of his duties as superintendent of schools. Under the correct standard of review in this matter, a judge could not, were this matter tried to a jury, direct a verdict for Boss. *Stephens v. Board of Ed. of Sch. Dist. No. 5*,

230 Neb. 38, 429 N.W.2d 722 (1988); *Eshom v. Board of Ed. of Sch. Dist. No. 54*, 219 Neb. 467, 364 N.W.2d 7 (1985).

I would reverse the judgment of the Court of Appeals and remand the matter with directions to affirm the judgment of the district court.

CONNOLLY, J., joins in this dissent.

GARY M. HOOVER, APPELLANT, V. BURLINGTON NORTHERN RAILROAD COMPANY, A CORPORATION, APPELLEE.

559 N.W.2d 729

Filed February 7, 1997. No. S-94-825.

1. **Trial: Evidence: Appeal and Error.** To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded.
2. **Directed Verdict.** A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.
3. **Trial: Evidence: Waiver: Estoppel.** A party may, by his acts or omissions, waive, or be estopped to make, objections to the admission or exclusion of evidence. Such waiver or estoppel may arise from failure to object, from acts done or omitted before the evidence is offered, as by failure to object to previous similar evidence, or from some affirmative act done after the ruling on the evidence.
4. **Appeal and Error.** A party cannot complain of error which he has invited the court to commit.
5. **Jury Instructions: Appeal and Error.** Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party.
6. **Juries: Verdicts: Negligence: Jury Instructions: Appeal and Error.** Where a jury, using a special verdict form, finds no negligence on the part of the defendant and, accordingly, does not reach the question of the plaintiff's contributory negligence, any error in instructing the jury on the plaintiff's contributory negligence is harmless.
7. **Directed Verdict.** The party against whom a verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law.
8. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

C. Marshall Friedman, Kenneth E. Rudd, and John J. Higgins for appellant.

Jeanelle R. Robson and Terry C. Dougherty, of Knudsen, Berkheimer, Richardson & Endacott, for appellee.

WHITE, C.J., CAPORALE, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ., and REAGAN, D.J.

GERRARD, J.

Gary M. Hoover suffered injuries as the result of a fall suffered in the course of his work for Burlington Northern Railroad Company. Hoover claimed damages under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 et seq. (1994), alleging that Burlington was negligent in not providing proper training and in not providing a reasonably safe workplace. Hoover appeals from the district court judgment after a jury verdict finding that Burlington was not negligent. Finding no reversible error by the trial court, we affirm.

FACTUAL BACKGROUND

Hoover worked for Burlington off and on for approximately 11 years prior to his injuries, most recently as a journeyman carman. On November 7, 1988, Hoover injured his back and ribs when he fell from a bulkhead flatcar while attempting to move a large metal patch on the center sill of the flatcar.

Hoover's responsibility as a carman was to attach large steel reinforcing patches to the bulkheads of the flatcars. These patches were put into place by welding a ring onto each patch so that it could be lifted into place by an overhead crane. The practice in the shop was to weld rings onto all four patches that would go on one end of the car before calling for the crane to lift them into place. Once a ring was welded to the top patch in the stack, the carman moved that patch out of the way so that a ring could be attached to the patch underneath.

The forklift operators who placed the patches on the car were instructed to place them so that the carmen could perform their

work while standing on a 3-foot-wide surface of the top cover plate rather than on the 12- to 18-inch-wide surface of the center sill. Hoover was trained in these procedures by a fellow carman that had worked in this area for approximately 5 or 6 months. Hoover was assigned to this workstation on a permanent basis 2 to 3 weeks prior to his injuries.

A "three-man inspection report" performed by Burlington employees on the night of the incident indicated that the patches had not been properly placed on the car. Consequently, Hoover was required to go out on the center sill to reach the patches.

The flatcars had been stripped of the wooden decking prior to their arrival at Hoover's workstation; this decking was replaced once repairs to the cars were completed. In addition, the cars were sandblasted prior to arriving at the workstation, a process which left loose material on the center sill. Hoover was aware of loose material on the center sill, but he did not attempt to sweep the sill with a broom that was available at the workstation. While he was attempting to pull the patch backward along the center sill, Hoover slipped and fell through one of the openings left by the removal of the decking. There had been some discussion at safety meetings about the possibility of providing plywood to stand on in the absence of decking. Hoover testified that he had not seen any plywood around his workstation. However, Hoover's supervisor testified that there was plywood available nearby upon request of any worker.

Hoover brought suit under FELA, alleging that Burlington had been negligent in not providing proper training and in not providing a reasonably safe workplace. Burlington denied that it had been negligent and alleged that Hoover had been contributorily negligent. The jury was instructed on both the standards for negligence under FELA and the standards for contributory negligence. The jury returned a special verdict, finding that Burlington had not been negligent. Additional facts will be set forth as necessary in the analysis section below.

ASSIGNMENTS OF ERROR

Hoover alleges that the trial court erred in (1) excluding a portion of the inspection report as a subsequent remedial measure; (2) submitting the question of Hoover's contributory neg-

ligence to the jury and instructing it accordingly; (3) instructing the jury that "[t]he mere happening of an accident causing injury does not make the defendant liable nor does it raise any presumption of negligence on the part of the defendant. Accidents frequently occur through no one's fault"; and (4) refusing to direct a verdict in favor of Hoover on the issue of Burlington's liability or, alternatively, granting a new trial.

STANDARD OF REVIEW

To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded. *McIntosh v. Omaha Public Schools*, 249 Neb. 529, 544 N.W.2d 502 (1996).

A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996); *McWhirt v. Heavey*, 250 Neb. 536, 550 N.W.2d 327 (1996).

ANALYSIS

Subsequent Remedial Measures

Hoover first asserts that the trial court erred in excluding part of the inspection report as a subsequent remedial measure under Neb. Evid. R. 407, Neb. Rev. Stat. § 27-407 (Reissue 1995). Rule 407 provides in relevant part: "When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event."

The inspection report was conducted the night of the injury and was for the purpose of ascertaining the causes of injuries on the line. The inspection report read in its entirety:

> Material on car was not being placed properly from the store house should be one pallet at each end of car sitting at center edge of top cover plate with I beams placed at center of car. Will notify store house on nights, and I will inform J.C. Johnson to inform store house on days. Also will use 3/4" x 4' x 8' sheets of plywood on striped [sic] Deck car as to walk on. (2 sheets per car)

The first portion of this report was submitted to the jury; thus, the jury was informed that "[m]aterial on car was not being placed properly from the store house." The remainder of the report was excluded from evidence as subsequent remedial measures under rule 407.

The last part of the report, which reads, "Will notify store house on nights, and I will inform J.C. Johnson to inform store house on days. Also will use 3/4" x 4' x 8' sheets of plywood on striped [sic] Deck car as to walk on. (2 sheets per car)," was clearly a description of remedial measures that would be taken and, as such, was properly excluded. However, Hoover contends that the middle portion of the report, which reads, "[S]hould be one pallet at each end of car sitting at center edge of top cover plate with I beams placed at center of car," should have been received in evidence. Hoover asserts that this portion of the report was not a subsequent remedial measure within the meaning of rule 407, but, rather, a description of the proper placement of the patches, which is evidence of Burlington's negligence.

However, we need not decide whether the controverted portion of the report was admissible under rule 407 because counsel for Hoover waived their objection to the exclusion of the remainder of the report. The second time the exhibit was offered at trial, the following colloquy occurred between Hoover's counsel and the trial court:

> THE COURT: No, up here, up here, "house." "Material in the car was not being placed properly from the storehouse," period. It doesn't show a period, but starting with the word "should," aren't we starting to talk about remedial matters, what should be done?
>
> [PLAINTIFF'S COUNSEL]: Yes, I agree with that.
>
> . . . .
>
> THE COURT: So you would agree that if there's a — if everything — If this is redacted somehow to omit everything after the word "house," then you would have — you would offer it with those things, the rest of the remarks omitted?
>
> [PLAINTIFF'S COUNSEL]: Absolutely, Your Honor.

The following morning, counsel for Hoover offered a redacted version of the exhibit, in which only the first line remained.

This redacted exhibit was received into evidence and read to the jury.

A party may, by his acts or omissions, waive, or be estopped to make, objections to the admission or exclusion of evidence. Such waiver or estoppel may arise from failure to object, from acts done or omitted before the evidence is offered, as by failure to object to previous similar evidence, or from some affirmative act done after the ruling on the evidence. *In re Estate of Hill*, 214 Neb. 702, 335 N.W.2d 750 (1983). Further, a party cannot complain of error which he has invited the court to commit. *Norwest Bank Neb. v. Bowers*, 246 Neb. 83, 516 N.W.2d 623 (1994).

Engaging in the above-quoted colloquy, agreeing with the court that the controverted portion of the report was a discussion of remedial measures, and subsequently redacting the portion at issue and offering the redacted report were affirmative acts on the part of Hoover's counsel that followed the ruling excluding the evidence. These acts affirmatively waived any argument that Hoover presents regarding the admissibility of the questioned portion of the inspection report. This assignment of error is without merit.

CONTRIBUTORY NEGLIGENCE

Hoover next asserts that the instruction to the jury regarding contributory negligence was not supported by the evidence and ought not to have been given.

Under FELA, the burden of proving contributory negligence is on the defendant. *Martinez v. Union Pacific R. Co.*, 82 F.3d 223 (8th Cir. 1996); *Hose v. Chicago Northwestern Transp. Co.*, 70 F.3d 968 (8th Cir. 1995). Title 45 U.S.C. § 53 of FELA makes it clear that contributory negligence is not a bar to recovery in a suit brought under that act, but only proportionately diminishes proven damages. The defendant is entitled to a jury instruction on contributory negligence if there is any evidence to support that theory. *Martinez v. Union Pacific R. Co., supra*; *Hose v. Chicago Northwestern Transp. Co., supra.*

However, the special verdict form utilized in the instant case required the jury to first decide if Burlington's negligence proximately caused Hoover's injuries and, if so, then and only then

required the jury to determine if Hoover was contributorily negligent in any manner so as to reduce his recovery proportionately. The jury returned a verdict for Burlington on the negligence issue and thus never reached the issue of whether Hoover was contributorily negligent.

Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party. *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996); *Stephens v. Radium Petroleum Co.*, 250 Neb. 560, 550 N.W.2d 39 (1996); *Bunnell v. Burlington Northern RR. Co.*, 247 Neb. 743, 530 N.W.2d 230 (1995).

This court has considered a situation identical to that in the instant case, wherein a special verdict form separated the issues of the defendant's negligence and the plaintiff's contributory negligence. In *Bunnell v. Burlington Northern RR. Co., supra*, we held that where a jury, using a special verdict form, finds no negligence on the part of the defendant and, accordingly, does not reach the question of the plaintiff's contributory negligence, any error in giving the instruction is harmless. In the present case, a special verdict form was used, the jury found that Burlington was not negligent, and, thus, the jury did not reach the question of Hoover's contributory negligence. Even if we assume, without deciding, that the contributory negligence instruction was erroneously given, the error was harmless in this case, since the jury never reached the issue of contributory negligence.

INSTRUCTION NO. 7—ACCIDENTS

Hoover next asserts that the trial court erred in giving a jury instruction which read: "The mere happening of an accident causing injury does not make the defendant liable nor does it raise any presumption of negligence on the part of the defendant. Accidents frequently occur through no one's fault." Hoover contends that this instruction has a one-sided focus on the defendant and permits undue speculation as to the plaintiff's fault. Further, Hoover argues that informing the jury that accidents *frequently* occur through no one's fault implies that accidents occur *infrequently* as a result of someone's fault and was, thus, unduly argumentative.

We have held that the giving of an instruction similar to the instruction given here is not reversible error where the jury was properly instructed on the burden of proving negligence. *McKinney v. County of Cass*, 180 Neb. 685, 144 N.W.2d 416 (1966); *Harding v. Hoffman*, 158 Neb. 86, 62 N.W.2d 333 (1954). The U.S. Court of Appeals for the Eighth Circuit has noted that such an instruction is "merely part of the trial court's explanation to the jury that there was no presumption of negligence against anyone by the mere occurrence of an accident . . . ." *Walther v. Omaha Public Power District*, 412 F.2d 1164, 1170 (8th Cir. 1969). Accordingly, that court has found that such an instruction is an expression of common sense and is not reversible error. See, *Meyers v. Union Pacific R. Co.*, 738 F.2d 328 (8th Cir. 1984); *Walther v. Omaha Public Power District, supra.*

We conclude, as we did in *McKinney v. County of Cass, supra*, that this instruction was unnecessary, and we disapprove of its use in future cases; however, any error in giving the instruction in the instant case was harmless. The jury was properly instructed on the burden of proving the negligence charged as a proximate cause of the injury, and there was substantial evidence from which the jury could have determined that Burlington had not been negligent. Thus, Hoover's substantial rights were not prejudiced, and this assigned error is without merit.

Failure to Direct Verdict or Grant New Trial

Finally, Hoover claims that the trial court erred in not directing a verdict against Burlington on the issue of liability or, alternatively, in refusing to grant a new trial. Hoover contends that Burlington was negligent as a matter of law.

A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996); *McWhirt v. Heavey*, 250 Neb. 536, 550 N.W.2d 327 (1996). The party against whom the verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the

benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law. *Id.* In FELA cases, it has been noted that finding the railroad negligent as a matter of law "should be reserved for only the exceptional case." *Borough v. Duluth, Missabe & Iron Range Ry. Co.*, 762 F.2d 66, 68 n.1 (8th Cir. 1985).

This is not a case in which only one reasonable conclusion can be drawn from the evidence. While it would have been reasonable for the jury to find that Burlington had been negligent in not providing Hoover with proper training to do his job safely or in not providing a safe workplace, it was just as reasonable to conclude from the evidence presented that Burlington acted with due care in providing training and safe workplace conditions. When viewing the evidence in a manner resolving every controverted fact in favor of Burlington and giving Burlington the benefit of every inference which can reasonably be drawn from the evidence, the jury could reasonably have found that Burlington met its duty of care by (1) providing training to Hoover from a more experienced carman, (2) conducting safety meetings, (3) providing brooms that could be used to clear the workspace, and (4) providing access to plywood that could be properly placed for a walking space. The weight of the evidence and the resolution of conflicts in the evidence are matters for the jury to determine. This case was properly submitted to the jury.

A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Farmers & Merchants Bank v. Grams*, 250 Neb. 191, 548 N.W.2d 764 (1996); *Hartley v. Guthmann*, 248 Neb. 131, 532 N.W.2d 331 (1995).

We have determined that it was proper for the jury to decide whether or not the weight of the evidence showed Burlington to have acted negligently. Based on the same rationale, we conclude that the trial court did not abuse its discretion in refusing to grant a new trial.

CONCLUSION

For the foregoing reasons, we conclude that all of Hoover's assigned errors lack merit, and we affirm the judgment of the district court.

AFFIRMED.

FAHRNBRUCH, J., not participating.

FRANCIS L. KAST, PERSONALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DALLAS ALLEN KAST, ET AL., APPELLEES, V. AMERICAN-AMICABLE LIFE INSURANCE COMPANY OF TEXAS, A CORPORATION, APPELLANT.

559 N.W.2d 460

Filed February 7, 1997. No. S-94-1090.

1. **Insurance: Contracts: Appeal and Error.** The interpretation and construction of an insurance contract or policy involve questions of law, in connection with which an appellate court has an obligation to reach its conclusions independent of the determinations made by the court below.
2. **Insurance: Contracts.** Whether an insurance contract is ambiguous and therefore in need of construction is a question of law.
3. **Insurance: Contracts: Intent: Appeal and Error.** If an appellate court finds that an insurance policy is ambiguous, then the court may employ rules of construction and look beyond the language of the policy to ascertain the intention of the parties. A general principle of construction, which has been applied to ambiguous insurance policies, holds that an ambiguous policy will be construed in favor of the insured. However, an appellate court will not read an ambiguity into policy language which is plain and unambiguous in order to construe it against the insurer.
4. **Insurance: Contracts.** When an insurance contract can fairly be interpreted in more than one way, there is ambiguity to be resolved by the court as a matter of law.
5. ____: ____. Interpretation of an unambiguous term or provision in an insurance policy also presents a question of law.
6. **Insurance: Contracts: Intent.** An insurance policy is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made. When the terms of the contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them. In such a case, a court shall seek to ascertain the intention of the parties from the plain meaning of the policy.

Appeal from the District Court for Dawson County: JOHN P. MURPHY, Judge. Reversed.

Terrance O. Waite, Susan C. Williams, and Todd R. McWha, of Murphy, Pederson, Waite, Williams & McWha, for appellant.

James J. Paloucek and Royce E. Norman for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

Appellees, the surviving parents of Dallas Allen Kast and Connie Lynn Kast, personally and/or as personal representatives of their estates, sued appellant, American-Amicable Life Insurance Company of Texas (American Life), in Dawson County District Court for amounts payable under a life insurance policy. The applicable part of the policy provides that "[American Life] **WILL PAY** the amount determined from the Schedule of Death Benefits *per Unit as shown herein*, based on the then attained age of the Spouse [Connie Kast]. The number of Units of Insurance . . . is shown on page 3 . . . ." (Emphasis supplied.) Page 3 defines the number of units as "5." American Life claims the amount due is that amount shown on the schedule of death benefits. Appellees claim the amount due is that shown on the schedule of death benefits "per Unit," or five times as much. American Life argues that "per Unit" is one element of the larger clause, which includes "as shown herein." Thus, the suit arises out of the interpretation of the phrase or reference to "per Unit as shown herein" in a section of the applicable insurance policy. The Dawson County District Court found no issues of material fact, granted appellees' motion for summary judgment, and denied American Life's motion for summary judgment. Specifically, the district court found that the plain language of the insurance policy entitled appellees to the judgment they were seeking and entered an order for payment to appellees in the amount moved for, $286,000, plus prejudgment interest, costs, and attorney fees. American Life appealed, stating that the district court erred as a matter of law in its interpretation of the clause contained in the "Family Insurance Agreement," in finding that the policy was an adhesion contract, in determining that there was an ambiguity in the policy language, in granting appellees' motion for summary

judgment and denying American Life's motion for summary judgment, and in awarding five times the amount of coverage contracted for upon the life of the insured's spouse. American Life also assigns that the district court erred in refusing to receive into evidence the affidavits of Robert A. Phares and Joe W. Dunlap; that the district court erred in refusing to give "'much weight'" to the affidavit and supplemental affidavit of Madine Chaney which were received into evidence; and that the district court's ruling was neither supported by the evidence nor sustained by sufficient evidence and was contrary to law. We removed the case from the Court of Appeals' docket pursuant to our power to regulate the docket of the Court of Appeals. We reverse.

BACKGROUND

On or about September 1, 1989, American Life issued a life insurance policy to Dallas Kast which, in part, was a life insurance policy on the life of his spouse, Connie Kast. As to Connie Kast, the policy states:

> [American Life] **WILL PAY** the amount determined from the Schedule of Death Benefits per Unit as shown herein, based on the then attained age of the Spouse [Connie Kast], upon receipt of due proof that the death of the Spouse occurred: (a) while this Agreement was in force; and (b) prior to the Expiry Date of this Agreement. The number of Units of Insurance under this Agreement is shown on page 3 of the Policy. The Expiry Date of this Agreement is the Policy anniversary nearest the Insured's attained age 65.

All premiums were timely paid as of March 16, 1991. On that date, in the second year of the policy, Connie Kast died, along with her husband and son. Under the schedule of death benefits, the second year death benefit dropped from $73,250 to $71,500. Under the schedule of death benefits, the policy shows the number of units of insurance under the agreement as "5.000." American Life was notified of the deaths and subsequently paid $71,500 and interest. Appellees filed suit, stating that the correct payment was $71,500 multiplied by the number of units, 5. The district court found that the plain language of

the insurance policy entitled appellees to the judgment they were seeking and entered an order for payment to appellees in the amount moved for, $286,000, plus prejudgment interest, costs, and attorney fees.

ASSIGNMENTS OF ERROR

American Life assigns as error:

1. The District Court erred as a matter of law in its interpretation of the clause contained in the Family Insurance Agreement . . . .
2. The District Court erred as a matter of law in finding that the policy was an adhesion contract.
3. The District Court erred as a matter of law in determining that there was an ambiguity in the policy language.
4. The District Court erred as a matter of law in granting the plaintiffs' summary judgment motion and denying the defendant's Motion for Summary Judgment.
5. The District Court erred in refusing to receive into evidence the affidavits of Robert A. Phares and Joe W. Dunlap.
6. The District Court erred in refusing to give "much weight" to the affidavit and supplemental affidavit of Madine Chaney which were received into evidence . . . .
7. The District Court's ruling was not supported by the evidence.
8. The trial court's decision is not sustained by sufficient evidence and is contrary to law.
9. The trial court erred as a matter of law in awarding five times the amount of coverage contracted for upon the life of the insured's spouse.

STANDARD OF REVIEW

The interpretation and construction of an insurance contract or policy involve questions of law, in connection with which an appellate court has an obligation to reach its conclusions independent of the determinations made by the court below. *Farm Bureau Ins. Co. v. Bierschenk*, 250 Neb. 146, 548 N.W.2d 322 (1996); *Standard Fed. Sav. Bank v. State Farm*, 248 Neb. 552, 537 N.W.2d 333 (1995); *Columbia Nat. Ins. v. Pacesetter*

Homes, 248 Neb. 1, 532 N.W.2d 1 (1995); *Katskee v. Blue Cross/Blue Shield*, 245 Neb. 808, 515 N.W.2d 645 (1994).

ANALYSIS

The parties are arguing over the interpretation of the reference to the words "per Unit" in the applicable section of the policy. American Life argues that $71,500 is the total payment due; appellees argue, and the district court found, that 5 units of $71,500 (5 times $71,500) were payable in the second year of the policy.

American Life attempted to introduce affidavits of individuals who attempted to explain the terms of the policy. Those individuals were Phares, an insurance agent, and Dunlap, vice president in charge of policy administration for American Life, but the court rejected the affidavits. The court did accept the affidavit of Chaney, the individual who issued the policy to Dallas Kast.

This court has held that whether an insurance contract is ambiguous and therefore in need of construction is a question of law. *Winfield v. CIGNA Cos.*, 248 Neb. 24, 532 N.W.2d 284 (1995). If we find that an insurance policy is ambiguous, then we may employ rules of construction and look beyond the language of the policy to ascertain the intention of the parties. A general principle of construction, which has been applied to ambiguous insurance policies, holds that an ambiguous policy will be construed in favor of the insured. However, we will not read an ambiguity into policy language which is plain and unambiguous in order to construe it against the insurer. *John Markel Ford v. Auto-Owners Ins. Co.*, 249 Neb. 286, 543 N.W.2d 173 (1996); *Winfield v. CIGNA Cos., supra*; *Katskee v. Blue Cross/Blue Shield, supra.*

When an insurance contract can fairly be interpreted in more than one way, there is ambiguity to be resolved by the court as a matter of law. *Farm Bureau Ins. Co. v. Bierschenk, supra.* The policy stated that "[American Life] **WILL PAY** the amount determined from the Schedule of Death Benefits per Unit as shown herein . . . ." We find that the contract language cannot be fairly interpreted in more than one way and that there is no ambiguity. The plain meaning of the document is in the words of the contract.

Finding that the term is unambiguous leads us to the rule that interpretation of an unambiguous term or provision in an insurance policy also presents a question of law. *Allied Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 243 Neb. 779, 502 N.W.2d 484 (1993); *National Am. Ins. Co. v. Continental Western Ins. Co.*, 243 Neb. 766, 502 N.W.2d 817 (1993).

Reflecting upon the unambiguous term or provision, we are reminded that an insurance policy is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made. When the terms of the contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them. In such a case, a court shall seek to ascertain the intention of the parties from the plain meaning of the policy. *Farm Bureau Ins. Co. v. Bierschenk*, 250 Neb. 146, 548 N.W.2d 322 (1996); *Mendenhall v. Grantzinger*, 249 Neb. 847, 546 N.W.2d 775 (1996); *Leader Nat. Ins. v. American Hardware Ins.*, 249 Neb. 783, 545 N.W.2d 451 (1996); *Katskee v. Blue Cross/Blue Shield*, 245 Neb. 808, 515 N.W.2d 645 (1994); *Decker v. Combined Ins. Co. of Am.*, 244 Neb. 281, 505 N.W.2d 719 (1993).

The plain language of the policy shows the amount determined is derived "from the Schedule of Death Benefits per Unit as shown herein . . . ." Appellees focus on the words "per Unit" to justify the argument that they are entitled to five times the amount shown on the schedule of death benefits. Appellee is shown to have 5 "units." This is clearly not what is articulated by the totality of the plain language of the clause.

The plain language of the clause states that appellees are entitled to "the amount determined from the Schedule of Death Benefits per Unit as shown herein . . . ." The amount has been determined and is shown in the policy on the schedule of death benefits. The words "per Unit" are only one element of the clause, and they cannot be taken out of context or divorced from the rest of the sentence. The phrase "as shown herein" is also an element of the clause, and when the clause is read in its entirety, appellees are entitled to receive only the $71,500.

There is absolutely no mention of taking the amount determined on the schedule of death benefits and then multiplying it

by the number of units of insurance mentioned in the policy. American Life has already computed the total amount due and payable to each beneficiary of the spouse for the convenience of the parties, and it is shown on the schedule of death benefits in this case to be $71,500. We therefore hold that the district court was in error in its finding that the amount payable was five times $71,500. We hold that the amount payable was $71,500.

We further hold that the district court was not in error in refusing to admit the two affidavits offered by American Life. The affidavits attempted to interpret the plain meaning of the contract language, which is the province of the court as a matter of law. *Farm Bureau Ins. Co. v. Bierschenk, supra*; *Mendenhall v. Grantzinger, supra*; *Leader Nat. Ins. v. American Hardware Ins., supra*; *Katskee v. Blue Cross/Blue Shield, supra*; *Decker v. Combined Ins. Co. of Am., supra*.

CONCLUSION

The judgment of the trial court was incorrect, and we therefore reverse.

REVERSED.

CONNOLLY, J., concurs in the result.

LANPHIER, J., dissenting.

I dissent from the majority opinion because I believe that a reasonable person would read the spousal clause and understand that the words "[American Life] **WILL PAY** the amount determined from the Schedule of Death Benefits per Unit as shown herein" to mean that American Life would pay whatever amount appears on the schedule of death benefits, multiplied by the number of units purchased. The amount shown on the schedule of death benefits is $71,500, and the number of units shown is 5.

Neither the amount of premiums paid nor the policy payoff limits or overrules the clear language contained within the policy. American Life argues that a reading of the policy in its entirety should govern over the plain language. The evidence presented showed that Dallas Kast completed a military application for insurance to American Life. The face amount specified on the policy was $100,000 for Dallas Kast. Also insured

were the lives of his wife, Connie Kast, and his son, Dallas, Jr., under a rider to the policy. American Life argues that since Dallas Kast was insured for only $100,000, his wife could not reasonably be expected to be insured for $357,500 on a rider to his policy.

It is true that there is an argument that the sum of $357,500 exceeded the reasonable expectations of the beneficiaries of the policy; however, the plain language of insurance policies governs. *Farm Bureau Ins. Co. v. Bierschenk*, 250 Neb. 146, 548 N.W.2d 322 (1996); *Mendenhall v. Grantzinger*, 249 Neb. 847, 546 N.W.2d 775 (1996); *Leader Nat. Ins. v. American Hardware Ins.*, 249 Neb. 783, 545 N.W.2d 451 (1996).

A result adverse to either party should not cause us to rewrite the plain language of the policy. An adverse result occurs to one party in every insurance policy dispute. We have in the past applied the plain language of insurance policies which had adverse results for insureds. See, *Coppi v. West Am. Ins. Co.*, 247 Neb. 1, 524 N.W.2d 804 (1994); *Roth v. Farmers Mut. Ins. Co.*, 220 Neb. 612, 371 N.W.2d 289 (1985). In the instant case, American Life could have written the language of its own policy to state different terms if it had wished to do so, but it may not in retrospect attempt to create a new contract. American Life could have worded the contract to state what it is arguing, that is, "[American Life] **WILL PAY** the amount determined from the Schedule of Death Benefits per Unit as shown herein [for a total of $71,500]." American Life did not do so.

The district court correctly stated, "[American Life] wishes the Court to interpret the policy of insurance in something other than the plain language and to, thereby, save it from itself. The Court declines this invitation and finds that [American Life] is bound by the language that it created." I agree with the district court, and I therefore dissent.

WHITE, C.J., and FAHRNBRUCH, J., join in this dissent.

MARSHA J. BLANCHARD, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MARY A. REARDON, DECEASED, APPELLANT, V. CITY OF RALSTON, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

559 N.W.2d 735

Filed February 7, 1997. No. S-94-1142.

1. **Judgments: Appeal and Error.** In an appellate review of a bench trial in a law action, the trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong.
2. ____: ____. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Due Process: Property: Notice.** The protections of procedural due process attach whenever there has been a deprivation of a significant property interest. If such an interest is shown, due process requires notice and an opportunity to be heard that is appropriate to the nature of the case.

Petition for further review from the Nebraska Court of Appeals, MILLER-LERMAN, Chief Judge, and IRWIN and MUES, Judges, on appeal thereto from the District Court for Douglas County, THEODORE L. CARLSON, Judge. Judgment of Court of Appeals affirmed.

Mandy L. Strigenz and E. Terry Sibbernsen, of E. Terry Sibbernsen, P.C., for appellant.

Eugene P. Welch and Francie C. Riedmann, of Gross & Welch, P.C., for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ.

WRIGHT, J.

Marsha J. Blanchard, individually and as personal representative of the estate of Mary A. Reardon, commenced this inverse condemnation action against the City of Ralston. The Douglas County District Court denied Blanchard's claim for damages. The Nebraska Court of Appeals reversed the judgment of the district court and remanded the cause for a determination of damages. See *Blanchard v. City of Ralston*, 4 Neb. App. 692, 549 N.W.2d 652 (1996). We granted the City's petition for further review.

SCOPE OF REVIEW

In an appellate review of a bench trial in a law action, the trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong. *Hill v. City of Lincoln*, 249 Neb. 88, 541 N.W.2d 655 (1996).

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Lee Sapp Leasing v. Catholic Archbishop of Omaha*, 248 Neb. 829, 540 N.W.2d 101 (1995).

FACTS

Blanchard was the sole heir to a house located in Ralston, Nebraska, which was previously owned by her mother, Reardon. After her mother's death, Blanchard lived in the house. She later moved to live with her husband and children in Valley, Nebraska. At the time Blanchard left the house in Ralston, the electricity and gas had been shut off and Blanchard had been given notice that the water was going to be shut off.

After she moved to Valley, Blanchard did not visit the house, and she heard nothing unusual concerning the house until December 1990, when she was informed by the Ralston Police Department that there had been some complaints concerning animal noises in the house. This situation was apparently resolved, and there were no more concerns with regard to the house until February 1991, when neighbors reported hissing noises coming from the house. The Ralston Police Department investigated and found that a water pipe had broken and leaked water into the basement. The police noticed fungal and mildew growth, which was apparently caused by the moisture. The police department concluded that the structure was a public health nuisance and so notified the mayor of Ralston on February 28, 1991. In response, on March 8, the mayor requested that a health inspector and a building inspector conduct inspections of the house.

Blanchard was not notified of the complaints, the alleged health nuisance determination, or the fact that inspections were being conducted in the house. The mayor testified that at the time she requested the inspections, she did not know who owned the house, nor had she made any inquiries regarding

ownership. Sometime thereafter, the mayor designated this responsibility to the city attorney. Prior to April 25, 1991, the mayor was told that the owner could not be located. The city attorney did not run a title search, but subsequently learned that there was in fact an estate proceeding.

On April 25, 1991, a health inspector and a building inspector examined the house. Both concluded that the house was a hazard. On that date, the police department called Blanchard's husband. The police apparently did not inform Blanchard's husband of the foregoing complaints and subsequent inspections, but directed Blanchard to call Connie Kompare at Ralston's city hall.

On April 29, 1991, Blanchard spoke with Kompare. Blanchard was told that there had been water damage to the house, but that she should not worry because the water had been shut off. Kompare informed Blanchard that there would be a meeting to discuss condemning the house, but did not explain why. Kompare did not tell Blanchard when the meeting would be held, but told Blanchard that if she wanted more information, she should contact the city attorney. Blanchard testified that she gave her address to Kompare at that time and that she told Kompare she had an interest in the property as the sole heir and personal representative of her mother's estate.

Blanchard made several attempts to contact the city attorney, but she did not recall whether she ever made contact. The city attorney testified that he had spoken with Blanchard on one occasion approximately 2 weeks prior to the eventual demolition of the house and that he was given Blanchard's address, but he did not write the address down.

On April 30, 1991, the Douglas County Health Department sent a letter to the City informing it that the house was a "public health hazard." Sometime before May 8, the mayor determined that the house was in such a condition that an emergency existed. Blanchard was not made aware of the health department's report or the mayor's determination.

At a city council meeting on May 7, 1991, demolition of the house was discussed. The city council determined that the procedure for demolition would consist of (1) posting notice of the demolition order on the house, (2) waiting 3 days, and (3)

demolishing the house. Blanchard was not informed of the May 7 meeting. On May 8, a notice of demolition was posted on the house stating that the owner of the house was required to remedy the odor and health-related hazards present in the house or demolish the house within 3 days, or the City would demolish the house. The notice also stated that an appeal of the decision to demolish the house and a request for a hearing on the decision could be filed with the city council within 10 days of the posting of the notice. Blanchard was not sent a copy of this notice.

Blanchard first learned of the demolition order on May 12, 1991, when a neighbor to the house in question told Blanchard that notice of the demolition had been posted on the house. The next morning, Blanchard attempted to enter the house, but was denied access and was told by the police that the house belonged to the City.

Blanchard then spoke with Kompare at the city clerk's office. Blanchard asked why the house had been condemned. Kompare simply referred her to the city attorney. Blanchard subsequently tried to contact the building inspector for more information, but he was out of town. Blanchard stated that she spent the rest of the afternoon trying to reach the city attorney. Eventually, Blanchard's friend Richard Medina was able to speak to the city attorney. Upon Medina's request, the city attorney told Medina that in order to appeal the demolition order, Blanchard would have to have an attorney file a notice of appeal. Blanchard was then given permission to enter the house in order to retrieve some estate papers.

Although the mayor admitted that by this time she was aware of Blanchard's interest in the house, no one contacted Blanchard between the time she inquired into the condemnation on May 13, 1991, and the hearing on May 16 regarding why the house had been condemned. Blanchard testified that she had no idea there were any concerns regarding structural problems with the house and that she thought, in accordance with the language of the posted notice, the City was only concerned with the odor.

Blanchard's attorney prepared a notice of appeal and request for a hearing regarding condemnation of the house, which he filed on May 15, 1991. Medina testified that Kompare told him

it was a waste of time to file an appeal. Blanchard was apparently given permission to enter the house to try to clean it up, but was unable to go to the house because one of her children was sick. Blanchard sent Medina in her place with a letter granting him permission to enter the premises. Medina testified that his purpose was to go through the house and remove the offensive odor "so that we could get permission to go in there and inspect the house and do what had to be done to get an extension there or reprieve on the demolition."

The hearing on the condemnation order was set for noon on May 16, 1991. Previously, the house had been scheduled for demolition on May 16 at 1 p.m. On the way to the hearing, Blanchard and her attorney noticed that demolition had already begun on the driveway. At the hearing, Blanchard's attorney requested that Blanchard be given 2 weeks to clean up the property. The request was not approved, and the house was completely demolished by 2:45 that afternoon.

Blanchard filed an inverse condemnation action, alleging that the City's actions violated Ralston Mun. Code §§ 9-401 through 9-406 because Blanchard had not been given proper notice or reasonable time to repair her property prior to demolition. The district court found that due to the condition of the house, an "immediate danger i.e. an emergency, existed." The court found that the notice afforded Blanchard was "less than perfect," but that Blanchard had received actual notice of the demolition in March or April 1991. The court held that the City had authority pursuant to its police power to order removal of the dangerous building, which had become a nuisance, without payment of compensation and without use of process of eminent domain, and the court dismissed Blanchard's inverse condemnation action.

The Court of Appeals held that while the City had the power to demolish the house, it did not provide Blanchard with proper notice prior to doing so. The Court of Appeals concluded that the demolition of Blanchard's house without proper notice violated her right to procedural due process and that, as a result, a taking occurred for purposes of an inverse condemnation action. The Court of Appeals reversed the district court's judgment and remanded the cause for trial on damages.

ASSIGNMENTS OF ERROR

The City alleges in its petition for further review that the Court of Appeals erred (1) in ruling that although an emergency existed, Blanchard was entitled to due process; (2) in ruling that the due process afforded Blanchard was insufficient; and (3) in reversing the district court's judgment and remanding the cause for a determination of damages.

ANALYSIS

It is undisputed that the City demolished Blanchard's house without instituting condemnation proceedings. In its order, the district court found that there was no question that an "immediate danger i.e. an emergency, existed." In an appellate review of a bench trial in a law action, the trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong. *Hill v. City of Lincoln*, 249 Neb. 88, 541 N.W.2d 655 (1996). We cannot say that this factual finding by the district court was clearly wrong. Therefore, the remaining issue before us is whether the City provided Blanchard with sufficient due process in light of such emergency.

Neb. Rev. Stat. § 18-1720 (Reissue 1991) provides that all cities have the power to "declare what shall constitute a nuisance, and to abate and remove the same." However, the protections of procedural due process attach whenever there has been a deprivation of a significant property interest. If such an interest is shown, due process requires notice and an opportunity to be heard that is appropriate to the nature of the case. *Howard v. City of Lincoln*, 243 Neb. 5, 497 N.W.2d 53 (1993).

Ralston Mun. Code § 9-403 provides:

> UNSAFE BUILDINGS; DETERMINATION AND NOTICE. Whenever . . . the Governing Body shall be of the opinion that any building or structure in the Municipality is an unsafe building, he shall file a written statement to this effect with the Municipal Clerk. The Clerk shall thereupon cause the property to be posted accordingly . . . and shall serve written notice upon the owner thereof . . . . Such notice shall state that the building has been declared to be in an unsafe condition; and

> that such dangerous condition must be removed or remedied by repairing or altering the building or by demolishing it; and that the condition must be remedied within sixty (60) days from the date of receipt.

Ralston Mun. Code § 9-405 provides:

> UNSAFE BUILDINGS; EMERGENCY. Where any unsafe building or structure poses an immediate danger to the health, safety, or general welfare of any person or persons, and the owner fails to remedy the situation in a reasonable time after notice by the Building Inspector to do so, the Municipality may summarily repair or demolish and remove such building or structure.

Since the district court found that there was an emergency, we therefore consider whether the City, in accordance with Ralston Mun. Code § 9-405, gave Blanchard a reasonable time after notice to remedy the situation. On May 8, 1991, a notice was posted on the house which gave Blanchard 3 days to remedy the problem, but 10 days to appeal the decision to demolish. The evidence indicates that Blanchard learned of this notice late Sunday evening, May 12. From our review of the record, we conclude that the notice given to Blanchard did not comply with Ralston Mun. Code § 9-405, which specifically provides that the owner must remedy the situation in a reasonable time after notice by the building inspector to do so.

It is clear that 3 days was not an ample opportunity to do what was necessary to make the house safe or healthy. Moreover, such an extremely limited amount of time was not justified by the circumstances. In other words, 3 days was not "reasonable." Although it is not disputed that there existed an emergency situation, the record does not establish that the condition of the house required its immediate destruction.

It is apparent that the information Blanchard received failed to comport with Ralston Mun. Code § 9-405 insofar as it failed to truly notify her of the City's concerns. The record shows that Blanchard was not advised of the City's specific health concerns, nor was she remotely aware of what concerns might be considered until after the house had been condemned. In fact, the most detailed information given to Blanchard was in the language of the posted notice, which stated only that the occupant

or interested party had 3 days in which to remedy the "odor and health hazard present." As such, the notice given to Blanchard was not meaningful because it failed to adequately inform Blanchard of what the alleged health hazard was or how Blanchard could protect her interest. Any amount of time given to Blanchard to remedy the situation was futile because she was not informed as to what needed to be remedied. See *Hancock v. City Council of Davenport*, 392 N.W.2d 472 (Iowa 1986). Our finding that Blanchard did not receive meaningful notice is also supported by the fact that although Blanchard was given an opportunity to be heard, demolition of the property began prior to the time of the hearing.

For the reasons set forth herein, we find that the notification given to Blanchard did not satisfy the requirements of due process insofar as it failed, under the circumstances, to give Blanchard a reasonable amount of time and a meaningful notice of the alleged hazard so that she could have an opportunity to remedy the situation and defend her case.

We therefore affirm the decision of the Court of Appeals, which reversed the judgment of the district court and remanded the cause for a determination of damages.

AFFIRMED.

COUNTY OF SEWARD, NEBRASKA, APPELLANT, V.
JOHN F. ANDELT AND DELORIS M. ANDELT, HUSBAND AND WIFE, ET AL., APPELLEES.
559 N.W.2d 465

Filed February 7, 1997. No. S-94-1162.

1. **Trial: Pleadings: Pretrial Procedure.** A motion for judgment on the pleadings is properly granted when it appears from the pleadings that only a question of law is presented.
2. ____: ____: ____. In making a motion for judgment on the pleadings, the moving party admits the truth of the well-pleaded facts in the opposing party's pleadings, together with all inferences to be drawn thereon.
3. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.

4. **Statutes: Legislature: Intent: Appeal and Error.** An appellate court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
5. **Statutes.** A court is to give a statute a reasonable construction which best achieves the purpose of the statute, rather than a construction that would defeat it.
6. **Counties: Foreclosure: Real Estate: Tax Sale: Liens.** Pursuant to Neb. Rev. Stat. § 77-1918 (Cum. Supp. 1994), a county must choose to foreclose real estate tax liens under either the lien method set forth at Neb. Rev. Stat. § 77-1901 (Reissue 1990) or the certificate method set forth at Neb. Rev. Stat. § 77-1902 (Reissue 1990).
7. **Actions: Foreclosure: Real Estate: Tax Sale: Time.** A foreclosure action brought under the certificate method set forth at Neb. Rev. Stat. § 77-1902 (Reissue 1990) must be brought within 6 months after the expiration of 3 years from the date of sale of any real estate for taxes.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Affirmed.

C. Jo Petersen, Seward County Attorney, for appellant.

Brian C. Bennett, of Bennett Law Office, P.C., guardian ad litem.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ.

CONNOLLY, J.

The County of Seward, Nebraska (County), appeals the district court's granting judgment on the pleadings, dismissing as time barred two tax foreclosure causes of action. The district court determined that the petition for foreclosure was brought under the certificate method pursuant to Neb. Rev. Stat. § 77-1902 (Reissue 1990). A foreclosure action brought under this section must be commenced within 6 months after the expiration of 3 years from the date of sale of any real estate for taxes. The County asserts its foreclosure action is not barred because it was brought under the lien method pursuant to Neb. Rev. Stat. § 77-1901 (Reissue 1990). We conclude that this foreclosure action was brought pursuant to § 77-1902 and is time barred. We therefore affirm the decision of the district court.

BACKGROUND

On August 10, 1993, the Seward County Attorney filed a petition for foreclosure in Seward County District Court. This petition, consisting of 13 causes of action, requested the court

to find that delinquent taxes and assessments on each parcel of real estate constituted a lien and that the County could satisfy those liens by selling the property at a public sale. Certificates of tax sale along with certificates of title for each parcel were attached to the petition, setting forth the taxes due on each.

The district court entered a decree of foreclosure for causes of action Nos. 10 and 11 on May 23, 1994. On that same date, the court set the remaining causes of action for trial. Upon a motion by the County, the foreclosure decree for causes of action Nos. 10 and 11 was vacated on June 20, 1994, because there was no appointment of counsel for defendants that may be in the military service, minors, or incompetents. A guardian ad litem was therefore appointed for these persons on June 21 for all causes of action. This appeal involves only causes of action Nos. 10 and 13.

The guardian ad litem filed an answer on August 31, 1994, alleging that causes of action Nos. 10 and 13 were barred by § 77-1902 because they were not brought within 6 months after the expiration of the tax sale certificates. A motion for judgment on the pleadings was filed by the guardian ad litem for these causes of action.

A hearing was had on the guardian ad litem's motion to dismiss on September 12, 1994. At this hearing, the County asserted that its petition for foreclosure was brought pursuant to the "lien method" of foreclosure set forth at § 77-1901 and that the statute of limitations for the "certificate method" of foreclosure as set out in § 77-1902 was therefore inapplicable. In support of this contention, the County offered exhibit 2, which contains resolution No. 1397 of the Seward County Board of County Commissioners. According to this resolution, the county attorney was directed to proceed with this foreclosure action "by the lien method." The guardian ad litem argued that the County, by issuing tax sale certificates for the properties, had elected to proceed under the certificate method of foreclosure and that since the limitation period for foreclosing under this method had expired on all certificates, the County could not now proceed under the lien method of foreclosure.

The court sustained the guardian ad litem's motion for judgment on the pleadings and dismissed causes of action Nos. 10

and 13, concluding that those actions were time barred by § 77-1902 because they were not brought within 6 months after the expiration of the tax sale certificates. The court did, however, enter a decree of foreclosure on cause of action No. 6.

Since the filing of this appeal, the County has dismissed all causes of action except Nos. 10 and 13. For this reason, the County appeals the district court's ruling only as it pertains to these causes of action.

The record reflects that tax sale certificates were issued for the property contained in causes of action Nos. 10 and 13. In particular, a tax sale certificate for the property in cause of action No. 10 was issued by the Seward County treasurer on April 15, 1989, and expired on April 15, 1992. The tax sale certificate for the property contained in cause of action No. 13 was issued on April 2, 1988, with an expiration date of April 2, 1991. The County's petition for foreclosure was filed August 10, 1993.

ASSIGNMENTS OF ERROR

Summarized and restated, the County asserts the district court erred in (1) finding that causes of action Nos. 10 and 13 were time barred and (2) not entering a decree of foreclosure on all causes of action, thereby bringing about an inequitable and unjust result.

STANDARD OF REVIEW

A motion for judgment on the pleadings is properly granted when it appears from the pleadings that only a question of law is presented. *White v. Ardan, Inc.*, 230 Neb. 11, 430 N.W.2d 27 (1988). In making such a motion, the moving party admits the truth of the well-pleaded facts in the opposing party's pleadings, together with all inferences to be drawn thereon. *Hoch v. Prokop*, 244 Neb. 443, 507 N.W.2d 626 (1993).

Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *Village of Winside v. Jackson*, 250 Neb. 851, 553 N.W.2d 476 (1996); *County Cork v. Nebraska Liquor Control Comm.*, 250 Neb. 456, 550 N.W.2d 913 (1996).

ANALYSIS

The issue in this appeal is whether the County's petition to foreclose for real estate taxes was brought pursuant to the lien method set forth at § 77-1901 or pursuant to the certificate method set forth at § 77-1902 which demands that a foreclosure cause of action be commenced within 6 months after the expiration of the issued tax sale certificates.

The lien method of foreclosure is set forth at § 77-1901, which provides:

> Counties shall have a lien upon real estate within their boundaries for all taxes due thereon . . . . After any parcel of real estate has been offered for sale and not sold for want of bidders, the county board shall make and enter an order directing the county attorney to foreclose the lien for all taxes then delinquent, in the same manner and with like effect as in the foreclosure of real estate mortgages, except as otherwise specifically provided by sections 77-1903 to 77-1917.

The other method of foreclosure, known as the certificate method, is set forth at § 77-1902, which provides:

> When land has been sold for delinquent taxes and a tax sale certificate or tax deed has been issued, the holder of such tax sale certificate or tax deed may, instead of demanding a deed or, if a deed has been issued, by surrendering the same in court, proceed in the district court . . . to foreclose the lien for taxes represented by the tax sale certificate or tax deed and all subsequent tax liens thereon in the same manner and with like effect as in the foreclosure of a real estate mortgage, except as otherwise specifically provided by sections 77-1903 to 77-1917. *Such action shall only be brought within six months after the expiration of three years from the date of sale of any real estate for taxes or special assessments.*

(Emphasis supplied.)

The Legislature envisioned a county's selection of one of the foregoing methods in foreclosing on a tax lien. According to Neb. Rev. Stat. § 77-1918 (Cum. Supp. 1994), a county board shall examine, on a yearly basis, a list of all real property on which taxes are delinquent. Upon such examination, the board

> shall, as to all real property upon which taxes are delinquent for three or more years, *either* enter an order directing the foreclosure of the lien of such taxes as provided in section 77-1901 *or* enter an order for the county treasurer to issue tax sale certificates to the county covering the delinquent taxes upon such real property, to be foreclosed upon in the manner and at the time provided in sections 77-1901 to 77-1918.

(Emphasis supplied.) § 77-1918.

As noted above, the parties in the present case disagree as to which method of foreclosure the County was proceeding under. The method used is determinative of this appeal, for as noted above, the tax sale certificates issued for the parcels in causes of action Nos. 10 and 13 expired on April 15, 1992, and April 2, 1991, respectively. Since an action to foreclose on a lien represented by a tax sale certificate can only be brought within 6 months after the expiration of the date of sale (i.e., the date on which the tax sale certificate expires), the County's petition filed August 10, 1993, is out of time if we determine this foreclosure action was commenced under the certificate method set forth in § 77-1902. Conversely, if this action is brought pursuant to the lien method set forth at § 77-1901, the causes of action are not time barred.

In asserting that it was proceeding under the lien method in this matter, the County directs our attention to resolution No. 1397 of the Seward County Board of County Commissioners, dated March 30, 1993. This resolution specifically directs the county attorney to foreclose the tax liens on the parcels in question by the lien method. The County therefore claims that this action was appropriately initiated pursuant to § 77-1901. The appellees argue that the County has already issued tax sale certificates for the parcels in question. As such, the appellees assert the County has elected to proceed under § 77-1902 and cannot now change to the lien method, because § 77-1918 demands that a county proceed under either of the methods, but not both.

Ascertaining which method of foreclosure was pursued in this matter requires an examination of the petition as well as interpretation of the applicable statutes. In so doing, we are reminded that an appellate court must determine and give effect

to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Rauert v. School Dist. 1-R of Hall Cty., ante* p. 135, 555 N.W.2d 763 (1996). In addition, this court is to give a statute a reasonable construction which best achieves the purpose of the statute, rather than a construction that would defeat it. *Village of Winside v. Jackson*, 250 Neb. 851, 553 N.W.2d 476 (1996).

We conclude that the foreclosure petition sets forth causes of action for real estate tax foreclosures under the certificate method. The fact that tax sale certificates were issued and sold to the County for the parcels in question is specifically noted in the petition, as is the fact that the certificates have expired. In fact, copies of the tax sale certificates were attached to the petition as exhibits. This in itself appears to denote a proceeding under the certificate method, for Neb. Rev. Stat. § 77-1908 (Reissue 1996) states that "[t]he tax sale certificate or tax deed, *in foreclosure proceedings under section 77-1902* . . . shall be presumptive evidence of all facts necessary to entitle the plaintiff to a decree for the amount appearing to be due thereon . . . ." (Emphasis supplied.) The only indication that the County was proceeding under § 77-1901 was a portion of the prayer for relief wherein the County asked for a confirmation of sale "to be had as set forth by Nebraska Revised Statutes for lien foreclosure . . . ." According to the County, this mention of lien foreclosure within the prayer makes it apparent that the instant action was brought under § 77-1901. We cannot agree, for this quoted language can equally apply to a proceeding under either § 77-1901 or § 77-1902, because both are methods to foreclose on tax liens.

In addition, the applicable foreclosure statutes reveal that the County was required to proceed under the certificate method in the instant case. The fact that the Legislature specifically provides two methods by which a county can foreclose on a tax lien indicates that a county has options prior to proceeding with a foreclosure action. However, as made clear by § 77-1918, a county must choose to foreclose under the lien method *or* the certificate method. The County in the instant case chose to issue tax sale certificates for the parcels in question. Instead of bring-

ing the instant foreclosure action within 6 months after these certificates expired, as contemplated by § 77-1902, the County let the time in which to bring such an action expire. It was only after this expiration that the board of county commissioners issued resolution No. 1397, ordering the county attorney to proceed with the instant causes of action under the lien method set out in § 77-1901.

To allow a county to issue tax sale certificates, let them expire, and then have the board of county commissioners issue an order to foreclose under the lien method runs contrary to a commonsense reading of the foreclosure statutes. Despite the fact that § 77-1918 requires a county to proceed under *either* the lien method *or* the certificate method, allowing the County to proceed under the lien method after the timeframe for initiating an action under § 77-1902 has expired effectively eliminates the purpose of having the limitation period. This is not what the Legislature envisioned, as evidenced by Neb. Rev. Stat. § 77-1856 (Reissue 1996), which provides in part:

> If the owner of any tax sale certificate fails or neglects to demand a deed thereon or to commence an action for the foreclosure of the same within the time specified in section 77-1837 or 77-1902, *such tax sale certificate shall cease to be valid or of any force or effect whatever and the real property covered thereby shall be forever released and discharged from the lien of all taxes for which the real property was sold.*

(Emphasis supplied.)

As this statute makes clear, it was not the intent of the Legislature to allow a county to initiate a different foreclosure proceeding once the limitation period to foreclose on a tax sale certificate has run.

Accordingly, we conclude that the County's issuance of tax sale certificates in the instant case required it to proceed with the present foreclosure action under the certificate method. Having made this determination, we reiterate that a foreclosure action brought under the certificate method must be brought within 6 months after 3 years from the date of sale of any real estate for taxes. § 77-1902. In other words, the action must be commenced within 6 months of the expiration of the tax sale

certificate. The record before us reveals that the tax sale certificate for the parcel within cause of action No. 10 expired on April 15, 1992. Therefore, the 6-month limitation period to bring a foreclosure action under § 77-1902 ran on October 15, 1992, some 9 months before the petition for foreclosure was filed. In a similar fashion, the tax sale certificate for the parcel within cause of action No. 13 expired on April 2, 1991, with the 6-month period running until October 2, 1991, more than 1 year before the filing of the County's petition. As such, any possibility of foreclosure for taxes the County may have had before the limitation period ran is barred. See, § 77-1856; *County of Lancaster v. Maser*, 224 Neb. 566, 400 N.W.2d 238 (1987). Therefore, we conclude that the district court was correct in granting the guardian ad litem's motion for judgment on the pleadings, insofar as the petition relates to foreclosure for delinquent taxes falling within the proscribed timeframe of § 77-1902.

As a second assigned error, the County asserts that the district court's granting a decree of foreclosure for cause of action No. 6 but not the others results in an unjust result because the same petition was used for all the causes of action. We find this assignment to be without merit, for the answer of the guardian ad litem did not allege that cause of action No. 6 was time barred. As such, the court's conclusion does not result in an "unjust" result.

CONCLUSION

We conclude that the district court was correct in dismissing causes of action Nos. 10 and 13 because the County failed to file its petition for foreclosure within the timeframe set out in § 77-1902.

AFFIRMED.

SID DILLON CHEVROLET-OLDSMOBILE-PONTIAC, INC., ET AL., APPELLEES, V. MORTON SULLIVAN ET AL., APPELLANTS.

559 N.W.2d 740

Filed February 7, 1997. No. S-94-1176.

1. **Injunction: Equity.** An action for injunction sounds in equity.
2. **Equity: Appeal and Error.** In an appeal from an equitable action, a reviewing court reviews the action de novo on the record and reaches a conclusion independent of the factual findings of the lower court, subject to the rule that where credible evidence is in conflict on material issues of fact, the reviewing court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
3. **Injunction.** An injunction is an extraordinary remedy and should not ordinarily be granted except in a clear case where there is actual and substantial injury. Such a remedy should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.
4. **Injunction: Equity: Libel and Slander.** Equity will not enjoin a libel or slander, absent a prior adversarial determination that the complained of publication is false or a misleading representation of fact, unless such libel or slander is published (1) in violation of a trust or contract or (2) in aid of another tort or unlawful act, or injunctive relief is essential for the preservation of a property right.
5. **Contempt.** The collateral bar rule requires that a party may not, as a general rule, violate a court order and raise the issue of its unconstitutionality collaterally as a defense in a contempt proceeding.
6. **Attorney Fees.** Attorney fees may be recovered only when authorized by statute or when a recognized and accepted uniform course of procedure allows recovery of an attorney fee.

Appeal from the District Court for Dodge County: MICHAEL MCGILL, Judge. Affirmed in part, and in part reversed and remanded with directions.

Michael M. O'Brien, of Cannon, Goodman, O'Brien & Grant, P.C., for appellants.

J. Joseph McQuillan, of Walentine, O'Toole, McQuillan & Gordon, for appellees.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

GERRARD, J.

The district court found appellant Morton Sullivan and his businesses to be in contempt of court in regard to Sullivan's

repeated violations of a temporary restraining order prohibiting him from uttering any word concerning appellees Sid Dillon and his businesses. Although Sullivan's and Dillon's businesses are named as parties to this action, we will refer to the appellants as Sullivan and the appellees as Dillon, since the focus of this opinion is on these individuals. Further, the district court substituted a permanent injunction for its temporary restraining order in regard to Sullivan's conduct and speech directed toward Dillon which it deemed violative of the Uniform Deceptive Trade Practices Act, Neb. Rev. Stat. § 87-301 et seq. (Reissue 1994), and assessed attorney fees against Sullivan. It is from these orders that Sullivan appeals.

We affirm the district court order finding Sullivan in contempt of court and the court's award of attorney fees in this regard. However, we conclude that the district court erred when it entered the temporary restraining order enjoining Sullivan's speech pursuant to the Uniform Deceptive Trade Practices Act. We likewise conclude the district court erred when it entered the permanent injunction further restraining Sullivan's speech and in awarding Dillon attorney fees in this regard.

ASSIGNMENTS OF ERROR

Sullivan assigns that the district court erred as follows: (1) by finding him in violation of the Uniform Deceptive Trade Practices Act, (2) in granting a permanent injunction in violation of Sullivan's First Amendment rights, (3) by finding him in contempt of court and imposing a civil penalty for his alleged violations of the temporary restraining order, and (4) in awarding Dillon reasonable attorney fees.

STANDARD OF REVIEW

An action for injunction sounds in equity. *Latenser v. Intercessors of the Lamb, Inc.*, 250 Neb. 789, 553 N.W.2d 458 (1996); *Ben Simon's, Inc. v. Lincoln Joint-Venture*, 248 Neb. 465, 535 N.W.2d 712 (1995). In an appeal from an equitable action, a reviewing court reviews the action de novo on the record and reaches a conclusion independent of the factual findings of the lower court, subject to the rule that where credible evidence is in conflict on material issues of fact, the reviewing

court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Engelhaupt v. Village of Butte*, 248 Neb. 827, 539 N.W.2d 430 (1995).

FACTUAL BACKGROUND

Sullivan owns and operates various advertising and information businesses in the Omaha area. Dillon owns and operates three General Motors automobile dealerships in Nebraska: two in Fremont and one in Blair.

On October 5, 1990, Sullivan took possession of a new 1990 Chevrolet Suburban from Vinton Motors in Blair. Sullivan obtained this vehicle as part of a negotiated settlement between General Motors and himself in regard to Sullivan's claim that the 1989 Suburban he purchased from a Lincoln Chevrolet dealership was a "total lemon." In addition, Sullivan received a General Motors extended protection plan warranty. Sullivan had his new Suburban serviced at Vinton Motors on more than one occasion. A receipt indicates that on July 2, 1991, Vinton Motors repaired the Suburban's front brakes. On August 1, Dillon entered into an agreement to purchase the assets of Vinton Motors and some time later began to operate the Blair General Motors dealership under his name.

On September 13, while in Fremont, Sullivan's Suburban quit running. Sullivan elected to have his vehicle towed to Dillon's Fremont Chevrolet dealership for repairs. It was discovered that an electrical junction box had shorted-out, causing the vehicle to stall. The service manager for the dealership testified that he thought the short was caused by the improper installation of "after-market" electronic equipment. The junction box was replaced, and, in addition, Dillon's changed the oil, and rotated and balanced the tires. The service manager testified that when Sullivan picked up his vehicle, Sullivan did not ask whether the repair was covered by either the standard General Motors new car warranty or Sullivan's separate extended protection plan warranty. Sullivan disputes this testimony and claims that he inquired as to whether the repair was covered by one of his warranties and was told that it was not. However, Sullivan was unable to recall which Dillon's

employee specifically told him the repair was not a covered item.

Sullivan continued to experience problems with his brakes, and on December 4, he presented his Suburban to Dillon's dealership in Blair for further repairs. The invoice from this repair indicates many of the same items previously repaired by Vinton Motors in July needed to be fixed again. Dillon did not charge Sullivan for this repair work but did charge Sullivan $67.49 for other service unrelated to the brake repairs. Sullivan paid for the service with a check, but said when he drove away that he immediately knew the brake problem had not been ameliorated. Sullivan returned to the Blair dealership the next day and complained to the service manager. Sullivan said the service manager refused to make further repairs. In response, Sullivan stopped payment on his check.

Dillon testified that sometime in January 1992, Sullivan came into his Fremont dealership and asked to see him. Dillon asked his son, Sid Dillon, Jr., to sit in on this meeting. Dillon, Sr., said Sullivan presented him with a pile of papers, some of which appeared to be General Motors repair invoices, and asked Dillon what he was going to do about that "stack of papers." Dillon said that he told Sullivan there was nothing he was going to do about them and that he did not want to do business with Sullivan any longer.

Not surprisingly, Sullivan's recollection of this meeting is different. Sullivan claims he went to see Dillon to apologize for stopping payment on the check and to give Dillon a cashier's check for the amount in question. Sullivan said he intended to tell Dillon he wanted to do business with him and inquire as to whether Dillon would honor the General Motors warranties on his Suburban. However, Sullivan claimed Dillon pointed his finger at him and started shouting that he knew of Sullivan's past practices, that under no circumstances would he honor any warranties on Sullivan's vehicle, and that he never wanted to see Sullivan's vehicle in any of his dealerships again.

In February 1992, Sullivan telephoned and faxed employees of the General Motors Protection Plan in Michigan, inquiring as to whether any of the repairs performed by Dillon should have been covered under his extended warranty plan. In a letter,

Thomas England, claims supervisor for General Motors Insurance Corporation, responded that $60.52 of the repair in regard to the electrical junction box was covered and offered to reimburse Sullivan that amount. However, England testified that at the time he wrote the letter to Sullivan, he was unaware of the fact that the installation of after-market electronic equipment was thought to be the cause of the junction box failure. England said that had he been informed of this fact, he would have told Sullivan the repair was not covered by his warranties. Furthermore, John Rahie, a General Motors staff attorney, and the supervisor of customer assistance both testified that they discussed England's letter with Sullivan and told him that England was wrong and that the repair at issue was not covered under either warranty because it was caused by the installation of after-market equipment.

In March, Sullivan sent a letter to Dillon in which he demanded that Dillon replace his 1990 Suburban with a new 1992 Suburban and an extended warranty plan. This demand was accompanied with the threat that if Dillon did not comply, Sullivan would become Dillon's "WORST NIGHTMARE" by informing everyone that Dillon was a dishonest dealer because he charged customers for warranty repairs and would not honor General Motors warranties. Sullivan's expressed goal was to put Dillon out of business. Toward this end, Sullivan began a campaign where, utilizing the mass mailing and communication capabilities of his businesses, he flooded the media with purported news releases concerning dishonest General Motors dealers, operated automatic telephone dialing equipment in order to provide the general public with "community service announcements" concerning Dillon, and faxed letters to local General Motors dealers detailing his side of the dispute with Dillon. The gist of Sullivan's several "announcements" and communications was that Dillon is a dishonest automobile dealer.

In addition, Sullivan has faxed or telephoned, in regard to his complaints, the former chairmen of General Motors, Robert Stempel and Roger Smith, General Motors' current chairman, Jack Smith, and General Motors' current corporate counsel. He has conducted mass mailings and telephoned neighbors of

General Motors' staff attorney Rahie in a successful attempt to obtain Rahie's home telephone number and then called Rahie's home and spoke to his children. Sullivan has also filed complaints against Rahie with the Michigan Bar Association and against Dillon's counsel with the Nebraska Bar Association.

On June 8, 1992, Dillon filed a verified petition in equity, seeking damages and injunctive relief in regard to two theories of recovery: the first, pursuant to the Uniform Deceptive Trade Practices Act, § 87-301 et seq., claiming that in the course of his business, Sullivan has disparaged the goods, services, or business of Dillon by false or misleading representations of fact, and the second pursuant to common-law libel and slander. That same day, the district court granted Dillon a temporary restraining order but did not specify which theory of recovery it relied on. The order provided that Sullivan was enjoined

> from uttering *any word, written or oral*, or engaging the automatic dialing-announcing device in any fashion, directed at the Plaintiffs, their agents or employees, or taking other steps or action which may reasonably lead or result in damage to the Plaintiffs' business in Blair, Nebraska, or surrounding communities.

(Emphasis supplied.)

Sullivan filed a motion to dissolve the temporary restraining order on June 15, 1992. After a hearing (the record of which is not included in the record before this court), the district court issued an order on August 18 denying Sullivan's motion. The court specifically found that Dillon was due injunctive relief with respect to his claim pursuant to the Uniform Deceptive Trade Practices Act. The court did not address whether Dillon was due injunctive relief pursuant to his common-law libel and slander theory of recovery.

The record indicates that Sullivan has violated the temporary restraining order on more than one occasion.

On November 10, 1994, in separate but contemporaneously issued orders, the district court found Sullivan to be in contempt of court, fined him $25,000 for his repeated violations of the temporary restraining order, and found Sullivan's conduct to be in violation of the Uniform Deceptive Trade Practices Act. In addition, the court vacated the temporary restraining order and

replaced it with a permanent injunction which provided that Sullivan and his agents and employees

> are permanently enjoined from uttering any false or misleading statements of fact, written or oral, or engaging in any automatic dialing-announcing device with the purpose of communicating any false or misleading statements of fact, directed at Plaintiffs, their principals, agents, attorneys or employees, or taking other steps or actions which may reasonably lead or result in the disparaging of the goods, services, or business of Plaintiffs.

The trial judge provided Sullivan with the opportunity to purge his contempt fine if he did not violate the permanent restraining order between the date of the order, November 10, 1994, and November 15, 1995. In addition, the court awarded attorney fees to Dillon's attorney, $5,000 in regard to the hearing on the permanent injunction and $1,000 in regard to the issue of contempt of court. At the time of argument before this court, both parties agreed that Sullivan has complied with the permanent injunction and purged the contempt fine.

ANALYSIS

Sullivan has been before this court on a prior occasion concerning the same sort of conduct and speech which is at issue in the instant appeal. In *J.Q. Office Equip. v. Sullivan*, 230 Neb. 397, 432 N.W.2d 211 (1988), Sullivan experienced numerous difficulties with his copier. After the warranty period for the copier expired, Sullivan, still dissatisfied, demanded further service and supplies at no cost. Eventually, the plaintiff's service technician informed Sullivan that the drum of the copier was damaged and needed to be replaced. Sullivan believed that the damage was caused by a service technician on a prior occasion and requested that the plaintiff replace the drum at its expense. When the plaintiff refused, Sullivan threatened to publicize through the use of his automatic telephone-dialing equipment his belief that the plaintiff's copiers and service were substandard. Some time later, the plaintiff learned that Sullivan planned to attend an exhibitors' show for office equipment and along with 15 friends, each with a bullhorn, surround the plaintiff's booth and broadcast Sullivan's complaint concerning the plain-

tiff and its copiers. The plaintiff then sought and obtained an injunction barring Sullivan's demonstration.

This court held that the injunction issued barring Sullivan's conduct constituted an unconstitutional prior restraint in violation of Sullivan's First Amendment right of free speech. We recited that prior restraints are not per se unconstitutional, but that there was a heavy burden against a prior restraint's constitutional validity. As a general rule, a prior restraint must fit within one of the narrowly defined categories to pass constitutional muster. Further, we specifically rejected the argument that Sullivan's speech was commercial speech and therefore deserving of lesser First Amendment protection. Instead, we concluded that Sullivan was expressing his opinion with coercive speech and that both opinion and coercive speech are just the sort of communications protected by the First Amendment.

For the purposes of the instant appeal, we note that an injunction is an extraordinary remedy and should not ordinarily be granted except in a clear case where there is actual and substantial injury. Such a remedy should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice. *Ben Simon's, Inc. v. Lincoln Joint-Venture*, 248 Neb. 465, 535 N.W.2d 712 (1995); *Nebraska Irrigation, Inc. v. Koch*, 246 Neb. 856, 523 N.W.2d 676 (1994).

Dillon argues that the instant case is different from Sullivan's previous appearance before this court. In the case at bar, Dillon complains that Sullivan's speech contains false and misleading representations of fact and, as such, is unprotected by the First Amendment. Further, Dillon argues he is due injunctive relief in regard to Sullivan's speech because of the operation of the Uniform Deceptive Trade Practices Act, § 87-301 et seq.

In pertinent part, § 87-303(a) provides: "A person likely to be damaged by a deceptive trade practice of another may be granted an injunction against it under the principles of equity and on terms that the court considers reasonable. Proof of monetary damage, loss of profits, or intent to deceive is not required." Section 87-302(a) provides: "A person engages in a deceptive trade practice when, in the course of his or her business, vocation, or occupation, he or she: . . . (8) Disparages the

goods, services, or business of another by false or misleading representation of fact . . . ."

We disagree with Dillon's contentions in at least two respects. First, it is axiomatic that the provisions of the Uniform Deceptive Trade Practices Act cannot abrogate Sullivan's free speech rights under the First Amendment to the U.S. Constitution or article I, § 5, of the Nebraska Constitution.

Further, by its own terms, § 87-303(a) only provides for equitable relief consistent with general principles of equity. As a general rule, equity will not enjoin a libel or slander. "One of the unwavering precepts of the American law of remedies has long been the axiom that equity will not enjoin a libel." Rodney A. Smolla, Law of Defamation § 9.13(1)(a) at 9-36 (1996). See, also, *Kramer v. Thompson*, 947 F.2d 666 (3d Cir. 1991); *Lothschuetz v. Carpenter*, 898 F.2d 1200 (6th Cir. 1990); *Matter of Providence Journal Co.*, 820 F.2d 1342 (1st Cir. 1986), *modified on other grounds* 820 F.2d 1354 (1987); *Community for Creative Non-Violence v. Pierce*, 814 F.2d 663 (D.C. Cir. 1987); *Alberti v. Cruise*, 383 F.2d 268 (4th Cir. 1967); *Konigsberg v. Time, Inc.*, 288 F. Supp. 989 (S.D.N.Y. 1968); *N. W. Pac. R. R. Co. v. Lumber & S. W. Union*, 31 Cal. 2d 441, 189 P.2d 277 (1948); *Moore v. City Dry Cleaners & Laundry*, 41 So. 2d 865 (Fla. 1949); *M. Ward & Co. v. United Employees*, 400 Ill. 38, 79 N.E.2d 46 (1948); *Greenberg v. De Salvo*, 254 La. 1019, 229 So. 2d 83 (1969); *Prucha v. Weiss*, 233 Md. 479, 197 A.2d 253 (1964), *cert. denied* 377 U.S. 992, 84 S. Ct. 1916, 12 L. Ed. 2d 1045; *Mescalero Apache Tribe v. Allen*, 81 N.M. 561, 469 P.2d 710 (1970); *Horne v. Radiological Health Services, P.C.*, 83 Misc. 2d 446, 371 N.Y.S.2d 948 (1975), *aff'd* 51 A.D.2d 544, 379 N.Y.S.2d 374 (1976); *Wolf v. Gold*, 9 A.D.2d 257, 193 N.Y.S.2d 36 (1959); *Schmoldt v. Oakley*, 390 P.2d 882 (Okla. 1964); *Willing v. Mazzocone*, 482 Pa. 377, 393 A.2d 1155 (1978); *Lawrence v. Atwood*, 295 S.W.2d 298 (Tex. Civ. App. 1956); *Kwass v. Kersey*, 139 W.V. 497, 81 S.E.2d 237 (1954).

Among the rationales traditionally advanced to support the proposition that equity will not enjoin a libel are that damages provide an adequate remedy at law, the defendant would be deprived of the right to a jury trial concerning the truth of his or her allegedly defamatory publication, and to enjoin defamation

is to effect an unconstitutional prior restraint on speech. See, *Kramer v. Thompson, supra*; *Matter of Providence Journal Co., supra*; *Greenberg v. De Salvo, supra*; *Mescalero Apache Tribe v. Allen, supra*; *Willing v. Mazzocone, supra*; Smolla, *supra*, § 9.13(1)(b).

Notwithstanding the general rule, it is also recognized that equity may restrain libel or slander if essential to preserve a property right, if the publication is in violation of a trust or contract, or if the defamation is published in aid of another tort or unlawful act. See, *M. Ward & Co. v. United Employees, supra*; *Horne v. Radiological Health Services, P.C., supra*; *Lawrence v. Atwood, supra*.

Some jurisdictions have concluded that an order enjoining further publication of libelous or slanderous material does not constitute a prior restraint on speech where there has been a full and fair adversarial proceeding in which the complained of publications were found to be false or misleading representations of fact prior to the issuance of injunctive relief. See, *Retail Credit v. Russell*, 234 Ga. 765, 218 S.E.2d 54 (1975); *Advanced Training Sys. v. Caswell Equip. Co.*, 352 N.W.2d 1 (Minn. 1984); *O'Brien v. Tenants*, 42 Ohio St. 2d 242, 327 N.E.2d 753 (1975). But see *Kramer v. Thompson, supra*.

Several other state appellate courts have reversed the issuance of injunctive relief in favor of merchants or service providers who were faced with dissatisfied customers' unconventional airing of their grievances. In *Lawrence v. Atwood, supra*, the appellant, dissatisfied with the construction of his home, placed on his property a large sign, visible to two heavily traveled streets, on which he declared his belief that his house, built by the appellee, was a "lemon." The appellee was granted a temporary injunction requiring the appellant to remove his sign. On appeal, the Texas Court of Civil Appeals reversed and dissolved the temporary injunction stating:

> The publication was alleged to be a continuing one, it is true, and it was alleged to be causing irreparable injury to appellee's reputation and business, for which injury, according to a further allegation of the petition, appellee had and has no adequate remedy at law; but these allegations did not alter the basic nature of the act that was

> charged to appellant. We are of the opinion, therefore, that the case is governed by the general rule that a court of equity has no jurisdiction to restrain a mere libel or slander, where no breach of trust or of a contract is shown.

Lawrence v. Atwood, 295 S.W.2d at 300.

In *Willing v. Mazzocone*, 482 Pa. 377, 393 A.2d 1155 (1978), the appellee was an attorney who at one point secured a workers' compensation disability award for the appellant. At the time of the settlement distribution, the appellee deducted the sum of $150 and paid this money in total to the appellant's treating psychiatrist for his testimony in the workers' compensation proceeding. The appellant, for some unexplained reason, developed the irrational belief that the appellee had diverted $25 of this money to the appellee's own benefit.

To protest her dissatisfaction with the appellee, the appellant began wearing a "sandwich-board" sign which announced her belief that her attorney had stolen money from her and sold her out to the insurance company. The appellant would march back and forth between two court buildings in downtown Philadelphia wearing her "sandwich-board" sign and pushing a shopping cart with an American flag, while continuously ringing a cowbell and blowing a whistle. The appellee sought and received an injunction which in general terms barred the appellant's conduct. On appeal, the Pennsylvania Superior Court modified the injunction to include only the appellant's specific message and conduct complained of by the appellee.

The Pennsylvania Supreme Court reversed the lower court's decision, citing the traditional view that equity lacks the power to enjoin the publication of defamatory matter. The court concluded that even in instances where a damage award would be a pointless gesture because of the tort-feasor's indigency, the remedy for defamation is still an action at law for damages. *Id.*

We adopt the view of those jurisdictions that have considered the issue and hold that absent a prior adversarial determination that the complained of publication is false or a misleading representation of fact, equity will not issue to enjoin a libel or slander, unless such libel or slander is published (1) in violation of a trust or contract or (2) in aid of another tort or unlawful act, or injunctive relief is essential for the preservation of a property right.

In the instant case, although Sullivan's speech and conduct is hardly a model of good citizenship, neither was it published in aid of another tort or unlawful act or in violation of Dillon's property rights, nor does its publication constitute a breach of trust or contract. A jury has yet to determine whether Sullivan's allegations about Dillon and his business practices are false or misleading representations of fact. For these reasons, we conclude that the temporary restraining order, as well as the permanent injunction restraining Sullivan's speech, constitute unconstitutional prior restraints in derogation of Sullivan's right to speak. Thus, Sullivan's conduct and speech do not fall within the ambit of § 87-303(a), and the district court erred by so finding.

Further, the district court awarded Dillon attorney fees pursuant to § 87-303(b), which provides that the "court in its discretion may award attorneys' fees to the prevailing party if . . . (2) the party charged with a deceptive trade practice has willfully engaged in the trade practice knowing it to be deceptive."

Sullivan's deceptive trade practice is his alleged disparagement of Dillon's business through false or misleading representations of fact. However, so as to not effect a prior restraint, Sullivan can only be found to have willfully engaged in a trade practice knowing it to be deceptive subsequent to a full and fair adversarial proceeding before a judicial tribunal and a finding that Sullivan's statements concerning Dillon were false or misleading representations of fact. See *Advanced Training Sys. v. Caswell Equip. Co.*, 352 N.W.2d 1 (Minn. 1984). Since no such prior finding has been made in the instant case, the district court abused its discretion in awarding attorney fees to Dillon in regard to Sullivan's alleged deceptive trade practice.

Even though the district court erred by enjoining Sullivan's speech, it does not follow that Sullivan was free to ignore the temporary restraining order without fear of sanction. The collateral bar rule requires that a party may not, as a general rule, violate a court order and raise the issue of its unconstitutionality collaterally as a defense in a contempt proceeding. The appropriate method to challenge such a court order is to petition to have the order vacated or amended. See, *Walker v. City of Birmingham*, 388 U.S. 307, 87 S. Ct. 1824, 18 L. Ed. 2d 1210

(1967); *Matter of Providence Journal Co.*, 820 F.2d 1342 (1st Cir. 1986), *modified on other grounds* 820 F.2d 1354 (1987).

Two exceptions to this rule are if the court is without jurisdiction over the subject matter or contemnor, then any order entered would be void ab initio and not subject to the collateral bar rule. *Matter of Providence Journal Co., supra.* Also, the Court in *Walker* hinted that the collateral bar rule would not apply "where the injunction was transparently invalid or had only a frivolous pretense to validity." 388 U.S. at 315.

Neither exception applies in the instant case. Here, upon application of Dillon, the district court issued an ex parte order on June 8, 1992, temporarily restraining Sullivan's speech. Sullivan filed a motion to dissolve this temporary restraining order on June 15, and a hearing was held on Sullivan's motion on July 28. In an order dated August 18, the district court denied Sullivan's motion. Sullivan never appealed from this ruling.

Whether an order is final and appealable does not always depend upon whether that order completely disposes of the action. An order affecting a substantial right made during a special proceeding is a final and appealable order. *Currie v. Chief School Bus Serv.*, 250 Neb. 872, 553 N.W.2d 469 (1996). A substantial right is an essential legal right, not a mere technical right. *Id.* A special proceeding includes every civil statutory remedy which is not encompassed in chapter 25 of the Nebraska Revised Statutes. *Jarrett v. Eichler*, 244 Neb. 310, 506 N.W.2d 682 (1993).

The district court grounded its denial of Sullivan's motion to dissolve the temporary restraining order on the fact that, in part, the action was brought and the order was entered under the Uniform Deceptive Trade Practices Act: a statutory civil remedy not encompassed in chapter 25. Further, the temporary restraining order completely prohibited Sullivan from speaking about Dillon; thus, the order clearly affected an essential legal right.

Accordingly, Sullivan was obligated to appeal the district court order denying his motion to dissolve the temporary restraining order. Because Sullivan failed to do so, the district court did not err in finding him in contempt of court and assessing a $25,000 fine for his repeated violations of the temporary

restraining order. The issue of whether this fine exceeded the district court's authority is moot, due to the fact that Sullivan purged the fine by not violating the permanent injunction.

Likewise, the district court did not err in awarding reasonable attorney fees to Dillon with respect to Sullivan's contempt of court violation. Attorney fees may be recovered only when authorized by statute or when a recognized and accepted uniform course of procedure allows recovery of an attorney fee. *In re Interest of Krystal P. et al., ante* p. 320, 557 N.W.2d 26 (1996). In *In re Interest of Krystal P. et al.*, we recently concluded that the award of attorney fees against the contemnor in a civil contempt proceeding is a recognized and accepted uniform course of procedure. Thus, the district court acted within its authority when it awarded Dillon reasonable attorney fees with respect to Sullivan's contempt of court violation.

CONCLUSION

For the foregoing reasons, we affirm the district court order finding Sullivan in contempt of court and the court's award of attorney fees in this regard. Because we conclude that the district court erred when it entered the permanent injunction enjoining Sullivan's speech pursuant to the Uniform Deceptive Trade Practices Act, we reverse, and remand this matter with directions to vacate the injunction imposed therein. We likewise reverse the award of attorney fees in regard to the imposition of the permanent injunction.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

LANPHIER, J., dissenting.

I respectfully dissent from the majority opinion.

I agree with the principle of law that an injunction is proper when essential to protect a property interest or when slander is published in aid of another tort.

I would hold that in this matter, the injunction was essential to preserve a property right and that the slander was in aid of another tort. As the majority states, Sullivan's expressed goal was to put Dillon out of business and to become his "worst nightmare," unless Dillon gave Sullivan something to which Sullivan was not legally entitled. That fits the classic definition

of blackmail or extortion. The resulting statements of Sullivan attacked the reputation of Dillon. Reputation is an element of the goodwill of a business to a community. The goodwill of a business is as much an asset as its inventory. When an individual intentionally destroys goodwill with statements as in this case, the business has a right to stop the waste of this asset.

An injunction was the proper measure in this case. See, *M. Ward & Co. v. United Employees*, 400 Ill. 38, 79 N.E.2d 46 (1948); *Horne v. Radiological Health Services, P.C.*, 83 Misc. 2d 446, 371 N.Y.S.2d 948 (1975), *aff'd* 51 A.D.2d 544, 379 N.Y.S.2d 374 (1976); *Lawrence v. Atwood*, 295 S.W.2d 298 (Tex. Civ. App. 1956).

I would affirm the decision of the district court.

DIANA J. HUMPHREY, BY HER MOTHER AND NATURAL GUARDIAN, MARY HUMPHREY, APPELLANT, V. BURLINGTON NORTHERN RAILROAD COMPANY, A CORPORATION, AND THE NATIONAL RAILROAD PASSENGER CORPORATION, ALSO KNOWN AS AMTRAK, A CORPORATION, APPELLEES.

559 N.W.2d 749

Filed February 7, 1997. No. S-95-407.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Negligence: Minors.** A child is required to exercise that degree of care which a person of that age would naturally and ordinarily use in the same situation under the same circumstances; the degree of care required increases when an actor is dealing with a dangerous activity.
3. **Negligence: Minors: Proximate Cause.** It is only in an extreme situation where the facts show plainly knowledge and appreciation of the danger that may be incurred, if certain action is had, that a court may decide as a matter of law that a child was guilty of negligence, or that the child's act or omission was the proximate cause of the happening in question.

Appeal from the District Court for Douglas County: MICHAEL W. AMDOR, Judge. Affirmed.

Shelly S. Watson and John P. Inserra, of Inserra Law Offices, for appellant.

Cheryl R. Zwart and Jeanelle R. Robson, of Knudsen, Berkheimer, Richardson & Endacott, for appellee Burlington Northern.

John P. Mullen and Michael C. Pallesen, of Gaines, Mullen, Pansing & Hogan, for appellee Amtrak.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ.

CAPORALE, J.

I. STATEMENT OF CASE

The plaintiff-appellant, Diana J. Humphrey, a minor, by and through her mother and natural guardian, Mary Humphrey, seeks to recover for damages allegedly caused by the negligence of the defendants-appellees, Burlington Northern Railroad Company and The National Railroad Passenger Corporation, also known as Amtrak. The district court sustained the separate motion for summary judgment filed by each of the defendants on the ground that the minor had been guilty of contributory negligence in a degree sufficient to bar recovery as a matter of law, and thereby dismissed her petition. The minor appealed to the Nebraska Court of Appeals, asserting that the district court erred in so ruling. Under our authority to regulate the caseloads of the two courts, we, on our own motion, removed the matter to our docket. We now affirm.

II. SCOPE OF REVIEW

Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Moulton v. Board of Zoning Appeals, ante* p. 95, 555 N.W.2d 39 (1996).

III. FACTS

The minor was born on October 31, 1979; thus, on September 16, 1990, she was approximately a month and a half

shy of 11 years of age. On the afternoon of that day, she was injured when trying to jump onto a moving train. Two parcels of railroad property are involved. One is the Amtrak station and its attendant platform areas. The other is the Burlington Northern property, which is immediately adjacent to the Amtrak property. Access to the Burlington Northern property can only be had by crossing the Amtrak property. Children frequently played on both properties, and on the afternoon in question, there were no guards posted to ensure that children would not play in the area. The train involved was moving on a track operated by Burlington Northern.

The minor lived with her parents, but had been visiting her aunt, Karen Lane, who lived in an apartment near the properties. The minor visited her aunt's residence every weekend or every other weekend, had just started the fifth grade, had a number of school friends, and had no trouble in school except for "just fighting and nit-picking is about all." Although she has taken some remedial classes in mathematics and reading, she has no learning problem. She was in the Girl Scouts and was involved in some church activities, including learning Bible verses each Wednesday night and participating in some camping activities. In addition, she performed household chores, such as washing the dishes and cleaning her room.

Before the accident, she "jogged around and rode bikes and stuff" for fun. She knew to look both ways before walking her bicycle across the street and knew the hand signals for turning. The minor stated that on the afternoon of her accident, she and her cousin, LaNeanne Lane, decided to ride their bicycles to a friend's house, but when the friend was not home, they went to the Amtrak station and rode around on the parking lot hills. After riding for a couple of hours, they sat on the tracks which she knew were safe because no trains used them. Sitting on the train tracks was "just something to do."

She stated that she "had always had something about trying to ride a train" and that she "tried to jump it." Riding on the side of the train "seemed like a really neat thing to do at the time." The first time she tried it, it felt to her like her arm was "ripped off" and, as it hurt, she let go. Because it hurt, she concluded that the train was "going real fast." As the result of "an instinct"

and because she "wanted to do it again," she attempted to jump onto the train a second time. She grabbed a ladder and got one foot on it, but her other foot was dragging. She fell and sustained injuries to her right foot and ankle.

A bystander, Lawrence Mazur, testified that he saw the minor make three attempts to grab the ladders on the railroad cars. According to him, the minor attempted to grab onto one of the rungs of the ladder but "spun around and let go"; when another car came by, she "grabbed that one, spun around, [and] fell down"; "on the third try, she spun around and this is when the accident occurred." According to Mazur, there was nothing unusual about the speed of the train; it was moving fairly slowly in comparison to the way trains generally move.

The mother stated that she had earlier told the minor that trains "could seriously hurt" her and that she should not "[p]lay on them when they are moving or even be on them at all." On one occasion, when the minor was 8 or 9 years old, the mother became aware that while visiting another relative, the minor and her brother had been playing around a train. The parents scolded the two of them and told them "what trains could do to them." In fact, when the minor's father learned that the minor was playing near the train, he, according to the minor's mother, "whipped her ass." The mother told the minor "something in the category that it could kill" her, that she could get "[s]eriously hurt," and that she should not "[p]lay by trains." The mother also recounted as an example for the minor a story about a child with whom the mother had attended school. The child had crawled underneath a train and had an arm cut off when the train moved. Indeed, the mother was surprised when the minor's accident occurred because she thought that what she had told the minor before "would have sunk in."

In response to questioning about what kind of harm the minor thought could result if she was on the tracks, she testified,

> Well, if a train comes — and you are sitting on a track — and you don't really know it, you can really get hit, but if you can get off that train track in time, you really couldn't get injured.

> Other things could happen to where a train could hit you head on, and you could really fly, and you could probably die.

The minor said she knew this at the time of the accident because of stories that people told her about trains. For example, with regard to the earlier incident, the minor's mother had told her "to stay away from them 'cause they were dangerous." The minor stated that her mother told her this "[b]ecause she didn't want me to get over there and get injured, and she knew that was probably what was going through my mind," and "[p]robably because she didn't want me to get hurt and she wanted me to know about it then."

The minor remembered her mother's scolding over the previous train incident to be that "she didn't want me playing near trains because something seriously could happen," which the minor thought meant she "could get killed or one of [her] legs or [her] arms could get cut off by it." The minor confirmed that she understood that she should not get close to trains, moving or standing still, or railroad tracks.

She also stated that she knew at the time of her accident that she might get into trouble for being near the trains because her mother thought she "could have gotten really injured really bad . . . ." She knew as well that jumping on the train could be dangerous and that she could get hurt, but she "didn't figure anything would really happen." She stated she "wasn't really figuring the consequences of what would happen," so she "just decided to do it anyway." Knowing she should not be trying to jump the train was going through her mind, but she "wanted to try something exciting," which would have been being "able to ride along the train."

The record includes the affidavit of Dr. Keith D. Allen, who holds a doctorate in child clinical psychology and who serves as an associate professor in the department of pediatrics, division of pediatric psychology, at the University of Nebraska Medical Center. Although he had never met or examined the minor, he has read the research of others and has conducted "psychological observations for the population within [the 10-14 year] age group including cognitive capacity for critical function and understanding of the full range of consequences of an action."

He declared his expert opinion to be that there is a "prevalence of high risk behavior and related injury typically found in youth [ages 10-14]" and that "[r]esearch suggests that there is an increased vulnerability of younger adolescents . . . for engaging in high risk behavior . . . ." As a suggestion for why youth engage in high-risk behavior, Allen stated that "perhaps they do not understand the risks they are taking[, b]ut there is growing evidence that youth are not ignorant of risks and are actually very aware of many aspects of some risks . . . ." He further stated:

> There is substantial evidence that youth do not have the cognitive capacity to use critical thinking [citation omitted]; to make reasoned choices and judgments [citation omitted]. An essential element of rational decision making is the ability to understand the full range of consequences of an action, or to think critically in terms of tradeoffs between benefits and costs. In large part this is because the cognitive development in most youth limits their ability to learn from generalized or abstract messages concerning the health risks of engaging in specified behaviors; experience is more important [citation omitted]. Research has demonstrated that nearly 85 % of youth 11-12 years old (and 65 % of youth as old as 18), still operate in the concrete operations level of cognitive development [citation omitted]. That is, they have a hard time thinking about future events or using information about those events in determining behavior now.
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> . . . .
>
> . . . Most youth think very concretely and do not comprehend abstract, future-oriented ideas, like the pursuit of health and avoidance of injury [citation omitted]. At the same time, they respond very well to concrete immediate experiences like peer pressure, self-expression, counter-control, and excitement.

IV. ANALYSIS

We begin our analysis by recalling that in actions accruing before February 8, 1992, a plaintiff may be barred from recovering as a matter of law if the plaintiff's contributory negligence

is more than slight and the defendant's negligence was not gross in comparison. *Melick v. Schmidt, ante* p. 372, 557 N.W.2d 645 (1997). Because this cause of action accrued on September 16, 1990, this rule applies. See Neb. Rev. Stat. § 25-21,185 (Reissue 1995).

We also recall that a plaintiff is contributorily negligent if (1) she or he fails to protect herself or himself from injury, (2) her or his conduct concurs and cooperates with the defendant's actionable negligence, and (3) her or his conduct contributes to her or his injuries as a proximate cause. *Harrison v. Seagroves*, 250 Neb. 495, 549 N.W.2d 644 (1996); *Nickell v. Russell*, 247 Neb. 112, 525 N.W.2d 203 (1995). To entitle a defendant to summary judgment on the issue of contributory negligence, the defendant has the burden of proving, under the facts viewed most favorably to the plaintiff, that (1) the plaintiff's contributory negligence was more than slight as a matter of law or (2) the defendant's negligence was not gross in comparison to the plaintiff's negligence as a matter of law. See *Melick, supra.*

We recall, too, that in reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Moulton v. Board of Zoning Appeals, ante* p. 95, 555 N.W.2d 39 (1996).

Where reasonable minds may draw different conclusions and inferences from the evidence as to the negligence of the defendant and contributory negligence of the plaintiff, and the degree thereof when one is compared to the other, the issues must be submitted to the jury. See, *Melick, supra*; *Harrison, supra.* The minor contends that the contributory negligence of a child is always a question of fact resting within the purview of the jury.

The seminal case concerning the current law on this issue is *Camerlinck v. Thomas*, 209 Neb. 843, 312 N.W.2d 260 (1981). Therein, the trial court had directed a verdict for a 6-year-old child on the basis that a child of tender years is not chargeable with negligence. Although *Camerlinck* deals with negligence, the case is nonetheless applicable to our analysis because, "although the cases in some jurisdictions distinguish between negligence and contributory negligence of minors, Nebraska

has been consistent in its holding that the same standards should apply in either situation." *Id.* at 856-57, 312 N.W.2d at 267. We recognized in *Camerlinck* that our prior holdings were not always consistent and adopted the rule found in Restatement (Second) of Torts § 283 A (1965), writing:

> The rule itself is cited in that work as follows at 14: "If the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances." The Restatement states that the rule contained in that section is commonly applied to children of tender years. In Comment b of that section the Restatement discusses the "*Special standard for children*," and we quote from that Comment at 15-16:
>
> "The special standard to be applied in the case of children arises out of the public interest in their welfare and protection, together with the fact that there is a wide basis of community experience upon which it is possible, as a practical matter, to determine what is to be expected of them.
>
> "A child of tender years is not required to conform to the standard of behavior which it is reasonable to expect of an adult. His conduct is to be judged by the standard of behavior to be expected of a child of like age, intelligence, and experience. A child may be so young as to be manifestly and utterly incapable of exercising any of those qualities of attention, perception, knowledge, experience, intelligence, and judgment which are necessary to enable him to perceive a risk and to realize its unreasonable character. On the other hand, it is obvious that a minor who has not yet attained his majority may be quite as capable as an adult of exercising such qualities. Some courts have endeavored to lay down fixed rules as to a minimum age below which the child is incapable of being negligent, and a maximum age above which he is to be treated like an adult. Usually these rules have been derived from the old rules of the criminal law, by which a child under the age of seven was considered incapable of crime, and one over fourteen was considered to be as capable as an adult. The

prevailing view is that in tort cases no such arbitrary limits can be fixed. Undoubtedly there is a minimum age, probably somewhere in the vicinity of four years, below which negligence can never be found; but with the great variation in the capacities of children and the situations which may arise, it cannot be fixed definitely for all cases.

"Between the two extremes there are children whose capacities are infinitely various. The standard of conduct required of the child is that which it is reasonable to expect of children of like age, intelligence, and experience. 'Intelligence' includes other mental capacities, but does not include judgment, which is an exercise of capacity rather than the capacity itself. The fact that the child is mentally retarded, or that he is unusually bright for his years, is to be taken into account; but once such account is taken, the child is still required to exercise the judgment of a reasonable person of that intelligence. Likewise to be taken into account are the circumstances under which the child has lived, and his experience in encountering particular hazards, or the education he has received concerning them. If the child is of sufficient age, intelligence, and experience to understand the risks of a given situation, he is required to exercise such prudence in protecting himself, and such caution for the safety of others, as is common to children similarly qualified.

"It is impossible to lay down definite rules as to whether any child, or any class of children, should be able to appreciate and cope with the dangers of many situations. A child of ten may in one situation have sufficient capacity to appreciate the risk involved in his conduct, and to realize its unreasonable character, but in another situation he may lack the necessary mental capacity or experience to do so; and in the case of another child of ten of different mental capacity or experience a different conclusion may be reached in the same situation."

209 Neb. at 858-60, 312 N.W.2d at 268. We then held that whether the 6-year-old defendant was negligent in striking another child in the eye with a stick while the latter was sliding

down a playground slide presented a question of fact for the jury, and thus reversed the judgment of the trial court.

More recently, in *Suarez v. Omaha P.P. Dist.*, 218 Neb. 4, 352 N.W.2d 157 (1984), a 12-year-old boy was shocked and burned when he climbed a 27-foot tree and touched a high-voltage wire strung above it. Although whether the boy knew the extent of the dangers of electricity was not clear, he possessed average intelligence and testified that he knew before he climbed the tree that there were powerlines running above it and that he could be shocked if he touched them. He also testified that he did not intentionally try to grab the wires. Citing *Johnston v. New Omaha Thomson-Houston Electric Light Co.*, 78 Neb. 27, 113 N.W. 526 (1907), we wrote that a 12-year-old should possess sufficient knowledge that a wire carrying electrical current is capable of causing shock or injury should one come in contact with it. Because the boy was of sufficient age, intelligence, and experience to understand the risk of climbing to the top of the tree in proximity to overhead powerlines, we ruled him guilty of contributory negligence and dismissed his cause of action.

Earlier in the year of the *Suarez* decision, we adjudicated *Garreans v. City of Omaha*, 216 Neb. 487, 345 N.W.2d 309 (1984), an action brought under the Political Subdivisions Tort Claims Act, in which the trial court had entered a judgment in favor of two 12-year-old boys who were injured when the lighted firecracker they dropped into a 55-gallon drum labeled "flammable" caused the explosion of the residue. Holding that the trial court was clearly wrong in failing to find that the boys had been guilty of contributory negligence sufficient to bar their recovery, we reversed the judgment in their favor and remanded the cause with the direction that it be dismissed. In so holding, we noted that the use of firecrackers was prohibited in the park at which the occurrence took place; that the boys had been warned by their parents that fireworks were dangerous and that they should be careful when using them; that the boys were aware of the danger involved in using fireworks; and that although there was conflicting testimony as to whether the boys had noticed the "flammable" marking on the drum, the label was plainly visible and the boys knew what the word

"flammable" meant. We restated the rule that a child is required to exercise that degree of care which a person of that age would naturally and ordinarily use in the same situation under the same circumstances, and observed that the degree of care required increases when an actor is dealing with a dangerous activity, such as exploding firecrackers.

Still earlier in the year, we were presented in *Cullinane v. Interstate Iron & Metal*, 216 Neb. 245, 343 N.W.2d 725 (1984), with the case of a 10-year-old boy who had apparently fallen through a hole in a building being scrapped for steel. The trial court granted the defendant building owner a directed verdict at the close of the plaintiff's case in chief. On the issue of the boy's contributory negligence, we wrote,

> In 1917, and still applicable today, we held in *Rule v. Claar Transfer & Storage Co.*, 102 Neb. 4, 165 N.W. 883 (1917), that, as a general rule, whether a child 11 years of age is of sufficient knowledge, discretion, and appreciation of danger that he may be held guilty of contributory negligence is a question for the jury to determine.

Id. at 249, 343 N.W.2d at 728. Noting the uncontroverted evidence that the building owner was aware of the hazardous condition presented by the holes in the floor and that another witness had almost fallen into one of the holes, we concluded that the issue of the boy's contributory negligence, or the degree thereof, should have been submitted to the jury.

Rule v. Claar Transfer & Storage Co., 102 Neb. 4, 165 N.W. 883 (1917), cited in *Cullinane*, involved a collision between an 11-year-old plaintiff riding a bicycle and a man driving a motor vehicle owned by the defendant. In appealing a judgment on the verdict for the plaintiff, the defendant argued that the plaintiff could not complain of the defendant's negligence, as the plaintiff's own negligence had concurred in producing his injury, and that an 11-year-old of ordinary intelligence may be guilty of contributory negligence as a matter of law. Remarking on the "sharp conflict in the evidence upon almost every point," *Rule*, 102 Neb. at 5, 165 N.W. at 883, we affirmed the judgment of the trial court, but wrote that of "the soundness of [defendant's] propositions we have little doubt," *id.* at 7, 165 N.W. at 884. We also reaffirmed that "[t]he general rule is that whether contrib-

utory negligence may be attributed to a child of such tender years is a matter for the jury under all the circumstances of each case." *Id.* Although not quoted in *Cullinane*, the *Rule* court also wrote:

> It is only in an extreme case where the facts show plainly knowledge and appreciation of the danger to be incurred if a certain act is performed, such as in the case of *Johnston v. New Omaha T. H. E. L. Co.*, 78 Neb. 27, [113 N.W. 526 (1907),] that a court will declare as a matter of law that a child of that age may be guilty of contributory negligence.

102 Neb. at 7, 165 N.W at 884. (The *Johnston* citation in *Rule* refers to the opinion on rehearing, the original opinion being found at *Johnston v. New Omaha Thomson-Houston Electric Light Co.*, 78 Neb. 24, 110 N.W. 711 (1907), wherein we reversed a judgment for a 12-year-old boy who purposely took hold of an electric powerline for the purpose of receiving a shock.)

The observation made in *Rule* was repeated in *Bear v. Auguy*, 164 Neb. 756, 83 N.W.2d 559 (1957). Therein, we affirmed a judgment on the verdict in favor of a motor bicyclist, who was approximately 14 years 8 months old, involved in an accident with an automobile while the bicyclist was being chased by a dog he feared. We again noted that

> [i]t is only in an extreme situation where the facts show plainly knowledge and appreciation of the danger that may be incurred, if certain action is had, that a court may decide as a matter of law that a minor of such an age was guilty of negligence, or that his act or omission was the proximate cause of the happening in question.

Id. at 768, 83 N.W.2d at 567.

The most recent case on the issue of a child's negligence is *Center State Bank v. Dana, Larson, Roubal & Assoc.*, 226 Neb. 408, 411 N.W.2d 635 (1987), wherein an almost-13-year-old boy was injured when propane gas escaping from an underground supply tank formed a white cloud and exploded. Some of the evidence showed that the child was running in and out of the white cloud before it exploded. The defendant alleged that the child was contributorily negligent in failing to leave an area which he knew, or in the exercise of reasonable care should

have known, was dangerous. Quoting *Farmer v. S.M.S. Trucking Co.*, 180 Neb. 779, 145 N.W.2d 922 (1966), we reaffirmed that "'[k]nowledge is fundamental to liability for negligence. The very concept of negligence presupposes that the party charged therewith either fails to foresee an unreasonable risk of injury to another, or could have foreseen it had he conducted himself as a reasonably prudent person.'" *Center State Bank*, 226 Neb. at 415, 411 N.W.2d at 639. We then observed that the only direct evidence about the child's knowledge and awareness of the dangerous area was his own testimony that he did not know what propane was, did not know the area around the propane truck where he was standing and walking was dangerous, and did not know the propane cloud was dangerous. We also noted that when the child arrived at the leak area, he thought the cloud looked like burning leaves and asked the truckdriver "'what was wrong,'" *id.* at 417, 411 N.W.2d at 640, showing that this was an unusual circumstance not seen before by him and that he did not recognize either the danger or that he was in a dangerous area. We therefore concluded that under the circumstances, the almost-13-year-old exercised the degree of care required of him and that he neither knew nor, in the exercise of reasonable care, should have known that he was in an area that was dangerous. We thus held that as a matter of law, the child was not contributorily negligent and that the issue should not have been submitted to the jury.

The foregoing review of our case law demonstrates that the minor in the instant case is wrong in asserting that the question of an almost-11-year-old's contributory negligence must always be decided by a jury. Rather, the issue is whether such a child had sufficient knowledge, discretion, and appreciation of the danger that it can be said as a matter of law that the child was contributorily negligent and, if so, whether that contributory negligence was sufficient to bar recovery as a matter of law.

In focusing on that question, we first turn our attention to the Allen affidavit and recall that in *Rodgers v. Chimney Rock P.P. Dist.*, 216 Neb. 666, 671, 345 N.W.2d 12, 15 (1984), we wrote, in regard to psychological evidence, that it is human nature sometimes to ignore obvious dangers:

> It is still the rule in this jurisdiction that one must exercise ordinary care for his own safety, and this duty is commensurate with the danger to which he is exposed. There is no rule which protects an injured party who assumes the risk of injury and fails to use due care to avoid injury from dangers which are open and obvious.

We then affirmed a judgment for the defendant power company in part on the basis that the decedent, while cleaning a well located under an electrical powerline, brought a metal pipe into contact with the line. Approximately 5 years ago, we reaffirmed that although "it may be human nature sometimes to ignore the obvious and disregard the familiar, [the rule nonetheless remains that] one must exercise ordinary care for his or her own safety, and this duty is commensurate with the danger to which he or she is exposed." *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 232, 475 N.W.2d 105, 119 (1991).

Accordingly, the Allen affidavit is simply not relevant to our inquiry; it merely points out that children do not always and in all respects think as do adults. That is not the question; the question is whether, under the circumstances existing here, the minor can be said as a matter of law to have failed to exercise the degree of care required of an almost-11-year-old in those circumstances.

The evidence that the minor was repeatedly warned that trains are dangerous is uncontradicted. She had been told that trains could seriously hurt or even kill her and that she should not play near them, and she had been scolded and disciplined for doing so. In addition, although she stated that she did not think anything would really happen, she nonetheless admitted that she knew that jumping on the train in question could be dangerous and that she could get hurt. Thus, there is no question that she knew she was doing something which was dangerous and could hurt her. While it is true that she may not have appreciated the specific danger involved in trying to jump onto a moving train, she certainly knew from the pain she felt after her first unsuccessful effort that she could sustain some type of injury. Moreover, her performance at school, work around her home, participation in activities outside of school, and understanding of the rules for operating a bicycle leave no question

that she was capable of understanding what she had been told, saw, and felt.

To constitute the want of due care, it is not necessary that one have anticipated the injury which occurred; it is sufficient that one knew or should have known that substantial injury was likely. See *Schmidt v. Omaha Pub. Power Dist.*, 245 Neb. 776, 515 N.W.2d 756 (1994). Thus, the uncontradicted evidence demonstrates that the minor's persistence in trying to do what she knew and appreciated was dangerous constitutes a failure by her to exercise in the circumstances presented the degree of care expected of a child of like age, intelligence, and experience. In short, this is one of those extreme cases contemplated in *Bear v. Auguy*, 164 Neb. 756, 83 N.W.2d 559 (1957), and *Rule v. Claar Transfer & Storage Co.*, 102 Neb. 4, 165 N.W. 883 (1917), wherein the facts show plainly that the minor had the knowledge and appreciation of the danger to be incurred such as to have required the district court to declare as a matter of law that she was guilty of contributory negligence sufficient to bar recovery.

V. JUDGMENT

Accordingly, as first noted in part I, the judgment of the district court must be, and hereby is, affirmed.

AFFIRMED.

WHITE, C.J., dissenting.

The majority in its opinion reaffirms the general rule that the issue of whether a child may be held guilty of contributory negligence is normally a question for the jury to determine. In addition, it recognizes and applies a narrow exception to such a rule, namely, that the issue of contributory negligence on the part of a minor constitutes a question of law when the facts clearly demonstrate that the minor had knowledge and appreciation of the danger to be incurred. I disagree with the majority's application and recognition of such an exception.

In *Armer v. Omaha and Council Bluffs St. Ry. Co.*, 151 Neb. 431, 37 N.W.2d 607 (1949), this court reviewed an incident where an 11-year-old girl had been hit by a bus while she was riding her bicycle. This court held that whether the girl was neg-

ligent was an issue to be determined by a jury. According to the court,

> [t]he conduct of appellant as shown by this record should not, her age considered, conclusively bar her right of recovery . . . . She doubtless knew that there was danger of injury in traveling in the street and in turning to the left to cross the street. Nearly any child of her age would answer, if asked, that it knew if it fell in the river it might be drowned; if it fell in the fire it would be burned; or if it got in the way of a streetcar or a motor vehicle it would be injured and possibly killed; but mere childish knowledge of everyday things does not necessarily establish that they appreciate or understand the necessity for keeping away from, or not doing these things. . . . The infant is favored by the law not so much on his lack of knowledge as because of indiscretion, imprudence, lack of judgment, and impulsiveness.

Id. at 437-38, 37 N.W.2d at 610-11.

While it may be true in the instant case that the minor was warned about the dangers of playing around trains and reprimanded for playing in trainyards, it is not clear whether she fully appreciated the necessity of keeping away from trains. As in *Armer*, there exists a dispute as to whether the minor fully understood the ramifications of playing around trains for purposes of establishing contributory negligence. Therefore, I conclude that the district court erred in declaring as a matter of law that the minor was guilty of contributory negligence.

Moreover, I disagree with the majority's recognition of an exception to the general rule, and I find it appropriate to overrule any prior Nebraska cases adopting such an exception. It is my position that the question of whether a child was contributorily negligent is always a question for the jury.

CHARLES F. ROBINSON AND JOSEPHINE A. ROBINSON, HUSBAND AND WIFE, APPELLANTS, V. BOB J. BLEICHER, M.D., ET AL., APPELLEES.

559 N.W.2d 473

Filed February 14, 1997. No. S-94-558.

1. **Motions to Dismiss.** When a trial court sustains a motion to dismiss, it resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw only one conclusion.
2. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.
4. **Negligence: Proof.** In order to succeed in an action based on negligence, a plaintiff must establish the defendant's duty not to injure the plaintiff, a breach of that duty, proximate causation, and damages.
5. **Motions to Dismiss: Proof.** In a court's review of evidence on a motion to dismiss, the nonmoving party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can be reasonably drawn therefrom, and where the plaintiff's evidence meets the burden of proof required and the plaintiff has made a prima facie case, the motion to dismiss should be overruled.
6. **Expert Witnesses: Malpractice: Physicians and Surgeons.** The "professional" theory holds that the duty to disclose the risks of a particular procedure or treatment is measured by the standard of a reasonable medical practitioner under the same or similar circumstances and must be determined by expert medical testimony establishing the prevailing standard and the defendant practitioner's departure therefrom.
7. **Trial: Malpractice: Expert Witnesses.** A medical expert from one community is competent to testify as an expert witness in a medical negligence case as to the standard of care or skill required in another community if the expert has knowledge of or familiarity with the practice and standard of the locality in question or of a similar or like community.
8. **Trial: Rules of Evidence: Expert Witnesses.** In determining whether an expert's testimony is admissible, a court considers four preliminary and interrelated questions: (1) whether the witness qualifies as an expert pursuant to Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995); (2) whether the expert's testimony is relevant; (3) whether the expert's testimony assists the trier of fact to understand the evidence or determine a controverted factual issue; and (4) whether the expert's testimony, even though relevant and admissible, should be excluded under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), because its probative value is substantially outweighed by the danger of unfair prejudice or other considerations.
9. **Trial: Expert Witnesses.** The soundness of a trial court's ruling regarding an expert's qualifications depends upon the particular facts of the case.
10. **Trial: Rules of Evidence: Expert Witnesses.** A witness may qualify as an expert by virtue of either formal training or actual practical experience in the field.

11. **Evidence: Expert Witnesses.** Expert testimony should not be received into evidence if it is evident that the witness does not possess such facts that enable him to express a reasonable, accurate conclusion as distinguished from a mere guess; without an adequate basis of facts, the witness should not be allowed to give an opinion.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Daniel B. Cullan and Pamela J. Dahlquist, of Cullan & Cullan, for appellants.

Michael J. Mooney and Alison L. McGinn, of Gross & Welch, P.C., for appellee Bleicher.

Walter E. Zink II and Allan E. Wallace, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellees Kent R. Eakins and Lincoln Ear, Nose & Throat Associates, P.C.

William L. Tannehill and Brett W. Berg, of Knudsen, Berkheimer, Richardson & Endacott, for appellee Bryan Memorial Hospital.

WHITE, C.J., CAPORALE, FAHRNBRUCH, WRIGHT, CONNOLLY, and GERRARD, JJ.

PER CURIAM.

Charles F. Robinson and Josephine A. Robinson appeal a jury verdict in favor of appellees in a medical malpractice action brought in Lancaster County District Court. The Robinsons allege that appellees Bob J. Bleicher, M.D., and Kent R. Eakins, M.D., failed to obtain Charles F. Robinson's informed consent for the surgical procedure accomplished and that appellee Bryan Memorial Hospital negligently failed to preserve and produce Robinson's consent form and certain sleep study information which was the basis for the surgery.

The trial court did not allow the Robinsons' medical expert witness to testify as to the standard of care for doctors, regarding informed consent, and as to standards for record maintenance by hospitals. The court dismissed Bryan Memorial at the close of the Robinsons' evidence. Dr. Bleicher's and Dr. Eakins' motions to dismiss were addressed by the court and granted in such a way that the only issue which was sent to the jury was

the question of whether Robinson gave his informed consent to the surgery done. The jury reached a verdict in favor of Drs. Bleicher and Eakins, and the Robinsons appealed. The Robinsons allege that the court erred in excluding their medical expert's testimony on the standard of care regarding informed consent in Lincoln, Nebraska, and in dismissing Bryan Memorial. We removed the case from the Nebraska Court of Appeals' docket pursuant to our power to regulate the dockets of lower courts. Finding no error in the district court's decision, we affirm.

BACKGROUND

Robinson sought treatment from Dr. Bleicher on March 23, 1988. After a sleep study, it was determined that Robinson suffered from a severe case of sleep apnea, a condition in which an individual ceases breathing while sleeping, which was life threatening due to the low levels of oxygen in his blood. Dr. Bleicher requested that Dr. Eakins treat Robinson as a consulting doctor.

Two surgical procedures are involved in this case. The first is called a uvulopalatopharyngoplasty (UPP). The testimony defined a UPP as removal of some of the excess tissue in the back of the throat in order to open up the airway and permit air to pass through the mouth during sleeping periods. The second is called a tracheostomy and involves making a hole in the windpipe and putting a tube in the hole, thereby bypassing the obstruction and allowing air to pass freely from the outside directly through the tube and into the lungs.

Frederic Paul Ogren, an ear, nose, and throat doctor in Omaha, Nebraska, who was an expert medical witness testifying for the appellees, stated that the tracheostomy is the standard by which all other treatments are measured because it bypasses the obstructed area in the upper respiratory tract and eliminates the obstruction. It is the only treatment which approaches being a 100-percent successful treatment for sleep apnea.

The testimony differs as to what procedures and alternatives were discussed by the Robinsons and Drs. Bleicher and Eakins.

Robinson claims that the UPP was the only discussed surgery and that no alternatives to that surgery were mentioned. Robinson also testified that after the March 28, 1988, tracheostomy, when he asked Dr. Bleicher, " 'What in the heck is this?' " Dr. Bleicher said, " 'That's what I'd like to know, what it is,' " upon seeing Robinson with a tracheotomy tube in his neck.

Josephine Robinson, Robinson's wife, testified that Dr. Eakins never informed them of the tracheostomy and never discussed alternative forms of treatment with them, although she was not present at all of Robinson's meetings with Drs. Bleicher and Eakins. Josephine Robinson testified that prior to the tracheostomy they had been a very happy couple and enjoyed each other's company, but following the surgery, Robinson became very depressed, withdrawn, and almost completely impotent.

Drs. Bleicher and Eakins claim that they discussed both the UPP and the tracheostomy, which is the more invasive procedure, and that Robinson consented to both procedures.

Bryan Memorial is unable to produce certain documents. First, the sleep study raw data could not be produced. Russell S. Steinkuehler testified that Bryan Memorial lost the sleep study raw data for all patients prior to 1989 during movement and consolidation of records from one storage building to another. Second, Bryan Memorial is unable to produce the consent form for surgery. The testimony adduced at trial demonstrated that the files of a patient headed to surgery pass through several persons' hands. The file documents are contained in a vinyl-covered binder. The consent form, as a loose sheet, is placed inside the cover of the binder. It is not bound into the binder. Occasionally, the consent form of a patient will stick to the vinyl cover of the chart binder. When the patient leaves the hospital, the chart is taken out of the vinyl binder, and the binder is reused. If and when loose consent forms are found, they are immediately sent to the records department to be placed with the appropriate file. Upon notice of the Robinsons' lawsuit, the Robinson file was placed in a locked facility. During the trial, the file was entered into evidence.

A legion of Bryan Memorial employees and former employees testified as to the hospital's standards. They concurred that

a patient goes through many checkpoints prior to surgery to ensure that a consent form is signed. Eunice Wendelin testified that she saw the tracheostomy consent form; she was in charge of Robinson's chart maintenance prior to the time of Robinson's surgery. Darlene Brummer testified that the sheet was signed, because the patient does not go off the preoperative floor unless a consent form is signed by the patient or a family member of the patient. Lorrie Larson testified that she followed a standard education procedure with Robinson about both the tracheostomy and the UPP. Karen Bade stated that surgeries like Robinson's do not proceed unless a patient-signed surgery consent form is on the patient's cart as it is rolled into the surgery room, because those surgeries are not rushed operations. Finally, Linda S. Kolterman testified that she discussed the tracheostomy and the UPP with Robinson and that Robinson agreed to proceed with the surgeries, with the totality of the conversation documented on the chart in evidence.

Rebutting all of these witnesses was Robinson, who testified that he recollects parts of the conversations which were documented on his chart but that he cannot recall those portions of his conversations documented which dealt with the scheduled surgeries.

ASSIGNMENTS OF ERROR

The Robinsons' assignments of error, in summary, are that the court erred in precluding the Robinsons' medical expert from testifying to the applicable standard of care, in dismissing Bryan Memorial at the close of the Robinsons' evidence, and in precluding testimony regarding the records retention standards set forth by the Joint Commission on the Accreditation of Hospitals (JCAH).

STANDARD OF REVIEW

When a trial court sustains a motion to dismiss, it resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw only one conclusion. *Hill v. City of Lincoln*, 249 Neb. 88, 541 N.W.2d 655 (1996); *Knaub v. Knaub*, 245 Neb. 172, 512 N.W.2d 124 (1994). When reviewing a question of law, an appellate court reaches a

conclusion independent of the lower court's ruling. *Allemang v. Kearney Farm Ctr., ante* p. 68, 554 N.W.2d 785 (1996); *Grand Island Latin Club v. Nebraska Liq. Cont. Comm., ante* p. 61, 554 N.W.2d 778 (1996); *Baltensperger v. Wellensiek*, 250 Neb. 938, 554 N.W.2d 137 (1996).

A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion. *McArthur v. Papio-Missouri River NRD*, 250 Neb. 96, 547 N.W.2d 716 (1996); *McIntosh v. Omaha Public Schools*, 249 Neb. 529, 544 N.W.2d 502 (1996); *Floyd v. Worobec*, 248 Neb. 605, 537 N.W.2d 512 (1995).

ANALYSIS

We will first address the assignments regarding the dismissal of Bryan Memorial.

MOTION TO DISMISS

In order to succeed in an action based on negligence, a plaintiff must establish the defendant's duty not to injure the plaintiff, a breach of that duty, proximate causation, and damages. *Hand v. Starr*, 250 Neb. 377, 550 N.W.2d 646 (1996); *Dolberg v. Paltani*, 250 Neb. 297, 549 N.W.2d 635 (1996); *Hill v. City of Lincoln*, 249 Neb. 88, 541 N.W.2d 655 (1996); *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 248 Neb. 651, 538 N.W.2d 732 (1995); *S.I. v. Cutler*, 246 Neb. 739, 523 N.W.2d 242 (1994); *Merrick v. Thomas*, 246 Neb. 658, 522 N.W.2d 402 (1994).

The Robinsons complain that the trial court erred in refusing to allow Dr. Edwin Breitenbach to testify as to Bryan Memorial's duty to procure and preserve medical records under the standards set forth by the JCAH. We note that no offer of proof was made concerning to what Dr. Breitenbach would have testified.

At the time Dr. Breitenbach testified, the Robinsons failed to show that the rules and regulations of the JCAH existed during the relevant times of Robinson's treatment. Also, at the time Dr. Breitenbach testified, there was no testimony that Bryan Memorial was, for the relevant time period, accredited by the

JCAH and no other evidence that Bryan Memorial was bound by or had adopted such rules and regulations. The Robinsons presented no other evidence. Bryan Memorial filed a motion to dismiss.

In a court's review of evidence on a motion to dismiss, the nonmoving party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can be reasonably drawn therefrom, and where the plaintiff's evidence meets the burden of proof required and the plaintiff has made a prima facie case, the motion to dismiss should be overruled. *Kreus v. Stiles Service Ctr.*, 250 Neb. 526, 550 N.W.2d 320 (1996); *Hill v. City of Lincoln*, *supra*; *Knaub v. Knaub*, *supra*.

Although the JCAH duties which the Robinsons attempted to introduce are paralleled in certain federal regulations made applicable to hospitals which have filed agreements to participate in the health insurance for the aged and disabled programs, the Robinsons did not prove that Bryan Memorial entered into such agreements. The trial court was therefore correct in finding that the Robinsons had failed to prove a duty on the part of Bryan Memorial to maintain records and properly granted Bryan Memorial's motion to dismiss.

Expert Testimony—Informed Consent

After Bryan Memorial was dismissed, the sole issue became whether Drs. Bleicher and Eakins failed to obtain informed consent for the surgery.

On the issue of informed consent, the Robinsons proffered testimony of one expert who was board certified, but who had no experience in Lincoln, or in Nebraska. Drs. Bleicher and Eakins properly objected. See *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996). The trial court refused to allow the expert to testify. In Nebraska, a physician's duty to disclose the risks of a particular procedure or treatment, allowing for informed consent, is established by the "professional" theory. The professional theory " 'holds that the duty is measured by the standard of the reasonable medical practitioner under the same or similar circumstances, and must be determined by expert medical testimony establishing the prevailing standard

and the defendant practitioner's departure therefrom. . . .'" *Eccleston v. Chait*, 241 Neb. 961, 967, 492 N.W.2d 860, 865 (1992) (quoting *Smith v. Weaver*, 225 Neb. 569, 407 N.W.2d 174 (1987)). This is a locality standard and is the correct standard to be applied in this case.

The Robinsons cite *Capps v. Manhart*, 236 Neb. 16, 458 N.W.2d 742 (1990), for the proposition that a medical expert from one community is competent to testify as an expert witness in a medical negligence case as to the standard of care or skill required in another community if the expert has knowledge of or familiarity with the practice and standard of the locality in question or of a similar or like community.

We agree that the proposition of law in *Capps v. Manhart, supra*, is applicable in a straight medical malpractice action; however, this action is based upon a lack of informed consent or inadequate information for Robinson's consent to a surgical procedure. As we expressly stated in *Eccleston v. Chait, supra*, in an informed consent case, a locality standard is applicable. Therefore, the *Capps* rule is not applicable in this case.

In determining whether an expert's testimony is admissible, a court considers four preliminary and interrelated questions: (1) whether the witness qualifies as an expert pursuant to Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995); (2) whether the expert's testimony is relevant; (3) whether the expert's testimony assists the trier of fact to understand the evidence or determine a controverted factual issue; and (4) whether the expert's testimony, even though relevant and admissible, should be excluded under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995), because its probative value is substantially outweighed by the danger of unfair prejudice or other considerations. *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.*, 248 Neb. 651, 538 N.W.2d 732 (1995). Further, the soundness of a trial court's ruling regarding an expert's qualifications depends upon the particular facts of the case. *McArthur v. Papio-Missouri River NRD*, 250 Neb. 96, 547 N.W.2d 716 (1996); *McIntosh v. Omaha Public Schools*, 249 Neb. 529, 544 N.W.2d 502 (1996); *Floyd v. Worobec*, 248 Neb. 605, 537 N.W.2d 512 (1995). Finally, a witness may qualify as an expert by virtue of either formal training or actual practical experience

in the field. *Crawford v. Department of Motor Vehicles*, 246 Neb. 319, 518 N.W.2d 148 (1994); § 27-702.

In determining whether the district court abused its discretion, this court has held that expert testimony should not be received into evidence if it is evident that the witness does not possess such facts that enable him to express a reasonable, accurate conclusion as distinguished from a mere guess; without an adequate basis of facts, the witness should not be allowed to give an opinion. *Menkens v. Finley, ante* p. 84, 555 N.W.2d 47 (1996).

In this case, Dr. Breitenbach clearly had no knowledge with respect to the standard of informed consent in Lincoln on March 24, 1988. The fact that Drs. Bleicher and Eakins may have testified about the standard in Iowa City, Iowa, and other cities vis-a-vis Lincoln does not establish foundation for Dr. Breitenbach to testify about the standard on informed consent in Lincoln on March 24. Because Dr. Breitenbach was not in possession of facts which would enable him to express a reasonable, accurate conclusion, it was not an abuse of discretion for the district court to exclude his testimony.

CONCLUSION

The motion to dismiss was properly granted. Finding no error at the district court level, the decision of the district court is hereby affirmed.

AFFIRMED.

LANPHIER, J., participating on briefs.

WRIGHT, J., concurring.

I concur in the result. Nebraska's "informed consent" requirement is found in Neb. Rev. Stat. § 44-2816 (Reissue 1993), which provides in part: "Informed consent shall mean consent to a procedure based on information which would ordinarily be provided to the patient under like circumstances by health care providers engaged in a similar practice in the locality or in similar localities."

There are two different theories regarding the extent of a physician's duty to disclose the risks of a particular treatment or procedure—the "professional" theory and the "material risk"

theory. The professional theory holds that the duty is measured by the standard of a reasonable medical practitioner under the same or similar circumstances, and must be determined by expert medical testimony establishing the prevailing standard and the defendant practitioner's departure therefrom. *Eccleston v. Chait*, 241 Neb. 961, 492 N.W.2d 860 (1992); *Smith v. Weaver*, 225 Neb. 569, 407 N.W.2d 174 (1987).

This is contrasted with the material risk theory, which holds that the duty to disclose is measured by the patient's need for information to balance the probable risks against the probable benefits in making the decision to either undergo or forgo the treatment proposed. Expert testimony is not required to establish the physician's duty to disclose, and the fact finder can decide, without the aid of a medical expert, whether a reasonable person in the patient's position would have considered the risk significant in making his or her decision. *Id.*

As we pointed out in *Eccleston*, "[t]he material risk theory protects a patient's 'right of physical self-determination [because it] mandates that the scope of a physician's duty to disclose therapeutic risks and alternatives be governed by the patient's informational needs.' " 241 Neb. at 968, 492 N.W.2d at 864.

We are bound to follow the standard established by § 44-2816, but I do not believe the reasons for this law are sound. A physician should be required to inform the patient of the possible risks and alternatives. The duty should not be measured by what other physicians are doing in the same or similar locality. It is the rights of the patient that must be considered first, not the standard of practice in a particular locality.

PAMELA NICKEL, APPELLANT, V. SALINE COUNTY SCHOOL DISTRICT NO. 163, ALSO KNOWN AS WESTERN PUBLIC SCHOOL, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

559 N.W.2d 480

Filed February 14, 1997. No. S-95-027.

1. **Schools and School Districts: Termination of Employment: Teacher Contracts: Evidence: Appeal and Error.** The standard of review in a proceeding in error from an order of a school board terminating the contract of a tenured teacher is whether the school board acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision.
2. **Schools and School Districts: Evidence.** The evidence is sufficient as a matter of law if the school board could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it.
3. **Schools and School Districts: Statutes: Legislature.** A school district is a creature of statute and possesses no other powers than those granted it by the Legislature.
4. **Schools and School Districts: Teacher Contracts: Termination of Employment: Proof.** Before the school board may terminate a teacher's employment because of a reduction in force, it must establish via proof at the hearing (1) a change in circumstances necessitating a reduction in force, (2) that the change in circumstances specifically relates to the teacher to be affected, and (3) that there are no vacancies in the staff for which the teacher to be affected is qualified.
5. **Schools and School Districts: Teacher Contracts: Termination of Employment.** If the contracts of a tenured teacher and a probationary teacher are subject to termination due to a surplus of staff, the tenured teacher must be retained so long as he or she has the required certification in the area.
6. **Schools and School Districts: Time.** For certificated school employees employed one-half time or more but less than four-fifths time, each such year of employment shall be credited against the 3-year requirement for acquiring permanent certificated employee status in an amount proportionate to the term of such employment for each year.
7. **Statutes: Legislature: Intent.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
8. **Statutes.** In construing a statute, a court must look to the statute's purpose and give the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
9. **Schools and School Districts: Time.** Neb. Rev. Stat. § 79-12,108(1)(b) (Reissue 1994) allows a teacher's pre-1991 service to be counted toward his or her permanent status.
10. **Schools and School Districts: Teacher Contracts: Termination of Employment: Notice.** Nebraska statutes require notice and a hearing for any teacher whose contract may be canceled due to a reduction in force.
11. **Schools and School Districts: Teacher Contracts: Termination of Employment: Evidence.** The mere fact that selected teachers received letters indicating that their

contracts might be terminated due to a reduction in force is not sufficient evidence to find that a final decision had been reached prior to the reduction in force hearing to terminate their employment contracts.

12. **Schools and School Districts: Termination of Employment.** A school board has broad discretion in determining what factors to include in its reduction in force policy as well as how to weight those factors.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Affirmed.

Scott J. Norby, of McGuire and Norby, for appellant.

Neal E. Stenberg, of Harding & Ogborn, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and LIKES, D.J.

WHITE, C.J.

Pamela Nickel appeals the decision of the Saline County School District No. 163 Board of Education canceling Nickel's teaching contract due to a reduction in force. We affirm.

Nickel was a permanent certificated teacher employed by the school district during the 1993-94 school year. On March 31, 1994, Nickel received notice that her "employment contract may be terminated after the close of this contract year because of reduction in force. It appears that, based on the criteria of the reduction in force policy, you would be affected by a reduction in the staff." The parties agree that declining student enrollment and the expense of complying with the Americans with Disabilities Act necessitated a reduction in force.

The district's reduction in force policy provides that "no permanent employee may be terminated through a [reduction in force] while a probationary employee is retained to perform a service that the permanent employee is qualified by certification and endorsement to perform or where certification is not applicable, by reason of college credits in the teaching area." The policy requires that selection of personnel for termination be based on eight criteria: (1) programs to be offered, (2) areas of certification and endorsement, (3) state and federal regulations mandating certain employment practices, (4) special qualifications that may require specific training and/or experience, (5)

contributions to activity programs, (6) qualifications based on employee evaluation procedures, (7) the impact created by multiple part-time certificated employees, and (8) any other reasons which can be rationally related to the instruction in or administration of the school system. The policy does not indicate how these eight criteria are to be weighed. However, the policy does specifically state that in the event that no significant difference exists between certificated employees after weighing these eight factors, then the employee with the longest period of uninterrupted service to the district must be retained.

Nickel requested a hearing before the board, and this hearing was held on April 26, 1994. At the hearing, board member Lori Miller testified as to each of the district's employees in relation to the eight criteria. Miller noted that each of the six certificated employees held an endorsement qualifying them to teach kindergarten through eighth grade in elementary education. Miller also noted that the criteria involving state and federal regulations, employee evaluations, and the impact of multiple part-time employees were not applicable in this instance.

The board made the following findings of fact as to each of the six certificated employees:

> 10. Henry Orf has a math endorsement and possesses math teaching skills exceeding those of the district's other teachers, none of whom have a math endorsement. Math is a critically important part of the district's curriculum, particularly for grades 7 and 8, which Mr. Orf teaches. Mr. Orf is the teacher best qualified to fulfill the district's math curriculum needs. Mr. Orf has filled the position of head teacher for 10 consecutive years, and because of his substantial experience in that area, he is best qualified to meet the district's need for a head teacher. Mr. Orf also makes a very valuable contribution to the district's extracurricular program by coaching football, basketball, volleyball, track, and softball. . . .
>
> 11. Wilma Gearhart is the only teacher employed by the district who has a special education endorsement, and she functions as the district's special education teacher. The district's special education program is a critically important part of the district's curriculum . . . .

12. Doris Broz possesses the special qualifications of education/training in using computers, and she has acquired experience in teaching computer skills to elementary students. None of the district's other teachers have comparable training and teaching experience regarding computers. Mrs. Broz is the district's Chapter I teacher and has several years['] experience in teaching Chapter I. Classes regarding use of computers and Chapter I education services are critically important parts of the district's curriculum . . . .

13. Mari Ann Pesek is involved with the following extracurricular programs: DARE, the lunch program, elder care program, concession sales, and assisting the coach for basketball, track, volleyball, and softball. Mrs. Pesek has a greater involvement with the district's extracurricular programs than any other teacher. The extracurricular programs with which she is involved provide students . . . with very valuable educational and athletic opportunities. . . .

14. Diane Ringler has endorsements in basic business and general office education, however, these more specific subjects do not constitute an integral part of the district's curriculum due to its focus on more general subjects. . . .

15. Pamela Nickel has an endorsement in physical education, however, this area of instruction is not an integral part of the district's curriculum due to the ability of other teachers to adequately cover this subject. . . .

The evidence also demonstrated that Nickel had made significant contributions to district programs in the past, but that she was making none of these contributions in the current school year. Additionally, although Nickel and other teachers had participated in different inservice programs including computer training, these inservice programs were not considered by the board in making its decision.

The board determined that based on the evidence before it, there was no significant difference between Nickel and Ringler in the context of reduction in force. Therefore, the board retained Ringler, in accordance with the reduction in force pol-

icy, because she had the longest period of uninterrupted service to the district.

Nickel timely appealed the board's decision to the district court for Saline County, alleging that the decision was not supported by the weight of the evidence and that the board had retained a probationary certificated employee, Broz, to perform services that Nickel was qualified to perform. The district court affirmed the decision of the board, and Nickel then appealed to the Nebraska Court of Appeals. Pursuant to our power to regulate the caseloads of the appellate courts, we removed this case to our docket.

On appeal, Nickel alleges several assignments of error. As summarized, Nickel asserts that the district court erred in failing to find that (1) the district violated the requirements of the Nebraska reduction in force statutes and its own policies in terminating the contract of a permanent employee while a probationary employee was retained to perform a service which the permanent employee was qualified to perform and (2) the district employed unlawful procedures and reached a decision that was not supported by the evidence contained in the record.

The standard of review in a proceeding in error from an order of a school board terminating the contract of a tenured teacher is whether the school board acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision. *Boss v. Fillmore Cty. Sch. Dist. No. 19, ante* p. 669, 559 N.W.2d 448 (1997); *Drain v. Board of Ed. of Frontier Cty.*, 244 Neb. 551, 508 N.W.2d 255 (1993); *Trolson v. Board of Ed. of Sch. Dist. of Blair*, 229 Neb. 37, 424 N.W.2d 881 (1988). The evidence is sufficient as a matter of law if the school board could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it. *Boss, supra*; *Drain, supra*; *Trolson, supra*.

We note at the outset that a school district is a creature of statute and possesses no other powers than those granted it by the Legislature. *Rauert v. School Dist. 1-R of Hall Cty., ante* p. 135, 555 N.W.2d 763 (1996); *School Dist. of Waterloo v. Hutchinson*, 244 Neb. 665, 508 N.W.2d 832 (1993). The Legislature has attenuated a school board's discretion to pare its staff in the face of reduced needs and has imposed specified

procedures for achieving a reduction in force. See, Neb. Rev. Stat. §§ 79-1254.02 to 79-1254.08 and 79-12,107 to 79-12,121 (Reissue 1994); *Trolson, supra.* Before the board may terminate a teacher's employment because of a reduction in force, it must establish via proof at the hearing (1) a change in circumstances necessitating a reduction in force, (2) that the change in circumstances specifically relates to the teacher to be affected, and (3) that there are no vacancies in the staff for which the teacher to be affected is qualified. § 79-1254.06; *Van Fossen v. Board of Governors*, 228 Neb. 579, 423 N.W.2d 458 (1988).

Here, the parties agree that a change in circumstances has occurred in that the district was experiencing annually decreasing enrollment and faced the additional costs of complying with the mandates of the Americans with Disabilities Act. This change in circumstances necessitated the reduction in force of one of the six teachers employed by the district, and there were no vacancies in the teaching staff. Thus, the issue before this court is not whether a reduction in force was necessary, but, rather, whether Nickel was the teacher properly affected.

Nickel's first assignment of error alleges that the district violated the requirements of the Nebraska reduction in force statutes and its own policies in terminating the contract of a permanent employee while a probationary employee was retained to perform a service which the permanent employee was qualified to perform. Specifically, Nickel argues that Doris Broz was a probationary teacher at the time Nickel's contract was terminated and was wrongly retained because Nickel was qualified to perform the services Broz performed. We disagree.

Nickel is correct insofar as she alleges that if the contracts of a tenured teacher and a probationary teacher are subject to termination due to a surplus of staff, the tenured teacher must be retained so long as he or she has the required certification in the area. See, § 79-1254.05; *Moser v. Board of Education*, 204 Neb. 561, 283 N.W.2d 391 (1979). Nebraska statutes define a probationary teacher as "a teacher . . . who has served under a contract with the school district for less than three successive school years . . . ." § 79-12,107(3).

Probationary certificated employees achieve permanent certificated, or tenured, status based on a statutory formula. The

applicable statute states in part that "[f]or certificated employees employed one-half time or more but less than four-fifths time, each such year of employment shall be credited against the three-year requirement for acquiring permanent certificated employee status in an amount proportionate to the term of such employment for each year." § 79-12,108(1)(b). This formula was amended in 1991 because prior to that amendment, part-time teachers who worked exactly one-half time or less could not accumulate credit toward permanent certificated status. See § 79-12,108(1)(b) (Reissue 1987).

In the instant case, Broz held a one-half-time contract as a kindergarten teacher for 11 years prior to the reduction in force hearing. Commencing in the 1992-93 school year, Broz obtained another one-half-time contract to teach computer skills and "Chapter I," and held this second contract again in the 1993-94 school year.

Nickel correctly argues that Broz had accumulated no years of service toward permanent status under the pre-1991 version of § 79-12,108(1)(b) because Broz held only one one-half-time contract with the district. Nickel also argues that the 1991 amended version of § 79-12,108(1)(b) does not allow any of the years Broz was employed by the district prior to the 1991 amendment to count toward her permanent certificated status, and that the only years of service which could accumulate under the 1991 statute were those performed following its passage. Nickel thus reasons that under the 1991 version, Broz had accumulated only 2½ years toward the 3-year requirement for permanent status because she had a one-half-time contract in 1991 and two one-half-time contracts in 1992 and 1993. According to Nickel, Broz was thus still a probationary employee at the time of the 1994 hearing. We disagree with Nickel's interpretation of the 1991 version of § 79-12,108(1)(b).

In construing a statute, we must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Rauert v. School Dist. 1-R of Hall Cty., ante* p. 135, 555 N.W.2d 763 (1996); *County Cork v. Nebraska Liquor Control Comm.*, 250 Neb. 456, 550 N.W.2d 913 (1996). In so doing, we must look to the statute's purpose and give the

statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *Solar Motors v. First Nat. Bank of Chadron*, 249 Neb. 758, 545 N.W.2d 714 (1996).

Here, the 1991 version of § 79-12,108(1)(b) does not specifically state that it has a retroactive effect. However, the statute also does not contain specific language limiting its application to years of service accumulated after its passage, nor does it prohibit the use of pre-1991 years of service in determining permanent status. The legislative history of the statute states that its purpose was to make eligible for permanent status educators teaching only one-half time.

We dealt with a similar issue in *Wang v. Board of Education*, 199 Neb. 564, 260 N.W.2d 475 (1977). In *Wang*, we found that while the statute then in effect for determining tenure did not specifically state that it was retroactive, the statute still allowed for the use of pre-effective-date service to determine permanent status. We stated:

> It seems clear to us that . . . the effect of the amendment . . . was that those employed on the effective date of the act, who had served at least 2 years prior to the effective date of the act, would escape the probationary period language of the act and thus not be placed in jeopardy. The inference is clear that the protection offered by the act, requiring a finding of just cause prior to any dismissal, was not intended by the Legislature to be available to those who had not yet, as of the effective date of the act's passage, been employed for 2 years.

Wang, 199 Neb. at 569, 260 N.W.2d at 478-79.

We find this reasoning persuasive in the instant case. We will not impose on the clear language of the 1991 version of § 79-12,108(1)(b) a limitation to its application not contained therein, nor will we interpret the statute so as to defeat its purpose. We therefore determine that § 79-12,108(1)(b) allows Broz' pre-1991 service to be counted toward her permanent status. Under the statutory formula, Broz attained permanent status with the passage of the statute in 1991 because she had already worked for at least 6 years at one-half time so as to attain the 3 full years of service required for permanent status.

Therefore, we find Nickel's first assignment of error to be without merit.

Nickel next alleges that even if we find that Broz was a permanent certificated employee, the district employed unlawful procedures in reaching its decision, and that the district's decision was not supported by the evidence contained in the record. We disagree.

Nickel first argues that the district improperly selected or targeted Nickel's contract for termination without considering other teachers in the district. She bases this argument on the fact that she received notice indicating that she would be affected by a reduction in the district's staff, and she interprets this notice as evidence that the board had reached a final decision that her contract should be terminated prior to the hearing. Specifically, the notice stated, "I am writing to inform you that your employment contract *may be terminated* after the close of this contract year because of reduction in force. *It appears that*, based on the criteria of the reduction in force policy, you would be affected by a reduction in the staff." (Emphasis supplied.)

Nebraska statutes require notice and a hearing for any teacher whose contract may be canceled due to a reduction in force. §§ 79-1254.06 and 79-12,107 to 79-12,121. As well, we have held that the mere fact that selected teachers received letters indicating that their contracts might be terminated due to a reduction in force was not sufficient evidence to find that a final decision had been reached prior to the reduction in force hearing to terminate their employment contracts. See, *Heithoff v. Nebraska State Bd. of Ed.*, 230 Neb. 209, 430 N.W.2d 681 (1988); *Van Fossen v. Board of Governors*, 228 Neb. 579, 423 N.W.2d 458 (1988).

Here, Nickel received her statutorily required notification indicating that her contract could be terminated due to a reduction in force. The language of the notice clearly demonstrates that no final decision had been reached in this matter, but that Nickel's contract *might* be terminated. There is no indication in the notice or in the record of this case that the board had reached a final decision as to Nickel's status prior to the hearing. We, therefore, hold that Nickel received appropriate notifi-

cation and that the district did not utilize unlawful procedures in so notifying Nickel.

Nickel also alleges that the board's decision was not supported by the evidence because the board considered only current contributions and refused to consider historical contributions to the district. Nickel argues that had the board considered historical contributions, her record of service would have included years as head teacher and coach for sports activities, as well as her involvement in a variety of other programs and activities.

We have held that a school board has broad discretion in determining what factors to include in its reduction in force policy as well as how to weight those factors. See *Dykeman v. Board of Education*, 210 Neb. 596, 316 N.W.2d 69 (1982). Our review of the board's decision in this case is limited to a determination of whether the board acted within its jurisdiction and whether there is sufficient evidence as a matter of law to support its decision. *Boss v. Fillmore Cty. Sch. Dist. No. 19, ante* p. 669, 559 N.W.2d 448 (1997); *Trolson v. Board of Ed. of Sch. Dist. of Blair*, 229 Neb. 37, 424 N.W.2d 881 (1988).

Clearly, the board acted within its statutorily authorized jurisdiction to effectuate a reduction in force. See § 79-1254.06. The board's policy does not specifically provide the manner in which the eight criteria are to be weighed, but board member Miller testified that the special education endorsement of teacher Wilma Gearhart was of the most importance in ranking the criteria and that contributions to activities were also very important to the board. While it is true that the board could have chosen to include historical contributions in its consideration of which staff member's contract to terminate, the record is clear that the board chose to consider only current contributions by teachers, that the board did not consider any teacher's historical contributions, and that the board's reduction in force policy did not state whether historical or current contributions were to be considered. The board exercised its discretion in applying its policy, and it did so evenhandedly. The board apparently decided that its reduction in force decision should be based only on what each staff member was currently contributing to the

educational program and not on what they may have contributed in the past.

Nickel argues that if the board is permitted to consider only current contributions, the board could simply shuffle assignments so as to impermissibly target a teacher for reduction in force. While it is conceivable that a school board could do as Nickel suggests, it is quite clear that the board did not do so and could not have done so in this situation. Head teacher Henry Orf testified that he did not assign duties to teachers, but instead asked for volunteers among the staff members. That Nickel did not choose to volunteer for more duties of this nature during the 1993-94 school year is certainly unfortunate, but that does not invalidate the board's decision in this case.

Nickel also argues that the board improperly failed to consider Nickel's inservice hours, which included computer training, in deciding to retain Broz due to her experience teaching computer keyboarding. Again, the board could have chosen to consider this as a factor but did not do so in its evaluation of any teacher. That the board determined that Broz' current experience in teaching computers was more valuable to the district than Nickel's inservice training and dearth of teaching experience is not a basis upon which we can invalidate the board's decision in this case.

We cannot say that the evidence was insufficient as a matter of law to support the board's determination. Based on the testimony and exhibits before the board, it could reasonably find that Nickel was the teacher properly affected by the reduction in force. Thus, we find that Nickel's second assignment of error is also without merit.

Because we hold that the district did not retain a probationary certificated teacher while terminating a permanent certificated teacher and did not utilize unlawful procedures or make its reduction in force decision based on insufficient evidence, we affirm the decision of Saline County School District No. 163 and the district court for Saline County.

AFFIRMED.

ROSALIE M. POPE, APPELLEE, V. PATRICK E. POPE, APPELLANT.

559 N.W.2d 192

Filed February 14, 1997. No. S-95-125.

1. **Modification of Decree: Alimony: Appeal and Error.** An appellate court entrusts the modification of an alimony award to the discretion of the trial court and reviews the trial court's decision de novo on the record for abuse of discretion.
2. **Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue. When evidence is in conflict, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
4. **Modification of Decree: Alimony: Good Cause.** Orders for alimony may be modified or revoked for good cause shown.
5. ____: ____: ____. Good cause is demonstrated by a material change in circumstances, but any changes in circumstances which were within the contemplation of the parties at the time of the decree, or that were accomplished by the mere passage of time, do not justify a change or modification of an alimony order.
6. **Modification of Decree: Alimony: Proof.** The moving party has the burden of demonstrating a material and substantial change of circumstances which would justify the modification of an alimony award.
7. **Modification of Decree: Child Support.** In the context of the modification of child support obligations, a petition for modification will be denied if the change in financial condition is due to fault or voluntary wastage or dissipation of one's talents and assets.
8. **Modification of Decree: Alimony.** A petition for the modification or termination of alimony will be denied if the change in financial condition is due to fault or voluntary wastage or dissipation of one's talents and assets.
9. **Courts: Jurisdiction: Judgments: Alimony.** A trial court has inherent power to retain jurisdiction to determine amounts due and to enforce judgments for alimony.
10. **Alimony: Appeal and Error.** In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable so as to deprive a party of a substantial right or just result.

Petition for further review from the Nebraska Court of Appeals, MILLER-LERMAN, Chief Judge, INBODY, Judge, and NORTON, District Judge, Retired, on appeal thereto from the District Court for Douglas County, LAWRENCE J. CORRIGAN, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Steven J. Lefler, of Lefler & Franklin Law Offices, for appellant.

Richard M. Fellman, of Fellman, Moylan, Natvig, Steichen & Kelly, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and ROWLANDS, D.J.

WHITE, C.J.

Rosalie M. Pope petitioned this court for further review of the Nebraska Court of Appeals' decision terminating the alimony obligation of her former husband, Patrick E. Pope. Because we find that Patrick's decrease in income does not in this instance constitute good cause to justify modification or termination of his alimony payments, we reverse the decision of the Court of Appeals and remand the cause with directions to reinstate the district court's order in this matter.

Rosalie and Patrick were married on July 31, 1971, and the Douglas County District Court entered a decree of dissolution on November 6, 1989. At the time of the decree, Patrick was employed in a management position at Kellogg Company in Omaha and earned approximately $70,000 per year. Rosalie was (and still is) employed as a teacher at a private school in Omaha and earned approximately $14,000 per year. The parties had one minor child.

The district court, in relevant part, ordered Patrick to pay $515 per month in child support. The court also ordered Patrick to pay alimony in the amount of $600 per month commencing October 1, 1989, continuing for 36 months, and then in the amount of $300 per month for 73 months.

On July 13, 1990, Patrick was fired from his position at Kellogg for sleeping at his desk during his night shift. During the hearing on this matter, Patrick's attorney asked him, "And can you tell the Court why you got terminated, sir?" Patrick answered, "They caught me sleeping at my desk during a lunch hour." This is the only evidence concerning the matter.

Patrick attempted to find other comparable employment, but was unsuccessful because he lacks a high school diploma and had attained his management position only by working his way

up through the company. On July 25, 1990, Patrick filed an application for modification of decree, asking for a reduction in his child support and alimony obligations. The court entered a temporary order on November 26, 1990, reducing Patrick's child support payments to $258 per month and his alimony payments to $300 per month, and ordering that the original decree remain in effect in all other respects.

Patrick found a job as a car salesman in March 1991, earning a net pay of approximately $1,000 per month. Patrick left this position in 1993 and started his own car interior repair business. In 1994, Patrick grossed approximately $1,500 per month and testified that the business was showing "good growth this year."

On April 27, 1994, Patrick again filed an application to modify the decree, asking that the court terminate his alimony obligation. Child support was not an issue because the parties' minor child had reached the age of majority. In the court order dated January 5, 1995, the district court found that Patrick was in arrears in alimony payments in the amount of $9,200 plus interest; that Patrick was in willful contempt of the prior orders of the court and could purge himself from contempt and remain out of jail by paying $200 per month commencing January 1, 1995, and continuing every month thereafter until all alimony originally decreed by the court plus interest was paid; and that the court believed that the $200-per-month payment was reasonable because it was comparable to Patrick's former monthly child support payment.

Patrick timely appealed to the Court of Appeals. The Court of Appeals terminated Patrick's alimony payments, finding that a material and substantial change of circumstances with regard to Patrick's employment status had occurred, that this change was not anticipated or the result of the mere passage of time, that Patrick would never be able to regain his former level of income, and that the failure of the trial court to terminate Patrick's alimony payments constituted an abuse of discretion. See *Pope v. Pope*, 96 NCA No. 21, case No. A-95-125 (not designated for permanent publication). The Court of Appeals remanded the matter with instructions to enter an order terminating Patrick's alimony payments and future obligation effective April 27, 1994. See *id.*

Rosalie petitioned this court for further review, and we granted that petition. Rosalie assigns as error the Court of Appeals' action in overruling the trial judge's determination that there existed no good cause justifying termination of alimony.

We entrust the modification of an alimony award to the discretion of the trial court and review the trial court's decision de novo on the record for abuse of discretion. *Pendleton v. Pendleton*, 247 Neb. 66, 525 N.W.2d 22 (1994); *Kleager v. Kleager*, 242 Neb. 24, 492 N.W.2d 873 (1992). In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue. When evidence is in conflict, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994). A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Adrian v. Adrian*, 249 Neb. 53, 541 N.W.2d 388 (1995); *Evenson v. Evenson*, 248 Neb. 719, 538 N.W.2d 746 (1995).

In her sole assignment of error, Rosalie alleges that the Court of Appeals erred in finding that Patrick's job loss constituted an unanticipated material and substantial change in circumstances. Rosalie argues that Patrick did not demonstrate good cause justifying the termination of alimony because he was fired from his former employment due to his own wrongdoing. We agree.

Orders for alimony may be modified or revoked for good cause shown. Neb. Rev. Stat. § 42-365 (Reissue 1995). Good cause is demonstrated by a material change in circumstances, but any changes in circumstances which were within the contemplation of the parties at the time of the decree, or that were accomplished by the mere passage of time, do not justify a change or modification of the alimony order. *Desjardins v. Desjardins*, 239 Neb. 878, 479 N.W.2d 451 (1992); *Cooper v. Cooper*, 219 Neb. 64, 361 N.W.2d 202 (1985). The moving party has the burden of demonstrating a material and substantial

change of circumstances which would justify the modification of the alimony award. *Chamberlin v. Chamberlin*, 206 Neb. 808, 295 N.W.2d 391 (1980).

While we have held that one may in good faith make an occupational change even though that change may reduce one's ability to meet financial obligations, we have never determined whether the termination of one's employment due to one's own bad acts or fault constitutes good cause justifying modification or termination of alimony payments. See *Cooper, supra*. Other jurisdictions have addressed this issue. For instance, the New Hampshire Supreme Court has stated, "Although unemployment or diminution of earnings is a common ground for modification, a petition for modification will be denied if the change in financial condition is due to fault or voluntary wastage or dissipation of one's talents and assets." *Noddin v. Noddin*, 123 N.H. 73, 76, 455 A.2d 1051, 1053 (1983) (involving petition to modify alimony and child support where father brought about his own reduced financial condition when he lost job for stealing trade secrets). The Maine Supreme Judicial Court has stated, "[R]emarriage, change of jobs or increased indebtedness does not *necessarily* justify reduction of an alimony award, especially when the change of conditions were [sic] voluntarily brought about by the payor or do [sic] not affect his ability to meet his alimony obligation." *Williams v. Williams*, 444 A.2d 977, 981 (Me. 1982). See, *Kiefer v. Kiefer*, 671 So. 2d 710 (Ala. Civ. App. 1995) (holding that, even if change of circumstances is shown, trial court is not required to grant modification of periodic alimony award unless husband had in good faith entered into new occupation at reduced income); *Kinne v. Kinne*, 599 So. 2d 191 (Fla. App. 1992) (employing good faith test to determine whether decrease in income should justify decrease in alimony); *Antonelli v. Antonelli*, 242 Va. 152, 409 S.E.2d 117 (1991) (holding that reduction in income resulting from voluntary employment decision does not require corresponding reduction in payor spouse's support obligations, even if decision was reasonable and made in good faith); *Giesner v. Giesner*, 319 N.W.2d 718 (Minn. 1982) (holding good faith test should apply to determine whether decreased earnings should result in decreased support payments); *Thomas v. Thomas*, 281

Ala. 397, 203 So. 2d 118 (1967) (holding that husband's knowledge of his obligation of support and his subsequent election to enter employment that would substantially reduce his income and make it impossible to meet his obligations would not justify reduction in support).

We have held, in the context of the modification of child support obligations, that "'a petition for modification will be denied if the change in financial condition is due to fault or voluntary wastage or dissipation of one's talents and assets. . . .'" *Ohler v. Ohler*, 220 Neb. 272, 275, 369 N.W.2d 615, 617 (1985) (holding that father's criminal activity resulting in incarceration did not constitute material change in circumstances justifying reduction in or termination of his child support obligations). See *Baer v. Simon*, 334 So. 2d 796 (La. App. 1976) (affirming denial of request to modify support where father's unstable financial condition was created by his failure to appear at work, his drinking habits, and his failure to do work for which he was paid). We have also analogized the material change of circumstances required to justify modifications of child support to the good cause requirement necessary to modify alimony. See *Ohler, supra.*

We find persuasive Rosalie's argument that Patrick's own bad act resulted in his reduction in income and that his failure to stay awake on the job should not be worked to her detriment. We also find persuasive the reasoning of cases such as *Noddin* and *Baer*. We therefore extend the rule of *Ohler* to cases involving the modification or termination of alimony and find that a petition for the modification or termination of alimony will be denied if the change in financial condition is due to fault or voluntary wastage or dissipation of one's talents and assets. In the absence of evidence that Patrick fell asleep because of some justifiable reason, we hold that Patrick's bad act resulting in the loss of his employment does not constitute good cause justifying the termination of his alimony obligation.

We also find that the trial court's order requiring Patrick to pay $200 per month in alimony until he has paid the full amount awarded under the decree and retaining jurisdiction to address the contempt issue in the event that payments are not timely made was not an abuse of discretion. The trial court has inher-

ent power to retain jurisdiction to determine amounts due and to enforce judgments for alimony. *Pendleton v. Pendleton*, 247 Neb. 66, 525 N.W.2d 22 (1994). As well, in reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable so as to deprive a party of a substantial right or just result. *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994).

Here, the trial court lowered the amount of the monthly payment due from Patrick in order to accommodate his lower monthly income and extended the time required for Patrick to pay the total amount of alimony due. We find that the trial court's award was not untenable, nor did it deprive Patrick of a substantial right or just result.

Because we have determined that Patrick's termination due to his falling asleep on the job does not constitute good cause justifying termination or modification of alimony and that the trial court's order was not an abuse of discretion, we therefore reverse the decision of the Court of Appeals and remand the cause with directions to reinstate the order of the trial court.

REVERSED AND REMANDED WITH DIRECTIONS.

CONNOLLY, J., dissenting.

I respectfully dissent.

This court has held that a decrease in income for the payor spouse may constitute a change in circumstances calling for a reduction in alimony payments. See *Cooper v. Cooper*, 219 Neb. 64, 361 N.W.2d 202 (1985). See, also, *Fogel v. Fogel*, 184 Neb. 425, 168 N.W.2d 275 (1969). The evidence before us shows that Patrick was earning approximately $70,000 per year at the time he was ordered to pay alimony to Rosalie. However, due to his termination by Kellogg and his lack of education, Patrick is now earning approximately $18,000 gross per year. In light of this $52,000 decrease in income per year, it becomes obvious that a material change in circumstances has occurred.

However, according to the majority, Patrick must overcome a second and much more elusive hurdle by providing a justifiable reason for falling asleep at work during his night shift. The only evidence concerning Patrick's termination by Kellogg is Patrick's testimony that he was fired because he was sleeping at

his desk during his lunch hour. There is nothing in the record that would lead one to conclude that he intentionally or through bad faith caused his termination. Absent such proof, the majority opinion concludes that "Patrick's *bad act* resulting in the loss of his employment does not constitute good cause justifying the termination of his alimony obligation." (Emphasis supplied.) Categorizing his falling asleep as a bad act seems harsh, since it is not an uncommon occurrence for night-shift workers.

As justification for reaching this result, the majority relies heavily on our decision in *Ohler v. Ohler*, 220 Neb. 272, 369 N.W.2d 615 (1985), wherein we held that incarceration for a criminal conviction does not warrant the reduction of child support obligations. In so holding, we cited a New Hampshire Supreme Court case which stated that "a petition for modification will be denied if the change in financial condition is due to fault or voluntary wastage or dissipation of one's talents and assets." *Noddin v. Noddin*, 123 N.H. 73, 76, 455 A.2d 1051, 1053 (1983). While I agree with this statement, it has no application in this case. The act of falling asleep on a night shift is hardly comparable to a criminal conviction carrying a 15-year sentence. Unlike the father in *Ohler*, Patrick committed no crime or "bad act"; he simply fell asleep during his lunch hour. There exists no evidence that this incident interfered with his work in any way.

Alimony should not be used to equalize the incomes of the parties or to punish one of the parties. *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994). The relative incomes of the parties are close, with Patrick earning $18,000 per year gross and Rosalie $14,000 per year gross. Rosalie, unlike Patrick, has a college degree and potentially a higher earning capacity. To insist that Patrick continue to pay alimony based on his old salary of $70,000 rises to the level of a penalty and serves no useful purpose. I would affirm the decision of the Court of Appeals and terminate Patrick's alimony obligation.

WRIGHT, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. TODD L. COOK, APPELLANT.
559 N.W.2d 471

Filed February 14, 1997. No. S-96-059.

1. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
2. **Sentences: Statutes.** The Nebraska sentencing statutes do not require that the minimum sentence be for a different term than the maximum sentence.
3. **Sentences.** In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.
4. ____. An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Affirmed.

Douglas J. Stratton, of Stratton & Ptak, P.C., and Mark A. Johnson, of Law Office of Mark A. Johnson, P.C., for appellant.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

WHITE, C.J., CAPORALE, WRIGHT, and CONNOLLY, JJ., and QUIST, D.J.

WRIGHT, J.

Todd L. Cook appeals a sentence imposed by the district court for use of a firearm to commit a felony.

SCOPE OF REVIEW

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996); *State v. Orduna*, 250 Neb. 602, 550 N.W.2d 356 (1996).

FACTS

On January 29, 1995, Cook and an accomplice entered a Gas 'N Shop convenience store in Norfolk, Nebraska. Cook pointed a 9-mm semiautomatic pistol at Ellen Gill, a clerk in the store,

and demanded that she open the cash register. After Cook's accomplice removed approximately $206 from the cash register, Cook demanded that Gill take him to retrieve the videotape used by the store's video surveillance machine. Gill took Cook to the video recorder, and Cook attempted to remove the videotape. When he could not remove the videotape from the recorder, Cook shot the recorder with his pistol. Thinking that he saw Gill move, Cook turned and shot Gill from approximately 2 feet away. The bullet struck Gill in her left hand and her throat, and she died from the gunshot wounds.

Cook was arrested and charged with two crimes: first degree murder, a Class I felony, and use of a firearm to commit a felony, a Class III felony. Cook pled guilty to both counts on November 2, 1995. On December 15, after a sentencing hearing was held, Cook was sentenced. On count I, first degree murder, the district court sentenced Cook to one term of life imprisonment and ordered Cook to pay the costs of prosecution. On count II, use of a firearm to commit a felony, the court sentenced Cook to imprisonment for a minimum term of 20 years and a maximum term of 20 years.

ASSIGNMENT OF ERROR

Cook alleges that the district court erred by giving him an excessive sentence on the conviction for use of a firearm to commit a felony.

ANALYSIS

Cook's appeal is limited to the sentence for use of a firearm to commit a felony. Under Neb. Rev. Stat. § 28-105 (Reissue 1989), a Class III felony is punishable by a maximum of 20 years' imprisonment, a $25,000 fine, or both, and a minimum of 1 year's imprisonment. The district court sentenced Cook to imprisonment for a minimum term of 20 years and a maximum term of 20 years.

Cook first argues that by imposing a minimum sentence that is equivalent to the maximum sentence, the district court has in effect failed to assess a minimum sentence within the limits of § 28-105.

This argument has no merit. The Nebraska sentencing statutes do not require that the minimum sentence be for a dif-

ferent term than the maximum sentence. Nor do the statutes require that an indeterminate sentence be issued in the present case.

Cook next argues that the district court's sentence was an abuse of discretion. Cook notes his unfortunate life history, his young age, and his history of drug and alcohol abuse as factors that should mitigate the severity of his crime. In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Orduna, supra*; *State v. Ladig*, 248 Neb. 737, 539 N.W.2d 38 (1995).

The district court's sentence was within the range of permissible penalties provided for by § 28-105. A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996); *State v. Orduna*, 250 Neb. 602, 550 N.W.2d 356 (1996). An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *Id.*; *State v. Bensing*, 249 Neb. 900, 547 N.W.2d 464 (1996).

We have reviewed Cook's personal and criminal history, and we hold that the imposition of a 20-year minimum and maximum sentence in the present case was not an abuse of discretion. Cook used the weapon at issue to terrorize and brutally murder Gill. The extremely violent and deadly nature of Cook's use of the firearm to carry out his crimes justifies the sentence the district court imposed on Cook.

The judgment of the district court is affirmed.

AFFIRMED.

GERRARD, J., not participating.

VICKIE J. SPULAK, NOW KNOWN AS VICKIE J. MAW, DOING BUSINESS AS BROADWAY CAFE & LOUNGE, APPELLANT, V. TOWER INSURANCE COMPANY, INC., A WISCONSIN CORPORATION, ET AL., APPELLEES.

559 N.W.2d 197

Filed February 21, 1997. No. S-94-1166.

1. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Directed Verdict.** A directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, where an issue should be decided as a matter of law.
3. **Directed Verdict: Waiver.** A party may waive or abandon a motion for the direction of a verdict in his favor by acts inconsistent with such motion.
4. **Directed Verdict: Waiver: Appeal and Error.** A defendant who moves for a directed verdict at the close of the plaintiff's evidence and, upon the overruling of such motion, proceeds with trial and introduces evidence waives any error in the ruling on the motion.
5. ____: ____: ____. A plaintiff who moves for a directed verdict at the close of the defendant's evidence and, upon the overruling of such motion, proceeds to introduce rebuttal evidence waives any error in the ruling on the motion.
6. **Directed Verdict: Summary Judgment.** A renewed motion for summary judgment made during the course of trial and before the jury verdict is treated as a motion for directed verdict.
7. **Directed Verdict: Judgments: Verdicts.** A motion for directed verdict made at the close of all the evidence is a prerequisite to a motion for judgment notwithstanding the verdict.
8. ____: ____: ____. A motion for judgment notwithstanding the verdict may not properly be sustained in the absence of a motion for directed verdict made at the close of all the evidence.
9. **Demurrer: Pleadings: Evidence.** A demurrer ore tenus is an appropriate method to challenge a defective pleading and to object to the introduction of evidence in support of the defective pleading.
10. ____: ____: ____. A demurrer ore tenus is considered an objection to the introduction of evidence, rather than to a pleading.
11. **Trial: Pleadings: Evidence.** An objection to the admission of evidence on the grounds that a petition does not state a cause of action may be made at any time during trial.
12. **Insurance: Contracts: Proof.** The insurer bears the burden of establishing as an affirmative defense that an event falls within an exclusionary clause.
13. **Demurrer: Pleadings.** It is generally an abuse of discretion to grant a demurrer without leave to amend where there is a reasonable possibility that the defect can be cured by amendment.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded for a new trial.

Denzel R. Busick and Kent A. Hadenfeldt, of Luebs, Leininger, Smith, Busick & Johnson, for appellant.

Eric L. Klanderud, of Walentine, O'Toole, McQuillan & Gordon, for appellee Tower Insurance Co.

CAPORALE, WRIGHT, and CONNOLLY, JJ., and FLOWERS, D.J., and BOSLAUGH, J., Retired.

WRIGHT, J.

Vickie J. Spulak, now known as Vickie J. Maw (Maw), sued Tower Insurance Company, Inc. (Tower), for breach of an insurance contract. The jury returned a verdict for Tower, and Maw appeals.

SCOPE OF REVIEW

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996); *Goolsby v. Anderson*, 250 Neb. 306, 549 N.W.2d 153 (1996).

FACTS

Around November or December 1990, an insurance agent soliciting business for Tower offered to give a quote on insurance for the Broadway Cafe & Lounge, which was owned by Maw. The agent looked at the property and submitted a quote to Frank Spulak (Spulak), who was Maw's husband at that time. Spulak advised Maw to purchase the insurance, and Tower subsequently issued a policy of insurance to "Vickie J. Spulak DBA Broadway Cafe & Lounge," which covered the period of December 11, 1990, to December 11, 1991. The policy insured the business against several perils, including loss by fire.

On January 16, 1991, a fire occurred at the Broadway Cafe & Lounge. Maw filed a proof of loss with Tower and made a claim for damages. Tower denied the claim, and Maw sued Tower for breach of contract.

As an affirmative defense, Tower alleged, inter alia, that the fire was intentionally set by Spulak, who was still Maw's hus-

band at the time of the fire. Tower asserted that Spulak was a partner, employee, and agent of Maw's and that, under the policy, losses due to dishonest or criminal acts of a partner, agent, or employee were excluded.

On November 3, 1993, Maw filed a motion for summary judgment, which was heard on February 4, 1994. The motion was overruled on February 25. On the first day of the trial, September 12, Maw made a motion to demur ore tenus. A demurrer ore tenus was later filed with the court on September 20. Maw alleged that Tower failed to state any legally cognizable defenses because (1) Tower cannot apply the partnership exclusion without first having reformed the insurance contract to state that the named insured is a partnership and (2) under the statutes of Nebraska, the relevant exclusion is not valid. The district court denied the demurrer ore tenus.

At the close of her case, Maw made a motion for directed verdict and renewed her motion for summary judgment and her demurrer ore tenus on the same grounds. These motions were denied. Again, when Tower rested, Maw renewed her motion for directed verdict, motion for summary judgment, and demurrer ore tenus, which the court denied.

Thereafter, Maw presented rebuttal evidence, and Tower presented evidence on surrebuttal. Maw did not renew any of her motions at the close of her rebuttal or at the close of Tower's surrebuttal, which was the end of all the evidence.

On September 20, 1994, the jury returned a verdict in favor of Tower. Following the jury verdict, Maw moved the court for a judgment notwithstanding the verdict or, in the alternative, a new trial. On November 18, the district court overruled the motion for new trial, and Maw appealed.

ASSIGNMENTS OF ERROR

Maw claims the district court erred (1) in failing to sustain her motion for summary judgment, demurrer ore tenus, motions for directed verdict, and motion for judgment notwithstanding the verdict or, in the alternative, motion for new trial; (2) in failing to declare that the insurance contract was inconsistent with the 1943 Standard Fire Insurance Policy of the State of New York and the applicable statutes of the State of Nebraska,

thereby rendering Tower's affirmative defense invalid as a matter of law; (3) in failing to rule that the designation of the named insured in the policy should be reformed to designate a partnership as the insured, as a prerequisite to Tower's asserting as an affirmative defense that the policy excluded coverage for dishonest acts of a partner in the insured business; (4) in failing to declare as a matter of law that the insurance contract between Maw and Tower was ambiguous, requiring a construction of the contract in favor of Maw and affording coverage; (5) in sustaining Tower's oral motion in limine preventing Maw's counsel from discussing the pertinent provisions of the insurance policy, despite the fact that the policy had been admitted into evidence without objection or limitation; and (6) in failing to give proposed instructions tendered by Maw which would have fully instructed the jury on the law regarding partnership and agency.

ANALYSIS

Maw's first argument is essentially that the policy exclusion relied upon by Tower as an affirmative defense was not validly included within the policy of insurance and that, accordingly, the court should have sustained Maw's demurrer ore tenus, motions for directed verdict, renewed motion for summary judgment, or motion for judgment notwithstanding the verdict. We first address the motions for directed verdict, renewed motion for summary judgment, and motion for judgment notwithstanding the verdict.

A directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, where an issue should be decided as a matter of law. *World Radio Labs. v. Coopers & Lybrand, ante* p. 261, 557 N.W.2d 1 (1996). A party may waive or abandon a motion for the direction of a verdict in his favor by acts inconsistent with such motion. 89 C.J.S. *Trial* § 668 (1955) (citing *Ballard v. Ballard*, 226 Iowa 699, 285 N.W. 165 (1939). Thus, we have long held that a defendant who moves for a directed verdict at the close of the plaintiff's evidence and, upon the overruling of such motion, proceeds with trial and introduces evidence waives any error in the ruling on the motion. *Farmers &*

Merchants Bank v. Grams, 250 Neb. 191, 548 N.W.2d 764 (1996).

At the close of Tower's case, Maw moved for a directed verdict and then proceeded to offer considerable rebuttal evidence. We have not previously addressed whether a plaintiff who moves for a directed verdict at the close of the defendant's evidence (which motion is overruled) and who then proceeds to introduce rebuttal evidence waives any error on the motion for directed verdict. We see no reason not to apply the same rule to the plaintiff that we apply to the defendant. A plaintiff who moves for a directed verdict at the close of the defendant's evidence and, upon the overruling of such motion, proceeds to introduce rebuttal evidence waives any error in the ruling on the motion. See, e.g., *Cullender v. Doyal*, 44 N.M. 491, 105 P.2d 326 (1940) (holding that if it was error for trial court to deny plaintiff's motion for directed verdict, such error was waived by plaintiff, who thereafter introduced rebuttal testimony). Thus, we conclude that Maw waived any error on the motion for directed verdict by proceeding to offer rebuttal testimony. The motion for directed verdict was not renewed at the close of all the evidence. Therefore, the issue of the correctness of the district court's ruling on Maw's motions for directed verdict is not before us.

Regarding Maw's renewed motion for summary judgment, a renewed motion for summary judgment made during the course of trial and before the jury verdict is treated as a motion for directed verdict. See, e.g., *Graham v. Morrison*, 71 N.C. App. 743, 323 S.E.2d 385 (1984); *Johnsrud v. Tri-State Sales, Inc.*, 353 N.W.2d 255 (Minn. App. 1984). Maw offered rebuttal evidence following this motion for summary judgment and, therefore, waived the issue of whether the district court erred in denying it. Similarly, Maw did not renew the motion for summary judgment at the close of all the evidence.

Maw's motion for judgment notwithstanding the verdict likewise was not preserved for our review. Neb. Rev. Stat. § 25-1315.02 (Reissue 1995) provides that a motion for directed verdict made at the close of all the evidence is a prerequisite to a motion for judgment notwithstanding the verdict. *Palmtag v. Gartner Constr. Co.*, 245 Neb. 405, 513 N.W.2d 495 (1994).

Although Maw moved for a directed verdict when Tower rested, she did not renew the motion at the close of all the evidence, after Maw's rebuttal and Tower's surrebuttal. A motion for judgment notwithstanding the verdict may not properly be sustained in the absence of a motion for directed verdict made at the close of all the evidence. *Id.*

We next address the demurrer ore tenus. A demurrer ore tenus is an appropriate method to challenge a defective pleading and to object to the introduction of evidence in support of the defective pleading. See *Newman Grove Creamery Co. v. Deaver*, 208 Neb. 178, 302 N.W.2d 697 (1981). In *Newman Grove Creamery Co.*, the defendants asserted that the court erred in granting the plaintiff's demurrer ore tenus as to the defendants' answer alleging duress in the execution of a promissory note from the defendants to the plaintiff. At trial, the plaintiff offered the note in evidence, as well as other evidence, and rested. The plaintiff then demurred ore tenus to the defendants' answer for the reason that it failed to state facts which constituted an affirmative defense to the action. The court sustained the demurrer. On appeal, the defendants argued the demurrer ore tenus was not timely and, therefore, should not have been sustained.

We stated that generally a demurrer ore tenus is considered an objection to the introduction of evidence, rather than to a pleading. As to the timeliness, we concluded that it was doubtful the demurrer ore tenus was included in the court's order requiring that motions be filed 10 days prior to trial, and we noted that an objection to the admission of evidence on the grounds that a petition does not state a cause of action may be made at any time during trial. We stated that it was well established that a demurrer ore tenus was a permissible practice and that if a pleading to which the demurrer is addressed is totally defective, it is error to admit any evidence under such pleading. *Id.* (citing *Dickinson v. Lawson*, 125 Neb. 646, 251 N.W. 656 (1933)).

In denying Maw's claim, Tower relied upon an exclusion found in the commercial property portion of the policy under the caption "Causes of Loss - Special Form." Exclusion B(2) provides:

> We will not pay for loss or damage caused by or resulting from any of the following:
>
> . . . .
>
> h. Dishonest or criminal act by you, any of your partners, employees, directors, trustees, authorized representatives or anyone to whom you entrust the property for any purpose:
>
> (1) Acting alone or in collusion with others; or
>
> (2) Whether or not occurring during the hours of employment.
>
> This exclusion does not apply to acts of destruction by your employees; but theft by employees is not covered.

Maw's position is that the foregoing exclusion is not contained in the 1943 Standard Fire Insurance Policy of the State of New York or otherwise approved by the director of the Department of Insurance for the State of Nebraska, as required by Neb. Rev. Stat. § 44-501 (Reissue 1993). Therefore, Maw claims the exclusionary provision was not a viable affirmative defense to the petition. Section 44-501 provides:

> No policy or contract of fire and lightning insurance . . . shall be made, issued, used, or delivered by any insurer or by any agent or representative thereof on property within this state other than such as shall conform as nearly as practicable to blanks, size of type, context, provisions, agreements, and conditions with the 1943 Standard Fire Insurance Policy of the State of New York . . . and no other or different provision, agreement, condition, or clause shall in any manner be made a part of such contract or policy or be endorsed thereon or delivered therewith except as provided in subdivisions (1) through (11) of this section.

Tower argues that its policy is valid because, under § 44-501(11), the Director of Insurance may approve any form of policy with variations in terms and conditions from the standard policy. Tower contends there is an issue of fact as to whether the exclusion was approved by the Director of Insurance under § 44-501(11). In support of such alleged issue of fact, Tower claims that since it is a reputable company, it would have done everything necessary to conform to Nebraska law and, therefore, the provision would have been approved by

the Director of Insurance. In sum, Tower argues that its position as a reputable company creates a reasonable inference that the exclusion has been approved by the Director of Insurance.

The insurer bears the burden of establishing as an affirmative defense that an event falls within an exclusionary clause. See *Amco Ins. Co. v. Norton*, 243 Neb. 444, 500 N.W.2d 542 (1993). Once Maw presented evidence, through introduction of the 1943 Standard Fire Insurance Policy of the State of New York, that the exclusion in question failed to comply with § 44-501, Tower had the burden to show that the exclusion was approved by the Director of Insurance. See *Chism v. Campbell*, 250 Neb. 921, 553 N.W.2d 741 (1996) (movant for summary judgment makes prima facie case by producing enough evidence to demonstrate that movant is entitled to judgment if evidence were uncontroverted at trial; at that point, burden of producing evidence shifts to party opposing motion).

Regarding the inferences that may be deduced, Tower is entitled to the benefit of all proper inferences deducible from the relevant evidence. See *McWhirt v. Heavey*, 250 Neb. 536, 550 N.W.2d 327 (1996). Section 44-501(11) states that "[t]he Director of Insurance may approve any form of policy with variations in terms and conditions from the standard policy provided for in this section." However, we do not agree with Tower's position that because it was necessary to have its policy approved by the Director of Insurance for it to conform to Nebraska law, it may reasonably be inferred that Tower did so.

A demurrer ore tenus is considered as an objection to the introduction of evidence to support a defective pleading. *Newman Grove Creamery Co. v. Deaver*, 208 Neb. 178, 302 N.W.2d 697 (1981). Tower's amended answer did not allege that the exclusion was a valid exception to § 44-501 as having been approved by the Director of Insurance. Nor was Tower entitled to the inference that the exclusion had, in fact, been so approved. Therefore, Tower's defense was limited by the provisions of the policy as written in conformity with the 1943 Standard Fire Insurance Policy of the State of New York. See *Insurance Co. of North America v. County of Hall*, 188 Neb. 609, 198 N.W.2d 490 (1972).

The only applicable provision of the 1943 Standard Fire Insurance Policy of the State of New York excludes coverage "for loss occurring (a) while the hazard is increased by any means within the control or knowledge of the insured . . . ." Maw was the only named insured, and it was not alleged by Tower that the fire hazard was increased by any means within her control or knowledge. Thus, it is clear that Tower's amended answer failed to state a viable affirmative defense, and Maw's demurrer ore tenus should have been sustained.

CONCLUSION

This brings us to the ultimate question: To what relief is Maw entitled? Obviously, Tower did not ask for leave to further amend its answer, since the demurrer ore tenus was denied. Therefore, we consider the situation from the reverse angle. Had the demurrer properly been sustained, the district court would have granted leave to further amend the answer. It is generally an abuse of discretion to grant a demurrer without leave to amend where there is a reasonable possibility that the defect can be cured by amendment. See *Hitzemann v. Adam*, 246 Neb. 201, 518 N.W.2d 102 (1994).

The record does not disclose whether the exclusion at issue was in fact approved by the Director of Insurance. That fact is not before us, and we do not consider it. However, it is apparent that Tower could plead such a fact in an amended answer, which would correct the defect alleged by Maw's demurrer ore tenus. Accordingly, the judgment of the district court is reversed, and the cause is remanded for a new trial. Having reversed the judgment and remanded the cause for a new trial, we find it unnecessary to address Maw's other assignments of error.

REVERSED AND REMANDED FOR A NEW TRIAL.

WHITE, C.J., participating on briefs.

GERRARD, J., not participating.

INNER HARBOUR HOSPITALS, LTD., A GEORGIA NONPROFIT CORPORATION, ON BEHALF OF BRENDA HIBBERD, APPELLANT, V. STATE OF NEBRASKA DEPARTMENT OF SOCIAL SERVICES, APPELLEE.

559 N.W.2d 487

Filed February 21, 1997. No. S-95-294.

1. **Administrative Law: Judgments: Appeal and Error.** On an appeal under the Administrative Procedure Act, Neb. Rev. Stat. § 84-901 et seq. (Reissue 1994), an appellate court reviews the judgment of the district court for errors appearing on the record and will not substitute its factual findings for those of the district court where competent evidence supports those findings.
2. **Administrative Law: Statutes: Appeal and Error.** The interpretation of statutes and regulations presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below, according deference to an agency's interpretation of its own regulations, unless plainly erroneous or inconsistent.
3. **Administrative Law: Final Orders: Appeal and Error.** Under the provisions of Neb. Rev. Stat. § 84-917 (Reissue 1994), one aggrieved by a final decision in a contested case before an administrative agency is entitled to judicial review.
4. **Appeal and Error.** Not only must a claimed prejudicial error be assigned, it must also be discussed in the brief of the asserting party; an appellate court will not consider assignments of error which are not discussed in the brief.
5. **Administrative Law: Medical Assistance: Proof.** A care facility seeking reimbursement from the Department of Social Services pursuant to state medical assistance program regulations has the burden to prove its entitlement thereto.
6. **Administrative Law: Medical Assistance: Federal Acts.** Although participation in the medical assistance program is voluntary, a state that chooses to participate must comply with federal statutory and regulatory requirements.
7. **Administrative Law: Medical Assistance: Constitutional Law.** The Supremacy Clause compels compliance with federal law and regulations by participants in the medical assistance program.
8. **Estoppel.** The state or one of its political subdivisions may be subject to the doctrine of equitable estoppel under compelling circumstances where right and justice so demand in the interest of preventing a manifest injustice.
9. ____. The doctrine of equitable estoppel applies where, as a result of conduct of a party upon which another person has in good faith relied to one's detriment, the acting party is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed.
10. ____. The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of

the real facts. As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to one's injury, detriment, or prejudice.

11. **Administrative Law: Final Orders: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act, Neb. Rev. Stat. § 84-901 et seq. (Reissue 1994), for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed as modified.

Richard P. Nelson and Abbie J. Widger, of Nelson Morris & Titus, and R. Scott Stevenson, of Harry Trauffer & Associates, for appellant.

Don Stenberg, Attorney General, and Royce N. Harper for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and QUIST, D.J.

CAPORALE, J.

I. STATEMENT OF CASE

The defendant-appellee, Nebraska Department of Social Services, denied the claim of the plaintiff-appellant, Inner Harbour Hospitals, Ltd., for payment under the terms of the "Medical Assistance Provider Agreement" entered into by Inner Harbour and the department for care Inner Harbour provided Brenda Hibberd, a minor adopted by Patrick and Barbara Hibberd under a "Subsidized Adoption Agreement" with the department. Inner Harbour appealed to the district court pursuant to the Administrative Procedure Act, Neb. Rev. Stat. § 84-901 et seq. (Reissue 1994). The district court affirmed the department's decision, but remanded the matter in order that the department might determine whether it had an obligation under the adoption agreement to pay Inner Harbour for the care it provided the minor. In its appeal to the Nebraska Court of Appeals, Inner Harbour asserted, in summary, that the district court erred in (1) determining the type of care Inner Harbour provided the

minor, (2) determining the type of care qualifying for medicaid payments, and (3) failing to rule that the department was estopped from denying liability for medicaid reimbursement. Under our authority to regulate the caseloads of the two courts, we, on our own motion, removed the matter to this court. We now affirm as modified.

II. SCOPES OF REVIEW

On an appeal under the Administrative Procedure Act, an appellate court reviews the judgment of the district court for errors appearing on the record and will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Rainbolt v. State*, 250 Neb. 567, 550 N.W.2d 341 (1996). However, to the extent the interpretation of statutes and regulations is involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below, according deference to an agency's interpretation of its own regulations, unless plainly erroneous or inconsistent. See *Slack Nsg. Home v. Department of Soc. Servs.*, 247 Neb. 452, 528 N.W.2d 285 (1995).

III. FACTS

Although the pertinent copy of the provider agreement in the record is not as readable as it should be, we can discern that in addition to agreeing to participate as a medical assistance program hospital provider, Inner Harbour undertook to follow the department's policies and procedures in the administration of the program and to accept the payments made under the program as full and complete payment for the services rendered.

Inner Harbour provides care in both a locked unit and an unlocked "wilderness setting" unit. Its locked unit is similar to an acute care hospital. Its unlocked unit consists of cabins in a wilderness setting which house two to three patients each. Inner Harbour does not place supervisors in every cabin, but does have supervisors on the "campsite" 24 hours a day. Thus, the patients in the unlocked unit have access to 24-hour medical treatment. Although the cabins in the unlocked unit are less restrictive than the locked facilities, the frequency, intensity, and type of treatment are the same in both.

Inner Harbour admits its children patients into the locked unit in 99.6 percent of its cases, and when the children reach a "level of stability," they are transferred into the unlocked unit. Before a patient is transferred permanently to the unlocked unit, the patient goes through a transition phase wherein the patient is allowed to spend the day in the wilderness setting and the evenings in the locked unit.

The Sunderbruch Corporation-Nebraska is the physician peer review organization authorized under the terms of a contract with the department for services financed through the program to conduct on behalf of the department reviews of inpatient hospital services and to perform inpatient utilization reviews. Pursuant to program regulations, Sunderbruch performs preadmission reviews and regular "continued stay" reviews to determine if inpatient stay is required. A continued stay review is performed after admission during a patient's hospitalization to determine the medical necessity and appropriateness of continuing the patient's stay in a hospital level of care. According to Bonnie Brown, a department employee, when nonstate wards, such as the minor, go to inpatient hospitalization, Sunderbruch handles the preauthorization and continued stay reviews; in contrast, the department conducts continued stay reviews for state wards.

On March 24, 1992, pursuant to a telephone review, Sunderbruch approved the minor's admission into an acute care program. Inner Harbour admitted the minor on March 25 and placed her in the locked unit. Sunderbruch's records indicate that on February 9, 1993, the minor was transferred to "residential care" and that the "acute psychiatric review was terminated." On May 4, Inner Harbour staff discovered that the minor was carrying a knife, and after being confronted, the minor threatened staff. As a result, the minor was readmitted into the locked unit. Sunderbruch's records further indicate that the minor was returned to the unlocked unit on May 6. However, Dr. James Claytor, who is board certified in psychiatry, has worked with Inner Harbour since October 1988, and is one of its clinical directors and the minor's attending physician since her admittance, is of the view that the minor was transferred back to the unlocked unit on May 25, 1993.

Claytor testified that the minor was returned to the locked unit on June 3 or 4, 1993, for a brief period of time after threatening staff members. Sunderbruch's records indicate that the minor was given a "therapeutic pass with family" from June 5 to 7. Inner Harbour also put the minor in the locked unit overnight on July 10 because she was suffering a migraine headache. She was again returned to the locked unit on July 30 after attempting to run away and on August 2 for verbally and physically threatening others.

Sunderbruch denied continued coverage for the minor's treatment for the periods of February 9 to May 3, 1993, and May 7 to August 3, 1993, on the ground that the minor was no longer receiving "acute inpatient services" for those periods. According to Melvin Clothier, a department staff supervisor, "[t]he decision to deny services to [the minor] as of February 9 was reached after a thorough medical review of evaluation of the patient's individual case record for treatment and her progress." Clothier also stated:

> The information provided Sunderbruch during the review conducted on February 15 of 1993 indicated that the [minor] had been transferred to residential care on February 9 of 1993. It was therefore determined that with the exception of services furnished on I believe May 3 through May 6 of 1993, that [program] benefits should be denied beginning February 9, 1993.

According to Claytor, the minor "has had one of the most severe depressions [he has] seen in an adolescent . . . ." Staying in the locked unit for 11 months straight is "extremely unusual," and he is of the view that if Inner Harbour had released the minor on February 9 when the payments stopped, she would be at a high risk for running away, acting out aggressively, and becoming self-abusive, and she would have regressed. Claytor is of the opinion that all of the minor's treatments were medically necessary.

Dr. John Riedler, board certified in psychiatry, reviewed the minor's chart, but has not talked to anyone at Inner Harbour nor to the minor. Riedler testified that for a patient to be admitted into an acute inpatient setting, risk behaviors must exist, such as

> self-destructiveness, danger to self or others with a severe level of functional daily activity dysfunction and this has to be of a medical nature so that the disorder that's being treated has to be one that's recognized as a medical condition generally speaking. And the need for the services has to be such that the physician supervision is required on a daily basis, 24 hours per day so that the structure would need to be of a severe high enough intensity that both nurses and physicians would be needed on a regular, all the time basis and the physician would need to be seeing the patient on a daily basis.

Examples of risk behaviors include cutting oneself, gouging oneself, ingesting toxic substances, and injuring oneself badly. Riedler is of the view that Inner Harbour's residential facility is not an acute inpatient setting and of the opinion that Inner Harbour has not provided acute psychiatric inpatient hospitalization for the minor.

According to Riedler, the minor does not meet the criteria for acute care. Thus, housing her at Inner Harbour, in either the locked or the unlocked unit, is not medically necessary at all. Riedler is of the view that the minor should have been treated by placement in a therapeutic foster home or a therapeutic group home. According to Riedler, the minor needs "a consistent nurturing stable environment where she can develop family relationships and develop as a normal, . . . population instead of being looked at as if she's some kind of special person with all kinds of special problems which is the way she's being treated now." Riedler further is of the opinion that Inner Harbour's treatment was contributing to the minor's problems.

Jackie Childress and Joy M. Kruppa, Inner Harbour employees, testified telephonically. On February 15, 1993, a "Jan" at Sunderbruch told Kruppa that Sunderbruch would no longer be reviewing the minor's stay, since she was no longer in acute care. Kruppa took this comment to mean that the department would now handle the minor's bills as it did those of Jack Malone, a state ward and patient at Inner Harbour whose medical expenses are paid by the State under contract with Inner Harbour. According to Kruppa, Sunderbruch does not conduct continued stay reviews for Malone's treatment. Both Childress

and Kruppa testified that they did not know whether the minor was a state ward, but nonetheless believed that her claims would be handled the same way as Malone's.

Until February 1993, the department had paid for all of the minor's medical care at Inner Harbour. Around April 9, Inner Harbour became concerned, as it was no longer receiving payments for the minor's care, and on May 21 concluded that it was "getting the run around with the state." Childress testified that on July 8, Jane Steele, the department program worker who processed the minor's claims, called Inner Harbour and stated that checks for March, April, and May 1993 should be coming, and to send any future claims to Marge Vontz. Inner Harbour has not received checks for those months.

Childress testified that she spoke to Vontz on July 26, 1993, and was told to resubmit all claims to the department. Childress further testified that on September 14, someone at Inner Harbour talked to Bobbie Frerichs at Sunderbruch, who stated that she would send the checks for all claims through August by the first of October 1993. Also, on September 27, after Kruppa talked to Laura Riggs, Steele's supervisor, Kruppa told Childress that "Laura does not see any problems at this time." Childress interpreted this as meaning that as of September 27, Riggs did not see any problems with paying for the minor's treatment.

Kruppa testified that September 30, 1993, "was the first time that [she] had heard the word denial based on anything to do with medical necessity or acute care or anything like that." Kruppa stated that up until September 30, Inner Harbour believed that the department was going to pay for the minor's care. She also testified that Sunderbruch did not tell Inner Harbour that it would have to apply for residential care separately and that neither Sunderbruch nor the department sent Inner Harbour anything indicating that the department would cover residential care.

IV. ANALYSIS

The district court found that during the period in question, the minor had been receiving residential care and that acute care was not medically necessary. It then wrote that "this does not

resolve the issue as to whether the [d]epartment is obligated to pay Inner [Harbour] based on the subsidized adoption agreement . . . ." The district court also noted that it did not decide "whether [the adoptive parents] complied with the terms of the agreement nor whether the [d]epartment complied with the [pertinent] notice provisions . . . ."

However, so far as the record reveals, the only issue presented to and considered by the department was whether Inner Harbour is entitled to payment under its provider agreement with the department. Section 84-917 provides that one "aggrieved by a final decision in a contested case" before an administrative agency "shall be entitled to judicial review . . . ." Assuming, but not deciding, that the department has jurisdiction to pass upon the rights, if any, which Inner Harbour may have against the department under the latter's agreement with the adoptive parents, the fact is that the matter was not before the department, and it therefore made no decision, final or otherwise, with respect thereto. That being so, there was no decision for the district court to review in that regard; it was therefore without jurisdiction to issue any orders with respect to the adoption agreement. See *Bohling v. State Bd. of Pub. Accountancy*, 243 Neb. 666, 501 N.W.2d 714 (1993) (holding that in absence of valid final order, district court lacked power to review board's action). Accordingly, the portion of the district court's order which purports to remand this case to the department for further proceedings under the adoption agreement must be vacated, set aside, and held for naught.

1. Care Provided

That having been determined, we direct our attention to the first assignment of error, in connection with which Inner Harbour asserts that the district court erred in finding that the minor was receiving custodial or residential and not acute care. However, Inner Harbour does not argue this assertion in its brief. Not only must a claimed prejudicial error be assigned, it must also be discussed in the brief of the asserting party; an appellate court will not consider assignments of error which are not discussed in the brief. *Landmark Enterprises v. M.I. Harrisburg Assocs.*, 250 Neb. 882, 554 N.W.2d 119 (1996);

Farmers & Merchants Bank v. Grams, 250 Neb. 191, 548 N.W.2d 764 (1996). We therefore accept without analysis the district court's finding that during the period in question, the minor received residential care.

2. Qualifying Care

In the second assignment of error, Inner Harbour asserts the district court wrongly determined that although providing acute psychiatric care entitles the provider to reimbursement under the program, providing residential psychiatric care does not.

A care facility seeking reimbursement from the department pursuant to state medical assistance program regulations has the burden to prove its entitlement thereto. *Sunrise Country Manor v. Neb. Dept. of Soc. Servs.*, 246 Neb. 726, 523 N.W.2d 499 (1994).

Under 471 Neb. Admin. Code, ch. 20, § 001.02 (1990), inpatient hospital psychiatric services are covered under the program only if such services are medically necessary. Inner Harbour correctly notes that ch. 20, § 001.02A, does not make acute care a requirement for reimbursement and that "[t]he correct standard is active psychiatric care pursuant to 471 N.A.C. § 20-001.02.A." Brief for appellant at 14. Inner Harbour further contends that ch. 20, § 001.02, only requires that a patient receive active treatment, not acute care, and that the main distinction is between hospitals providing inpatient active care and those providing chronic or custodial care. Chapter 20, § 001.02A, defines "active treatment" as follows:

> 1. Treatment provided under a treatment plan . . . .
>
> 2. Reasonably expected to improve the client's medical condition or to determine a psychiatric diagnosis. The treatment must, at a minimum, be designed to reduce or control the client's psychiatric symptoms to facilitate the movement of the client to a less restrictive environment within a reasonable period of time.
>
> . . . .
>
> 3. Services supervised and evaluated by a psychiatrist.

In Inner Harbour's view, the minor's care met the foregoing criteria.

Inner Harbour also argues that the use of an acute care standard violates department regulations requiring that psychiatric care be provided by the least restrictive means. Chapter 20, § 001.02A(2), requires that inpatient active treatment "must, at a minimum, be designed to . . . facilitate the movement of the client to a less restrictive environment within a reasonable period of time." Also, 471 Neb. Admin. Code, ch. 10, § 010.11 (1988), requires that "[i]npatient hospital care must be reasonable, medically necessary, and appropriate for the billed class of care." Furthermore, 471 Neb. Admin. Code, ch. 20, § 001 (1988), states:

> The [d]epartment['s] philosophy is that all [inpatient hospital psychiatric] care provided to clients must be provided at the least restrictive and most appropriate level of care. . . . More restrictive levels of care will be used only when all other resources have been explored and have been deemed to be inappropriate. Inpatient hospital psychiatric services are medically necessary psychiatric services provided to an inpatient as defined in 471 NAC 10-001.02.

While Inner Harbour argues that the minor received the same level of care in both the locked and the unlocked unit, Claytor's testimony is that if a patient in the wilderness setting required immediate medical attention, the patient would be returned to the locked unit. Thus, placing the minor in the unlocked wilderness unit is sufficient proof that she no longer needed 24-hour medical attention and daily visits from her physician. Neither is there any showing that the care in question met the requirement of ch. 20, § 001.02A(3), which states that "[t]he client must be treated by a psychiatrist at least three times a week . . . ."

Moreover, although participation in the medical assistance program is voluntary, a state that chooses to participate must comply with federal statutory and regulatory requirements. *Wilder v. Virginia Hospital Assn.*, 496 U.S. 498, 110 S. Ct. 2510, 110 L. Ed. 2d 455 (1990); *Alexander v. Choate*, 469 U.S. 287, 105 S. Ct. 712, 83 L. Ed. 2d 661 (1985); *Harris v. McRae*, 448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980). Furthermore, the Supremacy Clause compels compliance with federal law and regulations by participants in the medical assistance program. *Elizabeth Blackwell Health Center for Women v.*

Knoll, 61 F.3d 170 (3d Cir. 1995), *cert. denied* ___ U.S. ___, 116 S. Ct. 816, 133 L. Ed. 2d 760 (1996).

Under 42 U.S.C. § 1396d(a)(16) (1994), medical assistance includes payment for "inpatient psychiatric hospital services for individuals under age 21, as defined in subsection (h) of this section." Section 1396d(h)(1)(A) states that inpatient psychiatric hospital services for individuals under age 21 includes only "inpatient services which are provided in an institution (or distinct part thereof) which is a psychiatric hospital as defined in section 1395x(f) of this title or in another inpatient setting that the Secretary [of the U.S. Department of Health and Human Services] has specified in regulations." Also, ch. 20, § 001, requires that inpatient hospital psychiatric services must be provided by a hospital that meets the requirements for participation in the program for psychiatric hospitals. Those requirements are set out in 42 U.S.C. § 1395x(f) (1994), which states that "[t]he term 'psychiatric hospital' means an institution which . . . satisfies the requirements of paragraphs (3) through (9) of subsection (e) of this section." Finally, § 1395x(e)(5) states that "[t]he term 'hospital' . . . means an institution which . . . provides 24-hour nursing service rendered or supervised by a registered professional nurse, and has a licensed practical nurse or registered professional nurse on duty at all times . . . ."

Thus, while the department's interpretation of the level of care required for reimbursement as "acute" is erroneous, as was the district court's adoption of the "acute care" standard, the regulations governing the medical assistance program nevertheless require that the psychiatric treatment be "active." See ch. 20, § 001. Although the evidence would support a finding that the care in question constituted "active treatment" as defined in ch. 20, § 001, the foregoing statutes and regulations also make clear that only inpatient psychiatric services given those under age 21 in a facility which provides 24-hour nursing service qualify for payment under the program. The evidence does not establish that the care in question was provided in such a setting. Furthermore, 471 Neb. Admin. Code, ch. 20, § 001.01B(4)(b) (1988), provides that "[t]he staffing pattern must ensure the availability of a registered professional nurse

24 hours each day . . . ." The testimony does not establish that Inner Harbour's wilderness setting care meets that requirement.

Consequently, there is no merit to the second assignment of error.

3. Claimed Estoppel

In the third and final assignment of error, Inner Harbour claims that the district court erred in failing to find that the department's actions estopped it from denying reimbursement under the program.

It is true that the state or one of its political subdivisions may be subject to the doctrine of equitable estoppel under compelling circumstances where right and justice so demand in the interest of preventing a manifest injustice. *Jennings v. Dunning*, 232 Neb. 366, 440 N.W.2d 671 (1989). The doctrine of equitable estoppel applies where, as a result of conduct of a party upon which another person has in good faith relied to one's detriment, the acting party is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed. *Friehe v. Schaad*, 249 Neb. 825, 545 N.W.2d 740 (1996). The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to one's injury, detriment, or prejudice. *Hullinger v. Board of Regents*, 249 Neb. 868, 546 N.W.2d 779 (1996).

The program requirements for inpatient hospital psychiatric services are set out in federal statutes and were, or should have been, well known to Inner Harbour. Thus, the district court did

not err in determining that Inner Harbour should be "charged with the knowledge that the type of treatment" was not covered.

When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Rainbolt v. State*, 250 Neb. 567, 550 N.W.2d 341 (1996). Thus, Inner Harbour clearly fails in at least one of the elements to establish equitable estoppel, namely, the "lack of knowledge and of the means of knowledge of the truth as to the facts in question" prong.

V. CONCLUSION

There being no merit to Inner Harbour's assignments of error, the district court's order is modified as set forth in part IV above and, as so modified, is affirmed.

AFFIRMED AS MODIFIED.

STATE EX REL. WAL-MART STORES, INC., A DELAWARE CORPORATION, RELATOR, V. HONORABLE ALFRED J. KORTUM, JUDGE, DISTRICT COURT FOR SCOTTS BLUFF COUNTY, NEBRASKA, RESPONDENT.

559 N.W.2d 496

Filed February 21, 1997. No. S-95-1358.

1. **Mandamus: Proof.** In a mandamus action, the relator has the burden of proof and must show clearly and conclusively that it is entitled to the particular thing the relator asks and that the respondent is legally obligated to act.
2. **Mandamus: Words and Phrases.** Mandamus is a law action. It is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear legal right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of the law.
3. **Mandamus.** To warrant the issuance of a peremptory writ of mandamus to compel the performance of a legal duty to act, (1) the duty must be imposed by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty must be clear.
4. ____. Mandamus lies only to enforce performance of a mandatory ministerial act or duty and is not available to control judicial discretion.

5. ____. The general rule is that an act or duty is ministerial if there is an absolute duty to perform in a specified manner upon the existence of certain facts.
6. **Attorney and Client: Conflict of Interest: Presumptions.** Confidences and secrets possessed by an attorney are presumptively possessed by other members of the attorney's firm.
7. **Attorney and Client: Conflict of Interest.** An attorney or law firm must avoid the present representation of a cause against a client that the attorney or law firm formerly represented, and which cause involves a subject matter which is the same as or substantially related to that formerly handled by the attorney or law firm.
8. ____: ____. In fashioning a "substantially related subject matter" test, a court must balance several competing considerations, including the privacy of the attorney-client relationship, the prerogative of a party to choose counsel, and the hardships that disqualification imposes on parties and the entire judicial process. However, the preservation of client confidences is given greater weight in that balancing.
9. ____: ____. The subject matters of two causes are "substantially related" if the similarity of the factual and legal issues creates a genuine threat that the affected attorney may have received confidential information in the first cause that could be used against the former client in the present cause.

Original action. Peremptory writ denied.

Philip M. Kelly, of Nichols, Douglas, Kelly, and Meade, P.C., for relator.

No appearance for respondent.

Tylor J. Petitt and amicus curiae Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister.

WHITE, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, CONNOLLY, and GERRARD, JJ.

CONNOLLY, J.

This is an original action for a peremptory writ of mandamus brought by relator, Wal-Mart Stores, Inc. (Wal-Mart). We are asked to determine whether a writ should issue disqualifying the law firm of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder, and Hofmeister, P.C. (Van Steenberg), from representing a party in an action against Wal-Mart because of the firm's prior representation of Wal-Mart in another case.

We set forth a "substantially related" test and conclude that Van Steenberg's prior representation of Wal-Mart is not substantially related to the present action against Wal-Mart because the factual and legal issues are not so similar as to create a gen-

uine threat that Van Steenberg may have received confidential information in the prior action that could be used against Wal-Mart in the present action. As a result, we decline to issue a peremptory writ of mandamus compelling the district court for Scotts Bluff County to vacate its order denying Wal-Mart's motion to disqualify Van Steenberg.

BACKGROUND

The factual statement of this case is taken largely from the findings of fact made by District Judge Donald E. Rowlands II, who was appointed as special master by this court for the taking of evidence and for recommending findings of fact and conclusions of law. Additional facts were taken from the pleadings, the proceedings before the district court on the original motion to disqualify counsel, and various exhibits.

On July 21, 1994, Debra J. Holden filed suit against the Scottsbluff Wal-Mart store through her counsel, Leonard W. Shefren of Omaha, Nebraska. See Holden v. Wal-Mart Stores, Inc., Scotts Bluff County District Court, docket 41883. In her petition, Holden asserts that Wal-Mart was negligent in failing to properly maintain and/or warn of a hole in the store's parking lot and that this negligence caused her personal injury when she fell into the hole on July 1, 1992. Subsequent to Wal-Mart's filing an answer, Shefren withdrew as attorney of record. On or about September 7, 1995, Tylor Petitt, an attorney with Van Steenberg, entered an appearance as Holden's counsel.

Van Steenberg had previously defended Wal-Mart, through its partner Steve Smith, in four tort cases in the district court for Scotts Bluff County: Ramirez v. Wal-Mart Stores, Inc., docket 34217; Sanderson v. Wal-Mart Stores, Inc., docket 34218; Pottorff v. Wal-Mart Stores, Inc., docket 38913; and Nebarez v. Wal-Mart Stores, Inc., docket 41412.

The Ramirez and Sanderson cases involved claims of false arrest and malicious prosecution and ended in 1987 with summary judgments in favor of Wal-Mart. The Pottorff case involved claims that Wal-Mart was negligent in failing to properly maintain and/or warn of a dangerous condition in the floor of the store and that this negligence caused personal injury when the customer slipped and fell in an area that had previ-

ously been wet-mopped. The Pottorff case concluded in June 1993, with a jury verdict in favor of the plaintiff, approximately 1 year after Holden was injured but 2 years before Petitt entered an appearance as Holden's counsel. The Nebarez case involved claims by a customer who was injured in an assault inside the store and concluded in August 1994, with summary judgment in favor of Wal-Mart.

Wal-Mart does not have an outside claims administration firm or insurance agency that handles claims made against it. Instead, Wal-Mart relies on its staff of in-house attorneys to administer all claims and to hire legal counsel. A Wal-Mart attorney, Michelle Johnson, retained Smith to defend Wal-Mart in the aforementioned cases. In preparation for its defenses in those cases, Smith had complete access to the Scottsbluff Wal-Mart store and to its managers and staff.

While assisting Smith in preparation for Wal-Mart's defenses, Johnson related to Smith Wal-Mart's general defense strategy, internal policies, and the conduct of similar lawsuits in other parts of the country. In addition, Kern Radtke, manager of the Scottsbluff store, gave Smith complete access to procedure manuals, lists, and sales information. After Smith concluded his representation of Wal-Mart in the Nebarez case, he was informed by Wal-Mart that neither he nor Van Steenberg would represent Wal-Mart in any further matters.

The district court entered an order denying Wal-Mart's motion to disqualify Van Steenberg from further representation of Holden in her tort action against Wal-Mart. Wal-Mart brought this original action seeking a peremptory writ of mandamus from this court compelling the district court to vacate its order.

The special master appointed by this court found that during the time Wal-Mart was represented by Smith, the policies, procedures, and practices of which he was informed did not include any confidential information, trade secrets, or anything that was not discoverable. However, the special master recommended that a peremptory writ of mandamus be issued directing the district court to disqualify Petitt and Van Steenberg from further representation of Holden in her action against Wal-Mart. The special master reasoned that "the nexus between [the Pottorff

case and the instant case], both in type and time of occurrence, is too close to avoid the appearance of impropriety, whether in the subjective eyes of Wal-Mart employees, or of the legally recognized reasonable person."

ASSIGNMENT OF ERROR

Wal-Mart alleges that the district court erred in failing to disqualify Van Steenberg.

STANDARD OF REVIEW

In a mandamus action, the relator has the burden of proof and must show clearly and conclusively that it is entitled to the particular thing the relator asks and that the respondent is legally obligated to act. *State ex rel. FirsTier Bank v. Mullen*, 248 Neb. 384, 534 N.W.2d 575 (1995); *State ex rel. Scherer v. Madison Cty. Comrs.*, 247 Neb. 384, 527 N.W.2d 615 (1995).

ANALYSIS

PEREMPTORY WRIT OF MANDAMUS

Mandamus is a law action. It is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear legal right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of the law. *State ex rel. Scherer v. Madison Cty. Comrs., supra*; *State ex rel. Wieland v. Beermann*, 246 Neb. 808, 523 N.W.2d 518 (1994); *State ex rel. Creighton Univ. v. Hickman*, 245 Neb. 247, 512 N.W.2d 374 (1994).

To warrant the issuance of a peremptory writ of mandamus to compel the performance of a legal duty to act, (1) the duty must be imposed by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty must be clear. *State ex rel. FirsTier Bank v. Mullen, supra*; *State ex rel. Creighton Univ. v. Hickman, supra*. Mandamus lies only to enforce performance of a mandatory ministerial act or duty and is not available to control judicial discretion. *Id.* The general rule is that an act or duty

is ministerial if there is an absolute duty to perform in a specified manner upon the existence of certain facts. *State ex rel. FirsTier Bank v. Mullen, supra*; *State ex rel. FirsTier Bank v. Buckley*, 244 Neb. 36, 503 N.W.2d 838 (1993).

"SUBSTANTIALLY RELATED" TEST

Our first inquiry, and to a great extent the resolution of this action, involves a determination of what is meant by the phrase "substantially related subject matter." In *State ex rel. Freezer Servs., Inc. v. Mullen*, 235 Neb. 981, 987, 458 N.W.2d 245, 249-50 (1990), this court announced the rule that " '[a]n attorney, after receiving the confidence of a client, may not enter the service of others whose interests are adverse to such client, in the same subject-matter to which the confidence relates, or in matters so closely allied thereto as to be, in effect, a part thereof.' " In *State ex rel. FirsTier Bank v. Buckley*, 244 Neb. at 45, 503 N.W.2d at 844, this court expanded the rule announced in *State ex rel. Freezer Servs., Inc.*, by stating that

> an attorney must avoid the present representation of a cause against a client of a law firm . . . which he or she . . . formerly [represented], and which cause involves a subject matter which is the same as or substantially related to that handled by the former firm while the present attorney was associated with that firm.

See, also, *State ex rel. FirsTier Bank v. Mullen, supra*. However, this general rule arose, and has only been applied, in the context where an attorney or attorneys ceased working for a law firm that represented a particular client and then began working for another law firm in a position adversarial to that client. See, *id.*; *State ex rel. FirsTier Bank v. Buckley, supra*.

In the instant case, no attorneys switched law firms. Instead, Smith of Van Steenberg formerly defended Wal-Mart, and Petitt of Van Steenberg is now suing Wal-Mart. Nonetheless, this court has made it patently clear that "confidences and secrets possessed by an attorney are presumptively possessed by other members of the attorney's firm." *State ex rel. FirsTier Bank v. Mullen*, 248 Neb. at 389, 534 N.W.2d at 579. Accord, *State ex rel. Freezer Servs., Inc. v. Mullen, supra*. As such, an attorney or law firm must avoid the present representation of a cause

against a client that the attorney or law firm formerly represented, and which cause involves a subject matter which is the same as or substantially related to that formerly handled by the attorney or law firm.

In *State ex rel. FirsTier Bank v. Buckley*, 244 Neb. at 44, 503 N.W.2d at 843, we stated that "[i]n defining 'substantially related,' the court looked at whether counsel may have received confidential information from the former client that could be used against it in the subsequent representation." However, it is now necessary to further define what constitutes a "substantially related subject matter."

In fashioning a "substantially related subject matter" test, a court must balance several competing considerations, including the privacy of the attorney-client relationship, the prerogative of a party to choose counsel, and the hardships that disqualification imposes on parties and the entire judicial process. *State ex rel. Creighton Univ. v. Hickman*, 245 Neb. 247, 512 N.W.2d 374 (1994); *State ex rel. FirsTier Bank v. Buckley, supra.* However, the preservation of client confidences is given greater weight in that balancing. *State ex rel. FirsTier Bank v. Buckley, supra.*

Mindful of these competing interests, we determine that the subject matters of two causes are "substantially related" if the similarity of the factual and legal issues creates a genuine threat that the affected attorney may have received confidential information in the first cause that could be used against the former client in the present cause.

Simply stated, if the court determines that the unique factual and legal issues presented in both cases are so similar that there exists a genuine threat that confidential information may have been revealed in the previous case that could be used against the former client in the instant case, then disqualification must ensue.

A nonexhaustive list of the factors a court may consider in making this determination includes: whether the liability issues presented are similar; whether any scientific issues presented are similar; whether the nature of the evidence is similar; whether the lawyer had interviewed a witness who was a key in both causes; the lawyer's knowledge of the former client's trial strategies, negotiation strategies, legal theories, business prac-

tices, and trade secrets; the lapse of time between causes; the duration and intimacy of the lawyer's relationship with the clients; the functions being performed by the lawyer; the likelihood that actual conflict will arise; and the likely prejudice to the client if conflict does arise.

Clearly, the "appearance of impropriety" and attempted screening procedures ("Chinese Walls") do not address whether two causes are "substantially related" and, thus, are not factors that may be considered in determining whether or not to disqualify an attorney or firm.

Whether Causes Are "Substantially Related"

In the instant case, Wal-Mart asserts that the district court erred in failing to disqualify Van Steenberg. The parties are not disputing what the factual and legal issues are, but instead what implications they have on the disqualification decision. It is not disputed that Van Steenberg's interests are materially adverse to Wal-Mart's or that the information Smith acquired through his previous defenses of Wal-Mart is imputed to the entire Van Steenberg law firm. Thus, it is only left to be determined whether any of the previous cases in which Van Steenberg defended Wal-Mart are "substantially related" to the instant case against Wal-Mart.

Of the four cases in which Van Steenberg defended Wal-Mart, the case with factual and legal issues most closely related to the instant case is Pottorff v. Wal-Mart Stores, Inc., Scotts Bluff County District Court, docket 38913. As such, we must determine whether the Pottorff case and the instant case are substantially related.

In the instant case, Holden asserts that Wal-Mart's negligence caused her to suffer a strained knee and sprained ankle when she fell into a hole located in the store's parking lot. Approximately 1 year after Holden was injured, but 2 years before Petitt entered an appearance as Holden's counsel, Van Steenberg concluded its defense of Wal-Mart in the Pottorff case. In the Pottorff case, the jury found that Wal-Mart's negligence caused Pottorff to suffer a bulging disk, an injured elbow, headaches, and leg pain when she slipped and fell in an area inside the store that had previously been wet-mopped.

Wal-Mart asserts that these cases are substantially related because in both cases a customer was injured in a fall on Wal-Mart's premises, the petitions alleged that Wal-Mart was negligent in failing to properly maintain its premises and in failing to warn of dangerous conditions, and Wal-Mart asserted contributory negligence and assumption of risk as defenses. Conversely, Van Steenberg, appearing amicus curiae, asserts that these cases are not substantially related because the Pottorff case involved a slip and fall on a slick floor, while the instant case involves a fall into a hole; the Pottorff case involved a floor, while the instant case involves a parking lot; and the accident in the Pottorff case happened inside the store, while the accident in the instant case happened outside the store.

Wal-Mart correctly asserts that the pleadings in these cases are similar. However, the mere fact that the pleadings are similar does not make the two cases substantially related. The differences in the factual and legal issues, where a plaintiff falls into a hole in a parking lot as opposed to where a plaintiff falls on a wet floor inside a store, are crucial and are not outweighed by the similarities.

We agree with the special master's findings that during the time Wal-Mart was represented by Smith, the policies, procedures, and practices Smith was told about did not include any trade secrets or anything that was not discoverable. Courts have recognized that defense strategies are confidential information that may be factored into the disqualification decision. See, e.g., *SLC Ltd. V v. Bradford Group West, Inc.*, 999 F.2d 464 (10th Cir. 1993); *Texaco, Inc. v. Garcia*, 891 S.W.2d 255 (Tex. 1995); *Gellman v. Hilal*, 159 Misc. 2d 1085, 607 N.Y.S.2d 853 (1994). However, the defense strategies utilized in these types of relatively uncomplicated slip-and-fall actions are generally commonplace and routine. Wal-Mart did not assert that Van Steenberg became privy to any defense strategies that are unique, unexpected, unusual, or novel. Thus, we determine that an outside firm, with no prior association with Wal-Mart, would have the same or similar practical knowledge of how Wal-Mart would defend against this action and would have the same discovery opportunities.

Because Van Steenberg did not acquire any specialized knowledge of defense strategies or any other discovery advantages, we conclude that the similarity of the factual and legal issues does not create a genuine threat that Van Steenberg may have received confidential information from Wal-Mart that could be used against Wal-Mart in the instant case.

Because Wal-Mart failed to meet its burden of clearly showing that it has a legal right to the relief sought, we determine that the district court had no alternative but to deny Wal-Mart's motion to disqualify Van Steenberg. See, *State ex rel. Scherer v. Madison Cty. Comrs.*, 247 Neb. 384, 527 N.W.2d 615 (1995); *State ex rel. Wieland v. Beermann*, 246 Neb. 808, 523 N.W.2d 518 (1994); *State ex rel. Creighton Univ. v. Hickman*, 245 Neb. 247, 512 N.W.2d 374 (1994). Since the district court did not have a clear legal duty to act at the time the writ was applied for, we decline to issue the requested writ. See, *State ex rel. FirsTier Bank v. Mullen*, 248 Neb. 384, 534 N.W.2d 575 (1995); *State ex rel. Creighton Univ. v. Hickman, supra.*

CONCLUSION

We decline to issue a peremptory writ of mandamus compelling the district court to vacate its order denying Wal-Mart's motion to disqualify Van Steenberg from further representation of Holden in her tort action, Holden v. Wal-Mart Stores Inc., Scotts Bluff County District Court, docket 41883.

PEREMPTORY WRIT DENIED.

WHITE, C.J., concurring.

In *State ex rel. Freezer Servs., Inc. v. Mullen*, 235 Neb. 981, 986, 458 N.W.2d 245, 249 (1990), the court framed the issue as follows: "[W]hether a law firm which represents one party in a pending lawsuit must be disqualified from further representation of that party when the law firm hires attorneys and personnel *who have worked closely with and represented the opposing party* in that same litigation." (Emphasis supplied.) We answered in the affirmative.

In my judgment, that statement contains the sole test for disqualification of counsel. I concur.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. FRED H. BROWN, RESPONDENT.

560 N.W.2d 123

Filed February 28, 1997. No. S-94-156.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline a lawyer is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings.** In order to sustain a complaint in a lawyer discipline proceeding, the Nebraska Supreme Court must find the complaint to be established by clear and convincing evidence.
3. **Disciplinary Proceedings: Rules of the Supreme Court.** The failure to comply with Neb. Ct. R. of Discipline 16 (rev. 1996) places one in contempt of court and constitutes an aggravating circumstance.
4. **Disciplinary Proceedings.** Doing what one is required to do is not a mitigating circumstance.
5. ____. The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
6. **Disciplinary Proceedings: Convictions.** The conviction of a crime involving moral turpitude, whether a felony or misdemeanor, is conclusive evidence warranting disciplinary action.
7. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed, it is necessary that the following factors be considered: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
8. ____. Violation of a disciplinary rule concerning the practice of law is a ground for discipline.

Original action. Judgment of disbarment.

John W. Steele, Assistant Counsel for Discipline, for relator.

Fred H. Brown, pro se.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and SPRAGUE, D.J.

PER CURIAM.

This is a lawyer discipline case wherein the relator, Nebraska State Bar Association, seeks to have this court discipline the respondent, Fred H. Brown, a member of the relator association.

SCOPE OF REVIEW

A proceeding to discipline a lawyer is a trial de novo on the record, in which this court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, this court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. NSBA v. Johnston, ante* p. 468, 558 N.W.2d 53 (1997).

FACTS

Brown was duly admitted by this court to the practice of law in the State of Nebraska and to membership in the association on October 28, 1982. On February 19, 1993, he was indicted in the U.S. District Court for the District of Nebraska for the felonies of possessing with the intent to distribute cocaine and of conspiring to distribute cocaine, all in violation of federal law, and with using or intending to use a vehicle to commit or facilitate the same. On February 4, 1994, Brown was convicted of the offenses charged in the indictment, and on February 11, we suspended him from the practice of law.

On July 25, 1994, Brown was sentenced to pay a $10,000 fine, to imprisonment for a term of 15 months, and to supervision upon release from imprisonment for a term of 3 years. In addition, his interest in the vehicle mentioned earlier was forfeited to the U.S. Government. His convictions were affirmed by the U.S. Court of Appeals for the Eighth Circuit in *U.S. v. Fregoso*, 60 F.3d 1314 (8th Cir. 1995). No further appeal was taken.

Brown has served 7 months of the 15-month prison sentence, from August 1994 to March 1995, and remains under supervised release until March 1998. While on supervised release, Brown must comply with the following pertinent conditions:

> refrain from excessive use of alcohol and . . . not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
>
> . . . .

> . . . submit to such testing as may be requested by any person involved in monitoring [Brown's] supervision to detect the presence of alcohol or controlled substances in [his] body fluid and to determine whether [he] has reverted to the use of any prohibited substances.
>
> . . . .
>
> . . . participate in a program as directed and approved by the U.S. Probation Office for treatment of narcotic addiction, drug or alcohol dependency which will include testing for detection of substance abuse.

On February 28, 1996, the association filed formal charges against Brown, alleging, among other things, that his conduct violated Canon 1, DR 1-102(A)(1), (3), and (6), of the Code of Professional Responsibility, which provides that a lawyer shall not "(1) Violate a Disciplinary Rule. . . . (3) Engage in illegal conduct involving moral turpitude. . . . (6) Engage in any other conduct that adversely reflects on his or her fitness to practice law."

Brown filed an answer admitting that he had been convicted of the charged felonies and that the convictions had been affirmed, but denied that his conduct constituted a violation of the code.

The relevant evidence at the federal trial, as summarized by the U.S. Court of Appeals in *Fregoso, supra*, is that Brown facilitated Dixie Buck's cocaine enterprise. Buck began distributing cocaine in approximately February 1992 and testified that on one occasion when she ran out of cocaine, she called Brown and informed him of her situation. Brown told her to go to a local bar and he would meet her there and possibly be able to help her. She subsequently met Brown and Steve Cymbalista at the bar. Brown and Cymbalista set up a "buy" for her with one of the bar's patrons. Buck gave Brown $250, and Brown in turn gave the money to Cymbalista, who went to the men's room in the bar, bought one-eighth of an ounce of cocaine from the patron, and delivered it to Buck. Further, on several occasions, Brown acted as an informal "debt collector" for Buck by persuading Cymbalista and Mary Cox to pay sums they owed Buck for cocaine. For instance, Buck testified that she sometimes "fronted" cocaine to Cymbalista. When Cymbalista

would not pay her for the quantities, she testified that she called Brown, who persuaded Cymbalista to pay her. Brown frequently drove Cox and Cymbalista to Buck's house, where they would purchase cocaine, albeit for their own personal use. Brown was present at Buck's house when various drug transactions and drug use were taking place, frequently joining the activities himself, and he clearly knew the nature of business that was taking place there. Moreover, Buck testified that Brown was aware that she was getting some of her cocaine from others. Brown used Cox or Cymbalista to pick up cocaine from Buck and bring it back to him, after which they would share the drugs. Brown instructed Cox to carry the cocaine in her mouth and swallow it if she was stopped by the police. Brown also acquired cocaine from Buck by himself and shared it with Cox and Cymbalista. Cox witnessed Cymbalista purchase cocaine from Brown on numerous occasions. There was also evidence that Brown (who was representing Buck on her workers' compensation claim) personally delivered Buck's monthly workers' compensation checks to her without charging or deducting any attorney fee (thus indirectly financing her drug distribution business), and when Buck was arrested in Missouri on an unrelated drug charge, Brown provided the bail money. The circuit court concluded that the evidence shows that Brown was no passive purchaser but, instead, played a larger role than merely buying drugs from Buck for his own personal consumption.

The referee appointed by this court conducted a hearing, at which Brown and two lawyers who had practiced law with him testified. The pertinent portions of Brown's testimony are set forth later in this opinion. Attorney James H. Moylan expressed his opinion that Brown always did an excellent job representing clients. Having seen, observed, and talked with Brown since his convictions, Moylan recommended that Brown be reinstated to practice law and offered to supervise Brown's work if he were readmitted.

Attorney John P. Steichen testified that he had been acquainted with Brown since 1987. Brown had always been considered an excellent lawyer, and Steichen could not recall any of Brown's previous clients ever expressing any dissatisfaction with Brown's representation. Steichen was confident that

Brown would still be able to practice law and stated that he, too, would be willing to supervise Brown's work.

The referee found, among other things, that Brown neither acknowledges the nature of his convictions nor shows remorse for his actions, asserting that he was convicted for using and being addicted to cocaine; that the evidence did not support Brown's claim that his drug use and convictions arose from personal problems, including divorce; that as Brown did no more than he was required to do after being suspended, his actions in that regard do not mitigate any discipline to be imposed; and that while the evidence demonstrated that Brown has undergone inpatient and outpatient counseling and treatment for chemical dependency, he did not voluntarily enter treatment until some 5 months after he was indicted and has suffered a relapse, having used cocaine in February 1994. The referee concluded that Brown had violated the code as charged by the association and recommended disbarment.

Brown takes exception to the foregoing findings and to the recommended disciplinary sanction, urging that the referee did not properly consider and evaluate the mitigating circumstances.

ANALYSIS

In order to sustain a complaint in a lawyer discipline proceeding, we must find the complaint to be established by clear and convincing evidence. *State ex rel. NSBA v. Johnston, ante* p. 468, 558 N.W.2d 53 (1997).

FACTUAL FINDINGS

On de novo review, we independently find that the evidence clearly and convincingly establishes that Brown indeed neither acknowledges the nature of his convictions nor shows remorse for his actions. Notwithstanding the evidence at the federal trial, Brown continues to maintain that "there was never any cocaine found in my possession, and I readily admitted the use of it, didn't deny it. I think the facts leading up to the conspiracy to distribute were kind of suspect."

We also find that the evidence does not support a finding, even by a preponderance of the evidence, that Brown's cocaine

use stemmed from personal problems, including divorce. All the record contains in that regard is Brown's testimony that

> during that time and leading up through that and — you know, before and after the conviction, I'd gone through some personal problems, went through a divorce and — which is kind of hard, and I think — you know, problems leading up through the divorce and even afterwards probably contributed to kind of going downhill and using drugs and things.

If ever personal problems may constitute mitigation for involvement in a drug enterprise, a matter we do not decide, this evidence falls far short of providing such a basis.

Neb. Ct. R. of Discipline 16 (rev. 1996) requires, among other things, that one suspended from the practice of law return to the Clerk of this court the card showing membership in the association and file an affidavit stating that all present clients and lawyers have been notified of the suspension and that clients have been assisted in obtaining representation. While the failure to comply with the rule places one in contempt of this court and certainly constitutes an aggravating circumstance, see *Johnston, supra*, it does not follow that compliance with the rule provides a mitigating circumstance; as the referee noted, doing what one is required to do is not a mitigating circumstance. In point of fact, it took Brown more than one try at complying with the rule because the first notices he sent to his clients were deficient in that they contained a recommendation that representation be provided by a particular substitute lawyer.

The evidence establishes that Brown began substance abuse counseling in July 1993, 5 months after he was indicted. Further, although Brown appears to be arguing that because he attends counseling voluntarily, it should be considered a sufficient mitigating factor, he fails to acknowledge that all of the treatment programs he has completed were mandated by the conditions of his supervised release, including the random urinalysis testing and chemical dependency treatment. It is of particular significance that when asked at the hearing before the referee how long it had been since he had used cocaine, Brown answered that he had stopped using cocaine after he was

indicted up until the time he was convicted, but then "just kind of said, hell with it" and used cocaine in February 1994. Brown, however, swore under oath in his February 22, 1994, response to our order to show cause why he should not be temporarily suspended from the practice of law that "the last time he used cocaine was in March of 1993" and that because of such, "there exist[ed] no legitimate concern" that any harmful conduct was continuing or constituted a danger of continuing. This inconsistency is of grave concern, as it raises the question of whether Brown was lying under oath when he stated that he had not used cocaine since March 1993, or whether he in fact used cocaine within a couple of weeks of swearing to us that there was no longer a legitimate concern that he would engage in harmful conduct. As the referee noted, neither of the possibilities is reassuring.

The basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances. *State ex rel. NSBA v. Gridley*, 249 Neb. 804, 545 N.W.2d 737 (1996).

The conviction of a crime involving moral turpitude, as this crime does, whether a felony or misdemeanor, is conclusive evidence warranting disciplinary action. See *State ex rel. Nebraska State Bar Assn. v. Tibbels*, 167 Neb. 247, 92 N.W.2d 546 (1958). Accordingly, the evidence clearly and convincingly establishes that Brown violated DR 1-102(A)(1), (3), and (6), which warrants disciplinary action. The only question is what the disciplinary sanction should be.

Determination of Sanction

To determine whether and to what extent discipline should be imposed, it is necessary that the following factors be considered: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *State ex rel. NSBA v. Johnston, ante* p. 468, 558 N.W.2d 53 (1997). Violation of a disciplinary rule concerning the practice of law is a ground for discipline. *Gridley, supra.*

In *State ex rel. NSBA v. Matt*, 213 Neb. 123, 327 N.W.2d 622 (1982), the respondent was charged with conspiracy to possess cocaine with intent to deliver. He was allowed to successfully complete a pretrial diversion program, after which the charges were dismissed. The association charged the respondent with violation of DR 1-102(A)(1) and (6). Evidence showed that as a result of the respondent's efforts, the cocaine buyer was able to illegally purchase a controlled substance, and the seller, also an acquaintance of the respondent's, was able to sell a controlled substance, and that the respondent knew that such would be the result of his efforts. The evidence also showed his conduct was motivated by his friendship with the buyer and seller, and he received no remuneration for his efforts. Finally, there was evidence that the respondent had purchased and occasionally used marijuana personally. We wrote that

> such conduct adversely reflects upon respondent's fitness to practice law and constitutes a violation of the disciplinary rules as charged. There can be no doubt that aiding and abetting criminal dealings in controlled substances, whatever the motivation of an attorney may be, constitutes conduct involving moral turpitude and warrants disciplinary action.

Matt, 213 Neb. at 126, 327 N.W.2d at 623-24. Because the record reflected that the respondent had successfully completed pretrial diversion and was no longer involved with alcohol or drugs and that there were other mitigating circumstances, we concluded that he should be suspended from the practice of law for a period of 1 year.

In *State ex rel. NSBA v. Egan*, 246 Neb. 583, 520 N.W.2d 779 (1994), the respondent was convicted in the federal courts of conspiracy to distribute and possession with the intent to distribute methamphetamine, and with 25 related substantive crimes committed in furtherance of the conspiracy. See *U.S. v. Lucht*, 18 F.3d 541 (8th Cir. 1994). He was sentenced to a term of incarceration of 15 years 8 months. The evidence at the drug trial showed that the respondent was a willing participant in the conspiracy, that he had distributed drugs, and that he advised his supplier about laundering money. The respondent voluntarily surrendered his license and admitted that he had been convicted

and that such convictions violated Canon 1, DR 1-102 and his oath of office as a lawyer. After waiving his right to notice, appearance, and hearing, we accepted the surrender and ordered the respondent disbarred.

The respondent in *State ex rel. NSBA v. Aguilar*, 242 Neb. 274, 494 N.W.2d 346 (1993), had been suspended from the practice of law in Nebraska for failure to pay membership dues. Over a year after his suspension in Nebraska, the Florida Supreme Court disbarred him after finding that he had been the attorney for the leader of a large cocaine-smuggling operation, had conspired with other individuals to import large amounts of cocaine into the United States, had defrauded the United States by concealing the income gained through the drug trafficking, and had developed an elaborate system to "launder" the proceeds from the illegal transactions. In the proceedings for reciprocal discipline, we disbarred the respondent.

In *State ex rel. NSBA v. Payne*, 226 Neb. 727, 414 N.W.2d 283 (1987), another proceeding for reciprocal discipline, the Indiana Supreme Court held that possessing and using cocaine; purchasing and possessing marijuana, unspecified narcotics, and cocaine; failing to appear for a client at a hearing; and accepting cocaine as payment for legal services warranted disbarment. The respondent had also been disbarred in Colorado. We also disbarred the respondent from the practice of law in Nebraska.

Brown calls to our attention a number of cases from other jurisdictions in which a variety of disciplinary sanctions other than disbarment were imposed. E.g., *In re Leardo*, 53 Cal. 3d 1, 805 P.2d 948, 278 Cal. Rptr. 689 (1991) (lawyer convicted of two counts of possession of controlled substances with intent to distribute placed on conditional probation; became dependent on unavailable synthetic opiates resulting in his originally obtaining heroin for self-medication); *Matter of Rivkind*, 164 Ariz. 154, 791 P.2d 1037 (1990) (lawyer convicted of attempted possession of cocaine suspended 2 years and placed on probation 1 year; demonstrated contrition, rehabilitated self, and engaged in educating and assisting others); *Matter of Kinnear*, 105 N.J. 391, 522 A.2d 414 (1987) (lawyer shared or gave cocaine to undercover agent; pled guilty to distribution of

cocaine, suspended 1 year; did not profit from single unlikely to recur act).

However, as we observed in the contexts of disciplining a judge, *In re Complaint Against Kneifl*, 217 Neb. 472, 351 N.W.2d 693 (1984), and of considering an applicant's fitness to be admitted to the practice of law, *In re Application of Majorek*, 244 Neb. 595, 508 N.W.2d 275 (1993), any effort to design the appropriate discipline by comparing this case to cases from other jurisdictions is of limited value. Although such an analysis might be instructive, the responsibility of defining and enforcing proper conduct for Nebraska lawyers falls upon this court.

In discharging that responsibility, we recognize that there can exist circumstances which mitigate the punishment which should otherwise be exacted. See, *State ex rel. NSBA v. Bruckner*, 249 Neb. 361, 543 N.W.2d 451 (1996); *State ex rel. NSBA v. Gleason*, 248 Neb. 1003, 540 N.W.2d 359 (1995); *State ex rel. NSBA v. Matt*, 213 Neb. 123, 327 N.W.2d 622 (1982).

While Brown urges that his drug involvement did not affect his clients, the reality is that his indictment made it necessary for his then clients to seek other counsel. Moreover, while Brown is to be commended for his efforts in pursuing rehabilitation, the fact is that he is compelled to do so by the terms of his supervised release from prison. In *State ex rel. NSBA v. Woodard*, 249 Neb. 40, 541 N.W.2d 53 (1995), a misappropriation case, we did not consider the 12-year abstention from alcohol abuse and the almost 6-year freedom from nonmedical prescription drug use to militate against disbarment. We find nothing which mitigates the punishment which should be imposed in this case.

CONCLUSION

Balancing Brown's interest in regaining his privilege to practice law against the nature of his offenses, the need to deter others from similar misconduct, the need to maintain the reputation of the bar as a whole, and the need to protect the public, we determine that Brown must be, and hereby is, disbarred, effective immediately.

JUDGMENT OF DISBARMENT.

RITCHIE C. RICHARDSON AND TERRI J. RICHARDSON, HUSBAND AND WIFE, APPELLEES, V. RANDY L. GRIFFITHS AND LINDA C. GRIFFITHS, HUSBAND AND WIFE, APPELLANTS.

560 N.W.2d 430

Filed February 28, 1997. No. S-95-092.

1. **Trial: Attorneys at Law: Appeal and Error.** In an appeal from an order disqualifying counsel, an appellate court reviews the trial court's factual findings for clear error and ultimately makes its disqualification decision independent of the trial court's ruling.
2. **Jurisdiction: Final Orders: Appeal and Error.** Generally, for an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. Conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
3. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after a judgment is rendered.
4. **Final Orders: Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
5. **Final Orders: Appeal and Error.** A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing.
6. **Mandamus.** Mandamus is not a preventive remedy but essentially a coercive writ, one that commands performance of a duty and not desistance therefrom.
7. **Attorneys at Law: Appeal and Error.** If the appeal from an order of disqualification of counsel involves issues collateral to the basic controversy and if an appeal from a judgment dispositive of the entire case would not be likely to protect the client's interests, interlocutory review is appropriate.
8. **Attorney and Client.** An attorney-client relationship is created when a person seeks advice or assistance from an attorney, the advice or assistance sought pertains to matters within the attorney's professional competence, and the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance.
9. **Attorney and Client: Conflict of Interest.** An attorney or law firm must avoid the present representation of a cause against a client that the attorney or law firm formerly represented, and which cause involves a subject matter which is the same as or substantially related to that formerly handled by the attorney or law firm.
10. ____: ____. Where the same subject matter is involved, the appearance of impropriety is not a factor that may be considered in determining whether or not to disqualify an attorney or firm.
11. **Judgments: Appeal and Error.** Where the record demonstrates that the decision of the trial court is correct, although such correctness is based on a different ground from that assigned by the trial court, the appellate court will affirm.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

Patrick J. Nelson and Daniel L. Lindstrom, of Jacobsen, Orr, Nelson, Wright, Harder & Lindstrom, P.C., for appellants.

Larry E. Butler, of Butler, Voigt & Brewster, P.C., for appellees.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and FLOWERS, D.J., and BOSLAUGH, J., Retired.

CONNOLLY, J.

We are asked to determine whether the law firm of Jacobsen, Orr, Nelson, Wright, Harder & Lindstrom, P.C. (Jacobsen, Orr), should be disqualified from representing the appellants, Randy L. Griffiths and Linda C. Griffiths, in an action brought by the appellees, Ritchie C. Richardson and Terri J. Richardson, because of a prior contact between Terri Richardson and Jeffrey H. Jacobsen, an attorney with Jacobsen, Orr.

We conclude that the prior contact between Terri Richardson and Jacobsen created an attorney-client relationship that involved the same subject matter as that presently handled by Jacobsen, Orr in representing the Griffithses. As a result, we affirm the Buffalo County District Court's decision to disqualify Jacobsen, Orr from representing the Griffithses in this action.

I. BACKGROUND

On October 17, 1994, the Richardsons initiated a civil action in the district court to rescind a purchase agreement with the Griffithses, asserting that the Griffithses breached an implied warranty concerning the construction of the Richardsons' home. In their petition, the Richardsons pray for $210,090.05, representing the original purchase price and the costs of additions, improvements, and damages resulting from water leakage into the basement of their home.

On November 30, 1994, the Richardsons filed a motion to disqualify Jacobsen, Orr from representing the Griffithses in this action. The motion alleged that Terri Richardson revealed

confidential information to, and received legal advice from, Jacobsen concerning the subject matter of the action.

At the hearing on the motion to disqualify, Terri Richardson testified that sometime around January 19, 1993, she called Jacobsen at his home and discussed problems concerning the construction of the Richardsons' home; that she called Jacobsen upon the recommendation of acquaintances Roxanne Randall and Randy Jensen; that her conversation with Jacobsen lasted approximately 45 minutes; that she contacted Jacobsen as an attorney and considered the conversation to be confidential; that she requested that Jacobsen send her a bill for his time, but Jacobsen declined payment; and that she followed Jacobsen's advice.

Terri Richardson further testified that Jacobsen told her that the builder was responsible for the leakage problems with her house; that Jacobsen briefly explained to her the law of implied warranties; that he advised her that she should maintain a record setting forth the dates and nature of the problems which were occurring; that he stated that he knew Randy Griffiths and that she should continue to try to work with him to correct the problem; and that Jacobsen informed her that if the matter could not be resolved, she should call his office and make an appointment to meet with him.

On cross-examination, Terri Richardson stated that in addition to Jacobsen, she had also contacted two other attorneys prior to contacting and retaining Larry E. Butler as her attorney in the instant matter. Jacobsen testified that he had no independent recollection of the alleged conversation with Terri Richardson. Records of Jacobsen, Orr reveal that no file was ever opened concerning the matter of the alleged conversation, nor was a bill ever sent to the Richardsons. Roxanne Randall testified that she recommended Jacobsen to the Richardsons and that she had an additional conversation with Terri Richardson during which Terri Richardson stated that she had visited with Jacobsen about the problems with her home.

The record reflects that the instant suit was filed approximately 21 months after Terri Richardson's alleged conversation with Jacobsen. Thereafter, the Griffithses retained Patrick J. Nelson of Jacobsen, Orr to represent them in this matter. In its

order, the district court granted the Richardsons' motion to disqualify Jacobsen, Orr. The court reasoned:

> Although the evidence establishes Mr. Jacobsen has no recollection of any conversation with the plaintiff Terri Richardson, and it is therefore doubtful that any advantage could be gained by the defendants herein, nevertheless the court must find from the totality of the evidence that the conversation testified to by Ms. Richardson did in fact take place. . . .
>
> Although contacted at home and receiving no fee, it appears . . . that Mr. Jacobsen was in fact employed by . . . Terri Richardson in that she sought legal advice and assistance from Mr. Jacobsen and such advice was offered to her.
>
> It is obvious that Mr. Jacobsen's involvement in this matter was fully peripheral and would not appear to be substantial. However, the Nebraska Supreme Court has formulated what it considers to be a "bright line" rule in similar matters. [Citation omitted.] In formulating that rule the Nebraska Supreme Court was well aware of other rules utilized in other jurisdictions which proposed a balancing test weighing several competing considerations, including the privacy of the attorney/client relationship, the prerogative of a party to choose counsel, and the hardship that disqualification imposes on parties and the entire judicial process. It appears, however, that the Nebraska Supreme Court opted not to follow the balancing rational[e] of other jurisdictions. Our court specifically cited as an additional critical consideration the perception that the public has of the legal profession generally, and the necessity to preserve "not only the actual existence, but also the appearance, of propriety, and to eliminate as nearly as possible unnecessary and unwarranted criticism of the legal profession."

As of the time the Griffithses perfected this appeal, the underlying action had not proceeded to trial.

II. ASSIGNMENT OF ERROR

The Griffithses allege that the district court erred in disqualifying Jacobsen, Orr.

III. STANDARD OF REVIEW

In an appeal from an order disqualifying counsel, an appellate court reviews the trial court's factual findings for clear error and ultimately makes its disqualification decision independent of the trial court's ruling.

IV. ANALYSIS

1. JURISDICTION

The first issue that we must determine is whether this court has jurisdiction to adjudicate the instant appeal. In order for this court to possess jurisdiction, the district court's order disqualifying Jacobsen, Orr must be a final order or appealable under an exception to the final order requirement.

(a) Final Order

Generally, for an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. Conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *Currie v. Chief School Bus Serv.*, 250 Neb. 872, 553 N.W.2d 469 (1996); *Village of Orleans v. Dietz*, 248 Neb. 806, 539 N.W.2d 440 (1995).

There are three types of final orders which may be reviewed on appeal. Neb. Rev. Stat. §§ 25-1902 and 25-1911 (Reissue 1995). The three types are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made upon summary application in an action after a judgment is rendered. *Currie v. Chief School Bus Serv., supra*; *Rohde v. Farmers Alliance Mut. Ins. Co.*, 244 Neb. 863, 509 N.W.2d 618 (1994).

All three types of final orders share the requirement that a substantial right be affected. Thus, we must determine whether the granting of a motion to disqualify private counsel in a civil case affects a substantial right. A substantial right is an essential legal right, not a mere technical right. *Currie v. Chief School Bus Serv., supra*; *Rohde v. Farmers Alliance Mut. Ins. Co., supra*. A substantial right is affected if the order affects the sub-

ject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing. *Currie v. Chief School Bus Serv., supra*; *Jarrett v. Eichler*, 244 Neb. 310, 506 N.W.2d 682 (1993).

In the instant case, the district court's order affects the peripheral matter of whether Jacobsen, Orr should be disqualified from representing the Griffithses, rather than affecting the subject matter of the litigation. Regardless of who is counsel of record for the Griffithses, the same claims and defenses persist on the underlying action. As a result, we conclude that the district court's order does not affect a substantial right of the Griffithses and thus, does not meet any of the definitions of a final order.

(b) Exception to Final Order Requirement

Generally, in the absence of a final order from which an appeal may be taken, the appeal must be dismissed for lack of jurisdiction. *Currie v. Chief School Bus Serv., supra*; *In re Adoption of Krystal P. & Kile P.*, 248 Neb. 907, 540 N.W.2d 312 (1995). However, we must determine whether any exceptions to the final order requirement apply that vest this court with jurisdiction to entertain the appeal.

In *CenTra, Inc. v. Chandler Ins. Co.*, 248 Neb. 844, 540 N.W.2d 318 (1995), this court held that when an appeal from an order denying disqualification of counsel involves issues collateral to the basic controversy, and when an appeal from a judgment dispositive of the entire case would not be likely to protect the client's interests, the party should seek mandamus or other interlocutory review. (Citing *Maddocks v. Ricker; Casson*, 403 Mass. 592, 531 N.E.2d 583 (1988).) However, the instant case involves the granting, not the denial, of a motion to disqualify counsel. The general rule is that mandamus is not a preventive remedy but essentially a coercive writ, one that commands performance of a duty and not desistance therefrom. *State ex rel. Bates v. Morgan*, 154 Neb. 234, 47 N.W.2d 512 (1951). See, also, 52 Am. Jur. 2d *Mandamus* § 9 (1970). As such, the Griffithses could not bring an original action for a peremptory

writ of mandamus to compel the district court to vacate its order of disqualification.

However, in *Maddocks v. Ricker; Casson, supra*, cited with approval in *CenTra, Inc. v. Chandler Ins. Co., supra*, the Massachusetts Supreme Judicial Court held that "if the appeal from an order of disqualification involves issues collateral to the basic controversy and if an appeal from a judgment dispositive of the entire case would not be likely to protect the client's interests, interlocutory review is appropriate." 403 Mass. at 600, 531 N.E.2d at 588. In order to provide both parties (movant and nonmovant) with an equal opportunity to seek interlocutory review of an attorney disqualification decision, we adopt the rule articulated in *Maddocks* as an exception to the final order requirement.

We determine that the instant appeal from the district court's order of disqualification involves issues collateral to the underlying action to rescind the purchase agreement. Delaying the appeal until a dispositive judgment on the underlying controversy has been rendered would not likely protect the Griffithses' interests in the counsel of their own choosing and in the time and expense associated with hiring new counsel. Thus, we conclude that this court possesses jurisdiction to adjudicate the instant appeal under the *Maddocks* exception to the final order requirement.

2. Disqualification

The Griffithses allege that the district court erred in disqualifying Jacobsen, Orr. Notwithstanding what we stated in *CenTra, Inc. v. Chandler Ins. Co., supra*, in an appeal from an order disqualifying counsel, an appellate court reviews the trial court's factual findings for clear error and ultimately makes its disqualification decision independent of the trial court's ruling. In other words, upon giving deference to the trial court's factual findings, an appellate court independently determines whether an attorney-client relationship was created and if so, whether that representation involved the same, or a substantially related, subject matter as that involved in the challenged adverse representation.

(a) Attorney-Client Relationship

An attorney-client relationship is created when a person seeks advice or assistance from an attorney, the advice or assistance sought pertains to matters within the attorney's professional competence, and the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance. *Patterson v. Swarr, May, Smith & Anderson*, 238 Neb. 911, 473 N.W.2d 94 (1991); *McVaney v. Baird, Holm, McEachen*, 237 Neb. 451, 466 N.W.2d 499 (1991).

In its order, the district court concluded that "[a]lthough contacted at home and receiving no fee, it appears . . . that Mr. Jacobsen was in fact employed by . . . Terri Richardson in that she sought legal advice and assistance from Mr. Jacobsen and such advice was offered to her." At the hearing on the motion to disqualify, Terri Richardson testified that she called Jacobsen, who told her that the builder was responsible for the leakage problems with her house; briefly explained to her about implied warranties; advised her that she should maintain a record setting forth the dates and nature of the problems which were occurring; stated that he knew Randy Griffiths and that she should continue to try to work with him to correct the problem; and informed her that if the matter could not be resolved, she should call his office and make an appointment to meet with him.

Thus, the trial court's factual findings, that Terri Richardson sought and received legal advice from Jacobsen, were not clearly erroneous. We conclude that an attorney-client relationship was created between Jacobsen and Terri Richardson.

(b) Same Subject Matter

An attorney or law firm must avoid the present representation of a cause against a client that the attorney or law firm formerly represented, and which cause involves a subject matter which is the same as or substantially related to that formerly handled by the attorney or law firm. *State ex rel. Wal-Mart v. Kortum, ante* p. 805, 559 N.W.2d 496 (1997).

In its order, the district court, relying on our decision in *State ex rel. FirsTier Bank v. Buckley*, 244 Neb. 36, 503 N.W.2d 838 (1993), cites the appearance of impropriety as its reason for disqualifying Jacobsen, Orr. However, we have recently held that

in the context of substantially related matters, the appearance of impropriety is not a factor that may be considered in determining whether or not to disqualify an attorney or firm. *State ex rel. Wal-Mart v. Kortum, supra.* Neither is the appearance of impropriety a factor to be considered in analyzing whether the same subject matter is involved. Nonetheless, where the record demonstrates that the decision of the trial court is correct, although such correctness is based on a different ground from that assigned by the trial court, the appellate court will affirm. *Gustin v. Scheele,* 250 Neb. 269, 549 N.W.2d 135 (1996); *Whitten v. Whitten*, 250 Neb. 210, 548 N.W.2d 338 (1996). We determine that Jacobsen's attorney-client relationship with Terri Richardson involved the same subject matter as that presently handled by Jacobsen, Orr in representing the Griffithses.

V. CONCLUSION

We conclude that an attorney-client relationship was created between Jacobsen and Terri Richardson and that the representation involved the same subject matter as that presently handled by Jacobsen, Orr in representing the Griffithses. Accordingly, we affirm the Buffalo County District Court's decision to disqualify Jacobsen, Orr from representing the Griffithses in this action.

AFFIRMED.

MIKE ANDERSON, APPELLEE, V. NASHUA CORPORATION, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT, AND LIBERTY MUTUAL INSURANCE COMPANY, DEFENDANT, AND W.S. BUNCH CO., A CORPORATION, ET AL., THIRD-PARTY DEFENDANTS, APPELLEES.

560 N.W.2d 446

Filed February 28, 1997. No. S-95-248.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

2. **Contracts: Appeal and Error.** The construction of a contract is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below.
3. **Contracts: Negligence: Intent.** An indemnitee may be indemnified against his or her own negligence if the contract contains express language to that effect or contains clear and unequivocal language that that is the intention of the parties.
4. **Contracts: Parties.** When there is a question as to the meaning of a contract, it is to be construed most strongly against the party preparing it.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Jay L. Welch and Douglas E. Baker, of Welch, Wulff & Childers, for appellant.

David D. Ernst and Michael C. Pallesen, of Gaines, Mullen, Pansing & Hogan, for appellee W.S. Bunch Co.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ.

CONNOLLY, J.

We are asked to determine whether there exists a genuine issue of material fact as to whether a valid contract to provide insurance was created between appellant Nashua Corporation (Nashua) and appellee W.S. Bunch Co. (Bunch), in which Bunch agreed to provide liability insurance to protect Nashua against claims resulting from Nashua's own negligence.

We conclude that a valid agreement to provide insurance was created; however, the contract does not contain express or clear and unequivocal language that the parties intended for Bunch to provide liability insurance to protect Nashua against Nashua's own negligence. As a result, we affirm the Douglas County District Court's decision granting Bunch's motion for summary judgment.

I. BACKGROUND

Nashua brought this third-party action against Bunch, its construction contractor, as part of an underlying action filed by Mike Anderson, a Bunch employee injured on Nashua's property within the scope of his employment. See *Anderson v. Nashua Corp.*, 246 Neb. 420, 519 N.W.2d 275 (1994). Liberty Mutual Insurance Company, Bunch's workers' compensation insurer, was joined in the action pursuant to its subrogation interests. Neb. Rev. Stat. § 48-118 (Reissue 1993).

Nashua operates a paper product manufacturing plant in Omaha, Nebraska. On the same tract of land, separate and apart from the plant, Nashua has underground storage tanks for chemicals used in its manufacturing process. Nashua hired Bunch to restore and paint the interior of the tanks. Anderson was severely injured when paint fumes ignited while he was painting.

A written contract between Nashua and Bunch provided that Bunch would do everything necessary for the restoration of the tanks, such as providing labor, materials, equipment, supervision, and direction. The contract, drafted by Nashua, further provided:

> 10. INSURANCE: If any work or services covered by this order, or any part thereof, are performed by Seller [Bunch] on Buyer's [Nashua's] property, *Seller shall carry at his own expense, sufficient public liability, property damage, employer's liability and compensation insurances, including motor vehicle liability insurance (both personal injury and property damage coverage) as will protect Seller (or its subcontractor) and Buyer from all risks and from any claims that may arise out of or pertain to the performance of such work or services*, including those coming under applicable Workmen's Compensation or occupational disease statutes. Insured amounts and insuring companies must be satisfactory to Buyer, and certificates of such coverage shall be submitted to Buyer prior to the start of any work or services pursuant to this order.

(Emphasis supplied.)

Bunch procured a liability insurance policy through United States Fidelity and Guaranty Company (USF&G). It is not disputed that Bunch began work before providing Nashua with a certificate of insurance. USF&G declined to defend or indemnify Nashua in the action brought by Anderson. Nashua then brought this third-party action against Bunch, alleging that Bunch breached its contractual obligation to purchase bodily injury liability insurance to effectively protect Nashua against claims resulting from Nashua's own negligence.

The district court for Douglas County granted Bunch's motion for summary judgment and overruled Nashua's motion for partial summary judgment. The district court determined that paragraph 10 of the contract constitutes an unenforceable contract of indemnification and not a valid contract to provide insurance, that the contract does not contain clear and unequivocal language that the parties intended there to be such insurance coverage, and that if Nashua was not satisfied with the insurance coverage obtained by Bunch, it should have prevented Bunch from beginning work on the project.

II. ASSIGNMENT OF ERROR

Nashua alleges that the district court erred in holding that paragraph 10 of the contract between it and Bunch constituted an unenforceable contract of indemnification and not a valid contract to provide insurance.

III. STANDARD OF REVIEW

Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Moulton v. Board of Zoning Appeals, ante* p. 95, 555 N.W.2d 39 (1996); *Polinski v. Omaha Pub. Power Dist., ante* p. 14, 554 N.W.2d 636 (1996).

The construction of a contract is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below. *Daehnke v. Nebraska Dept. of Soc. Servs., ante* p. 298, 557 N.W.2d 17 (1996); *Stephens v. Radium Petroleum Co.*, 250 Neb. 560, 550 N.W.2d 39 (1996).

IV. ANALYSIS

1. Valid Contract to Provide Insurance

Nashua alleges that the district court erred in holding that paragraph 10 of the contract between it and Bunch constituted an unenforceable contract of indemnification and not a valid contract to provide insurance. Neb. Rev. Stat. § 25-21,187(1) (Reissue 1995) states:

> In the event that a public or private contract or agreement for the construction, alteration, repair, or maintenance of a building, structure, highway bridge, viaduct, water, sewer, or gas distribution system, or other work dealing with construction or for any moving, demolition, or excavation connected with such construction contains a covenant, promise, agreement, or combination thereof to indemnify or hold harmless another person from such person's own negligence, then such covenant, promise, agreement, or combination thereof shall be void as against public policy and wholly unenforceable. *This subsection shall not apply to construction bonds or insurance contracts or agreements.*

(Emphasis supplied.)

In the instant case, the agreement to restore Nashua's tanks constitutes a private contract for the alteration, repair, or maintenance of a structure. We must determine whether the agreement requires Bunch to indemnify or hold Nashua harmless from Nashua's own negligence as prohibited by § 25-21,187 or whether the agreement requires Bunch to provide Nashua with liability insurance, in which case § 25-21,187 does not apply.

This court's only previous interpretation of § 25-21,187 was in *Hiway 20 Terminal, Inc. v. Tri-County Agri-Supply, Inc.*, 232 Neb. 763, 443 N.W.2d 872 (1989). The clause in the subcontract agreement at issue in *Hiway 20 Terminal, Inc.*, provided in pertinent part:

> "The Subcontractor agrees to indemnify and save harmless the Contractor from any and all loss or damage . . . occasioned wholly or in part by any negligent act or omission of the Subcontractor or that of anyone directly or indirectly employed by them or performing the work of this Subcontractor under the direction of the Subcontractor or anyone for whose acts any of them may be liable in carrying out the provisions of the general contract and of this Subcontract regardless of whether or not it is caused in part by a party indemnified hereunder."

(Emphasis supplied.) *Id.* at 768, 443 N.W.2d at 875.

This court held that "the final clause in this agreement, stating that the subcontractor must indemnify the general contrac-

tor even if the harm is caused by the negligence of the general contractor, is clearly invalid by application of § 25-21,187." *Id.*

However, the instant agreement is distinguishable from the agreement held invalid in *Hiway 20 Terminal, Inc.* The *Hiway 20 Terminal, Inc.*, agreement did not require the subcontractor to provide liability insurance for the general contractor but, instead, required the subcontractor to indemnify the general contractor for harm caused by the general contractor's own negligence. Conversely, the instant agreement did not require Bunch to indemnify Nashua for harm caused by Nashua's own negligence but, instead, required Bunch to provide Nashua with liability insurance.

Thus, we determine that § 25-21,187 does not render the instant agreement invalid because its exception for insurance agreements is applicable. As a result, we conclude that the district court erred in holding that paragraph 10 of the contract constituted an unenforceable contract of indemnification and not a valid contract to provide insurance.

2. Express or Clear and Unequivocal Language

Although a valid contract was created in which Bunch agreed to provide Nashua with liability insurance, we must next determine whether the contract requires the liability insurance to include coverage for harm caused by Nashua's own negligence. An indemnitee may require another to insure losses incurred by reason of his or her own negligence if the contract contains express language to that effect or contains clear and unequivocal language that that is the intention of the parties. See, *Oddo v. Speedway Scaffold Co.*, 233 Neb. 1, 443 N.W.2d 596 (1989); *Omaha P. P. Dist. v. Natkin & Co.*, 193 Neb. 518, 227 N.W.2d 864 (1975); *Peter Kiewit Sons Co. v. O'Keefe Elevator Co., Inc.*, 191 Neb. 50, 213 N.W.2d 731 (1974).

In *Omaha P. P. Dist., supra*, we applied the express or clear and unequivocal language requirement to determine whether an agreement to provide liability insurance included coverage for the insured's own negligence. Thus, we must determine whether the contract contains (1) express language requiring Bunch to provide Nashua with liability insurance that includes coverage for harm caused by Nashua's own negligence or (2) clear and

unequivocal language that the parties intended for there to be such coverage.

(a) Express Language

In *Omaha P. P. Dist.*, the agreement to provide insurance stated in pertinent part:

> "The Contractor [Natkin] shall take out and maintain during the life of this Contract, such Public Liability and Property Damage Insurance as shall protect him and any subcontractor performing work covered by this Contract, and the District [Omaha P. P. Dist. (OPPD)] from claims for damages for personal injury, including wrongful death, as well as claims for property damages, which may arise from operations under this Contract, whether such operations be by himself or by any subcontractor, or anyone directly or indirectly employed by either of them."

Id. at 520, 227 N.W.2d at 866.

This court held that "[d]efinitely the contract does not contain express language to the effect that Natkin would furnish insurance to cover OPPD's negligence." *Id.* at 523, 227 N.W.2d at 868. As in *Omaha P. P. Dist.*, we determine that the contract in the instant case does not contain express language to the effect that Bunch would furnish insurance to cover harm caused by Nashua's own negligence.

(b) Clear and Unequivocal Language

After concluding that the contract did not contain express language requiring Natkin to furnish insurance to cover OPPD's own negligence, the court in *Omaha P. P. Dist.*, 193 Neb. at 523, 227 N.W.2d at 868, stated: "We then must consider whether or not the contract contains clear and unequivocal language that was the intention of the parties. Reading the language without analysis one might argue such coverage is afforded. At best, however, if that was the intention of the parties, it is ambiguous."

Conversely, in *Oddo*, 233 Neb. at 9, 443 N.W.2d at 602, this court held:

> Although the lease's indemnity clause does not contain the word negligence, the intended consequence of indemnity is expressed clearly and unequivocally—Contractor [Oddo] was obligated to indemnify Speedway concerning

> claims arising from Speedway's conduct, including negligence, but excluding claims based on Speedway's willful misconduct.

(Emphasis omitted.)

In *Oddo*, the indemnity clause in the lease provided that Oddo would indemnify Speedway for claims arising out of Speedway's

> "conduct (including active, passive, primary or secondary)." In addition, the clause stated that the "*lessor [Speedway] shall only be liable or responsible for actions of wilful misconduct.*" Finally, the lease declared that the purpose of the indemnity clause was "to shift the risk of all claims relating to the leased property to the lessee during the entire term of this lease."

(Emphasis omitted and supplied.) *Id.*

Thus, we must determine whether the contractual language in the instant case is more like the language determined to be not clear and unequivocal in *Omaha P. P. Dist., supra*, or more like the language determined to be clear and unequivocal in *Oddo, supra.*

The contractual language stating that Bunch shall carry sufficient insurance that will protect Nashua from "all risks and from any claims that may arise out of or pertain to the performance of such work" is similar to the "claims for damages for personal injury, including wrongful death, as well as claims for property damages, which may arise from operation under this [c]ontract" language found to be not clear and unequivocal in *Omaha P. P. Dist v. Natkin & Co.*, 193 Neb. 518, 227 N.W.2d 864 (1975). Furthermore, unlike the language found to be clear and unequivocal in *Oddo v. Speedway Scaffold Co.*, 233 Neb. 1, 443 N.W.2d 596 (1989), nowhere is it stated that Nashua "shall only be liable or responsible for actions of wilful misconduct." Moreover, when there is a question as to the meaning of a contract, it is to be construed most strongly against the party preparing it, in this case, Nashua. See, *Omaha P. P. Dist., supra*; *Peter Kiewit Sons Co. v. O'Keefe Elevator Co., Inc.*, 191 Neb. 50, 213 N.W.2d 731 (1974). Thus, if the parties intended for Bunch to provide liability insurance to protect Nashua against

Nashua's own negligence, we determine that intention is not expressed or clear and unequivocal as a matter of law.

V. CONCLUSION

We conclude that a valid agreement to provide insurance was created; however, the contract does not contain express or clear and unequivocal language that the parties intended for Bunch to provide liability insurance to protect Nashua against Nashua's own negligence. As a result, we affirm the Douglas County District Court's decision granting Bunch's motion for summary judgment.

AFFIRMED.

MARY MAHONEY, APPELLEE, V. NEBRASKA METHODIST HOSPITAL, INC., A NEBRASKA CORPORATION, APPELLANT.
560 N.W.2d 451

Filed February 28, 1997. No. S-95-330.

1. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.
2. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Verdicts: Appeal and Error.** A jury verdict will not be disturbed on appeal as excessive unless it is so clearly against the weight and reasonableness of the evidence and so disproportionate as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or that the jury disregarded the evidence or rules of law.
4. **Evidence: Expert Witnesses.** Expert testimony should not be received into evidence if it is evident that the witness does not possess such facts that enable him to express a reasonable, accurate conclusion as distinguished from a mere guess. Without an adequate basis of facts, the witness should not be allowed to give an opinion.
5. **Trial: Evidence: Damages.** Under the collateral source rule, the fact that the party seeking recovery has been wholly or partially indemnified for a loss by insurance or otherwise cannot be set up by the wrongdoer in mitigation of damages.
6. **Jury Instructions.** The purpose of an instruction is to furnish guidance to the jury in their deliberations, and to aid them in arriving at a proper verdict; with this end in view, it should state clearly and concisely the issues of fact and the principles of law which are necessary to enable them to accomplish the purpose desired.
7. **Verdicts: Appeal and Error.** A jury verdict will not be disturbed on appeal as excessive unless it is so clearly against the weight and reasonableness of the evidence

and so disproportionate as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or that the jury disregarded the evidence or rules of law.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Joseph S. Daly, of Sodoro, Daly & Sodoro, P.C., for appellant.

Gregory M. Schatz for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and LUTHER, D.J.

CONNOLLY, J.

Nebraska Methodist Hospital, Inc., having admitted liability, appeals a jury verdict in favor of appellee, Mary Mahoney, in the amount of $400,000. Methodist Hospital asks this court to reverse the verdict and remand the cause because the trial court erred in excluding Methodist Hospital's expert testimony, in not admitting evidence of Mahoney's early retirement pension, and in instructing the jury on cosmetic deformity. We affirm the jury's verdict.

BACKGROUND

On July 13, 1990, police officer Mary Mahoney was attempting to provide crowd control in a riot disturbance in Omaha, Nebraska. While performing these duties, Mahoney was struck by a car. As a result, she suffered an injury to her right knee and was transported to a hospital for treatment. Mahoney ultimately had arthroscopic surgery on her right knee on September 11, 1990. Subsequent to this surgery, she returned to her duties as a police officer.

Despite the surgery, Mahoney continued to experience pain and mobility problems with her right knee. In February 1991, she sought the services of Dr. William M. Walsh, an orthopedic surgeon. Walsh first attempted to treat the injured knee with noninvasive procedures, such as physical therapy and taping to hold the kneecap in place. When these techniques failed to produce effective results, Walsh performed arthroscopic surgery on Mahoney's knee on April 8, 1991, during which the kneecap was realigned. Because of complications, Mahoney's knee

filled up with blood, requiring a third surgical operation on the knee to drain the excess blood. Following Mahoney's recovery from the surgeries, she returned to her job as a police officer on August 1, 1991, with no restrictions. In releasing Mahoney back to work, Walsh was aware of the physical requirements of being a police officer.

Mahoney returned to Walsh for a 6-week followup on August 27, 1991, complaining of pain in her right knee. Walsh determined she was suffering from a condition known as reflex sympathetic dystrophy. This condition involves an imbalance of sympathetic nerve flow into an extremity, often resulting in pain, tingling, and numbness. In order to treat this condition, Walsh ordered a series of sympathetic nerve blocks to control Mahoney's pain. Mahoney was told these injections would offer relief to her leg in that they would dilate the blood vessels.

The injections were given by an anesthesiologist on an outpatient basis at Methodist Hospital. Prior to the actual injection, the contents of the nerve-block shot would be prepared by dissolving a guanethidine pill in a saline solution. The solution would then be put into a syringe. After draining the blood from Mahoney's leg with the use of a tourniquet, the anesthesiologist would inject the solution into her leg.

Mahoney was to receive a series of 16 shots, with the first commencing on August 29, 1991. Mahoney continued to work as a police officer with no restrictions during her first 12 nerve-block treatments. On October 31, she received her 13th nerve-block injection at Methodist Hospital. During the administration of this injection, Mahoney experienced severe cramping and burning in her leg. Tests were ordered to help determine the cause of Mahoney's pain. It was later determined that Mahoney had suffered a hypertonic saline injection injury because a pharmacist employed by the hospital had prepared the injection incorrectly. The hospital admitted its liability in this respect.

Mahoney was required to stay in the hospital for a period of 15 days following the damaging injection. Throughout her stay, she experienced extreme pain and swelling and required daily injections of morphine and other narcotic drugs. In the spring of 1992, Walsh concluded that Mahoney would be unable to return to her job because of the injuries she suffered to her knee in the

car and hospital incidents. Mahoney subsequently retired from the Omaha Police Division in May 1992 and now receives a pension.

At trial, Mahoney offered evidence to establish the extent of her knee damage due to the hypertonic saline injection injury. Walsh testified that Mahoney's knee had a 30-percent permanent impairment, with 25 percent being attributable to the car accident and 5 percent attributable to the hypertonic saline injection injury at Methodist Hospital. In Walsh's opinion, the permanent impairment to Mahoney's knee because of the injection injury includes numbness in her calf; throbbing discomfort during long periods of standing; the possibility of edema, or swelling, of the right calf; and muscle spasms. At one point, Walsh testified that Mahoney might not have been able to return to work as a police officer even if the incident had not occurred at Methodist Hospital. However, Walsh stated that he informed the Omaha Police Division that Mahoney would be unable to return to the police force because of both the car accident and the injury sustained while receiving the nerve-block injection.

Methodist Hospital attempted to offer the deposition testimony of its own expert, Dr. Donald Gammel. In his deposition, Gammel testified that Mahoney's knee was 35 percent permanently impaired, with 25 percent attributable to the car accident and the remaining 10 percent attributable to the hypertonic saline injection injury. When Gammel was asked his opinion on whether Mahoney could have returned to work had the vascular injury at Methodist Hospital not occurred, counsel for Mahoney objected on the basis of foundation. During cross-examination at the deposition, Gammel stated that he was not aware of Mahoney's tasks as a police officer and that his opinion as to her not being able to return despite the saline injection injury was based on "lack of information" regarding her day-to-day activities as a police officer. The court sustained the foundation objection to Gammel's testimony.

The district court also sustained Mahoney's motion in limine preventing Methodist Hospital from introducing evidence that she was currently receiving an early retirement pension from the Omaha Police Division. The court made its ruling on the basis that any income Mahoney may be receiving from the

police department was inadmissible under the collateral source doctrine.

The jury returned a verdict in favor of Mahoney and awarded her $400,000 in damages. Methodist Hospital appeals, challenging the damage award.

ASSIGNMENTS OF ERROR

Methodist Hospital contends the district court erred in (1) not allowing Gammel to give his expert opinion as to whether Mahoney could have returned to work absent the Methodist Hospital incident, (2) not allowing Methodist Hospital to introduce evidence of Mahoney's pension, (3) giving an improper jury instruction, and (4) not granting a new trial because the jury award was excessive and given under the influence of passion or prejudice.

STANDARD OF REVIEW

A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion. *McArthur v. Papio-Missouri River NRD*, 250 Neb. 96, 547 N.W.2d 716 (1996); *McIntosh v. Omaha Public Schools*, 249 Neb. 529, 544 N.W.2d 502 (1996).

When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Grand Island Latin Club v. Nebraska Liq. Cont. Comm., ante* p. 61, 554 N.W.2d 778 (1996).

A jury verdict will not be disturbed on appeal as excessive unless it is so clearly against the weight and reasonableness of the evidence and so disproportionate as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or that the jury disregarded the evidence or rules of law. *Barks v. Cosgriff Co.*, 247 Neb. 660, 529 N.W.2d 749 (1995); *McDonald v. Miller*, 246 Neb. 144, 518 N.W.2d 80 (1994).

ANALYSIS

Methodist Hospital's first assigned error concerns the district court's sustaining the foundation objection to Gammel's testimony regarding Mahoney's ability to work as a police officer despite the injury she sustained as a result of the injection.

Methodist Hospital asserts this was error because the record establishes that Gammel was fully aware of Mahoney's condition and medical history and that he possesses the requisite skill, training, and experience necessary to give an expert opinion.

To clarify, Mahoney's objection to Gammel's testimony did not concern his capacity as an expert in the evaluation of disabling injuries. Indeed, the objection to Gammel's testimony concerns only his knowledge of pertinent facts on which his opinion was offered. A firm understanding of the pertinent, underlying facts is critical when an expert offers his or her opinion.

> Expert testimony should not be received into evidence if it is evident that the witness does not possess such facts that enable him to express a reasonable, accurate conclusion as distinguished from a mere guess. Without an adequate basis of facts, the witness should not be allowed to give an opinion.

Menkens v. Finley, ante p. 84, 93, 555 N.W.2d 47, 53 (1996). See, also, *Ketteler v. Daniel, ante* p. 287, 556 N.W.2d 623 (1996); *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996).

After a proper foundation objection was made during Gammel's deposition testimony, Gammel admitted during his cross-examination that he was unaware of the tasks Mahoney was required to perform while working as a police officer. In addition, Gammel admitted that his opinion that Mahoney could not return to work as an officer despite the hypertonic saline injection injury was based on a "lack of information" as to her day-to-day activities as a police officer. On redirect examination, Gammel testified that he was somewhat familiar with the duties of a police officer on account of what he has seen on television and of his "general sense" of what "beat cops" do. This testimony of Gammel makes it apparent that he possessed no knowledge of the physical demands actually placed upon Mahoney as a police officer. As such, Gammel lacked knowledge of facts necessary to support his opinion concerning Mahoney's ability to perform as a police officer in Omaha. Recognizing that a trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be

reversed only when there has been an abuse of discretion, *McArthur v. Papio-Missouri River NRD, supra*; *McIntosh v. Omaha Public Schools, supra*, we conclude that the district court did not abuse its discretion in excluding Gammel's testimony concerning Mahoney's ability to return to work as a police officer.

In its next assigned error, Methodist Hospital asserts the district court incorrectly precluded it from offering any evidence of the pension Mahoney is receiving as a result of her early retirement from the Omaha Police Division. Methodist Hospital argues that the pension is paid to Mahoney because of the car accident injury to her knee and is therefore not a collateral source regarding the injury she suffered to her knee as a result of the injection. Mahoney contends the lower court's ruling is correct because the collateral source rule prohibits the mitigation of personal injury damages with evidence establishing that the injured party is being compensated by another party during her disability.

Under the collateral source rule, the fact that the party seeking recovery has been wholly or partially indemnified for a loss by insurance or otherwise generally cannot be set up by the wrongdoer in mitigation of damages. *Chadron Energy Corp. v. First Nat. Bank*, 236 Neb. 173, 459 N.W.2d 718 (1990). We have stated:

> This rule provides that benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer. The theory underlying the adoption of this rule by a majority of jurisdictions is to prevent a tort-feasor from escaping liability because of the act of a third party, even if a possibility exists that the plaintiff may be compensated twice.

Hiway 20 Terminal, Inc. v. Tri-County Agri-Supply, Inc., 232 Neb. 763, 767, 443 N.W.2d 872, 875 (1989).

Ordinarily, compensation recognized as coming from a collateral source occurs in situations involving only one damaging incident. The instant case is unusual in that there exist two separate, and seemingly unrelated, injuries to Mahoney's knee: one injury attributed to the car accident and one injury attributed to

the injection injury. Due to this division, Methodist Hospital asks us to declare the pension Mahoney receives from the Omaha Police Division to be related only to that portion of her permanent knee injury sustained because of the car accident. As such, Methodist Hospital asserts that the pension was not "collateral" to any injury Mahoney suffered because of the injection injury and that evidence of it should therefore have been admitted for the purpose of mitigating damages.

This court has not had occasion to address the application of the collateral source rule in a situation in which there are two separate injuries. As a general matter, however, we have held that presenting evidence of a pension or disability benefits is inappropriate for purposes of determining damages. In *Harper v. Young*, 139 Neb. 624, 298 N.W. 342 (1941), the plaintiff sought recovery for damages he sustained in a car accident. Throughout the trial, evidence was adduced that the plaintiff would be eligible for a pension in the future and that he could have obtained compensation from the government for his injuries had he applied for them. This court remanded the cause, holding that the introduction of this evidence without limiting instructions was "not admissible upon any theory" and therefore prejudicial to the plaintiff. *Id.* at 630, 298 N.W. at 345. See, also, *Singles v. Union P. R.R. Co.*, 174 Neb. 816, 119 N.W.2d 680 (1963) (holding error committed in admission of testimony regarding size of pension, because financial conditions of parties are immaterial); Annot., Collateral Source Rule: Receipt of Public or Private Pension as Affecting Recovery Against a Tortfeasor, 75 A.L.R.2d 885 (1961) (stating general rule that payments from a collateral source may not be taken into consideration in assessing damages).

Other jurisdictions that have examined the precise issue put before us have concluded that benefits received for an initial injury are inadmissible to mitigate the damages of a subsequent tort-feasor responsible for further injury. In *Holman v. Grandview Hosp. & Med. Ctr.*, 37 Ohio App. 3d 151, 524 N.E.2d 903 (1987), the plaintiff was hospitalized for a permanently disabling back injury. Prior to surgery, he was to receive periodic injections of pain medication. A nurse improperly gave a shot, resulting in further injuries to the plaintiff. At trial, the

defendant hospital attempted to introduce evidence that the plaintiff was receiving payments for workers' compensation. The court, after determining that the statutory malpractice statute did not apply, held that evidence of such collateral source payments was inadmissible.

Likewise, in *Jones v. Laird Foundation, Inc.*, 156 W. Va. 479, 195 S.E.2d 821 (1973), the plaintiff suffered an initial injury to his back while at work. While hospitalized, he received inadequate care from a physician that caused further injury to his back. Due to the extent of both injuries, the plaintiff was awarded workers' compensation benefits. In reviewing the appeal of the plaintiff's claim against the physician, the West Virginia Supreme Court held that the plaintiff's compensation benefits were a collateral source and therefore could not be considered in mitigation of damages in the action against the physician for the additional injury to the plaintiff's back.

In the instant case, Mahoney testified that she continued to work as a police officer during the timeframe in which she was receiving the injections at Methodist Hospital. It was only after the October 31, 1991, injection that Mahoney was unable to return to work. At trial, Walsh testified that he informed the Omaha Police Division that Mahoney would be unable to perform her tasks as a police officer because of permanent injuries to her knee due to *both* the car accident *and* the injection injury. Faced with this diagnosis, she retired and began receiving her pension. Thus, the pension benefits Mahoney is now receiving are essentially for both injuries she sustained to her knee. Therefore, in accordance with both this court's repeated statements that presenting evidence of a pension is inappropriate for determining damages and the reasoning of those courts that have examined the operation of the collateral source rule in the context of two separate injuries, we conclude that Mahoney's pension is, in fact, a "collateral" and "independent" source of income for Mahoney's injuries suffered because of Methodist Hospital's negligence. That being the case, the second assigned error is without merit.

As its third assignment of error, Methodist Hospital contends the district court erred in instructing the jury regarding damages. In particular, Methodist Hospital argues that portion of

jury instruction No. 13 which provided that "[f]uture disability is not limited to functional disability, but includes cosmetic deformity as well" was incorrectly given because it was taken from the comments to and not the text of NJI2d Civ. 4.01, the pertinent instruction concerning general damages.

We have previously noted that "the instructions contained in the second edition of the Nebraska Jury Instructions are designed to be used when they reflect the law and the pleadings and evidence call for such an instruction." *Anderson v. Nashua Corp.*, 246 Neb. 420, 426, 519 N.W.2d 275, 281 (1994). Obviously, any instruction derived from the comments to the Nebraska Jury Instructions must also meet the same criteria. Simply because instruction No. 13 in the instant case used language from the comments to NJI2d Civ. 4.01 does not require us to determine the instruction erroneous per se. To so hold would essentially deny a court the opportunity to properly formulate instructions that are tailored to the case at hand. Such a result would be at odds with our repeated statement:

> " ' "The purpose of an instruction is to furnish guidance to the jury in their deliberations, and to aid them in arriving at a proper verdict; and, with this end in view, it should state clearly and concisely the issues of fact and the principles of law which are necessary to enable them to accomplish the purpose desired.". . . ' "

First Nat. Bank v. Bolzer, 221 Neb. 415, 420, 377 N.W.2d 533, 536-37 (1985), quoting *Bodtke v. Bratten*, 166 Neb. 36, 88 N.W.2d 159 (1958).

Thus, for purposes of this appeal, we must determine whether the instruction given on cosmetic deformity is supported by the law and the evidence of the case. See *Anderson v. Nashua Corp., supra*. In this regard, we note that an instruction on cosmetic deformities for purposes of future disability was upheld by this court in *Stapleton v. Norvell*, 193 Neb. 71, 225 N.W.2d 409 (1975), where the evidence adduced at trial established that the plaintiff suffered permanent scarring due to lacerations she received during a car accident. We conclude that the evidence in the instant case also supports an instruction on cosmetic deformity. Walsh testified that the difference in size

between Mahoney's left and right calves, as a result of the accident, was permanent in nature. Likewise, Mahoney testified that her calves were notably different in size as a result of the accident and that she has a scar on her forearm due to an infection from the IV's in her arm. In light of this evidence, the court did not err in instructing the jury on cosmetic deformity.

The last assigned error concerns the amount of the jury verdict. According to Methodist Hospital, the $400,000 verdict is so excessive in nature that it demonstrates the jury acted with extreme passion and prejudice. We disagree.

A jury verdict will not be disturbed on appeal as excessive unless it is so clearly against the weight and reasonableness of the evidence and so disproportionate as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or that the jury disregarded the evidence or rules of law. *Barks v. Cosgriff Co.*, 247 Neb. 660, 529 N.W.2d 749 (1995); *McDonald v. Miller*, 246 Neb. 144, 518 N.W.2d 80 (1994). An examination of the record in this case leads us to conclude that the jury verdict in favor of Mahoney was not excessive. At the time Mahoney received her injury at Methodist Hospital, she was a young police officer with substantial earning capacity. In 1989, her gross income was $41,399.28, and for 1990, it was $35,061. Mahoney testified at trial that she had planned on working as a police officer until the mandatory retirement age of 62. According to the dictates of Walsh, Mahoney's injuries to her knee make it impossible for her to fulfill that goal. The economic ramifications are substantial considering that James Rogers, a vocational rehabilitation counselor, testified that Mahoney's job qualifications allow her to make only $4.50 to $9 per hour.

In addition to the loss of her employment and earning capacity, Mahoney also testified that she experienced considerable pain and suffering as a result of Methodist Hospital's negligence. As noted above, Mahoney was constantly on high doses of pain medication for the 2 weeks following the nerve-block injection. In light of this evidence, we cannot conclude that the $400,000 jury verdict in this case is excessive. Accordingly, the fourth assignment of error is without merit.

CONCLUSION

In accordance with the above analysis, we conclude that no error was made and that the jury verdict in favor of Mahoney should be affirmed.

AFFIRMED.

SOUTHEAST RURAL VOLUNTEER FIRE DEPARTMENT, A NEBRASKA NONPROFIT CORPORATION, ET AL., APPELLANTS, V. NEBRASKA DEPARTMENT OF REVENUE, CHARITABLE GAMING DIVISION, AND M. BERRI BALKA, NEBRASKA STATE TAX COMMISSIONER, APPELLEES.

560 N.W.2d 436

Filed February 28, 1997. No. S-95-431.

1. **Administrative Law: Statutes: Appeal and Error.** The interpretation of statutes and regulations presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below, according deference to an agency's interpretation of its own regulations, unless plainly erroneous or inconsistent.
2. **Statutes: Legislature: Intent.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
3. **Statutes.** Statutory language is to be given its plain and ordinary meaning; the courts will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results.
4. ____. 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. ____. When a challenged statute is susceptible of more than one reasonable construction, a court uses the construction that will achieve the purposes of the statute and preserve the statute's validity.
6. **Administrative Law: Words and Phrases.** A decision is arbitrary when it is made in disregard of the facts or circumstances and without some basis which would lead a reasonable person to the same conclusion.
7. ____: ____. A capricious decision is one guided by fancy rather than by judgment or settled purpose; such a decision is apt to change suddenly; it is freakish, whimsical, humorsome.
8. **Administrative Law: Statutes.** Administrative bodies have only that authority specifically conferred upon them by statute or by construction necessary to achieve the purpose of the relevant act.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed in part, and in part reversed and remanded with direction.

Barry L. Hemmerling, of Jeffrey, Hahn, Hemmerling & Zimmerman, P.C., for appellants.

Don Stenberg, Attorney General, and L. Jay Bartel for appellees.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and BUCKLEY, D.J.

CAPORALE, J.

I. STATEMENT OF CASE

These consolidated appeals arise under the provisions of the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 through 84-920 (Reissue 1994 & Cum. Supp. 1996), the Nebraska Bingo Act, Neb. Rev. Stat. §§ 9-201 through 9-266 (Reissue 1991 & Cum. Supp. 1996), and the Nebraska Pickle Card Lottery Act, Neb. Rev. Stat. §§ 9-301 through 9-356 (Reissue 1991 & Cum. Supp. 1996). In the first appeal, enrolled at docket 505, page 241, in the records of the district court, and styled therein as "Southeast Rural Volunteer Fire Department, a Nebraska non-profit Corporation; Joseph Booth, Utilization of Funds Member; Ronald E. Olson, Gaming Manager, Plaintiffs, v. Nebraska Department of Revenue, Charitable Gaming Division, and M. Berri Balka, Nebraska State Tax Commissioner, Defendants," the appellee department, after an evidential hearing, denied, for the license period 1992-93, the applications of the appellant Southeast Volunteer for the renewal of a charitable gaming license, of the appellant Booth for a utilization of funds member's license, and of appellant Olson for a gaming manager's license. In the second appeal, enrolled at docket 514, page 230, in the records of the district court, and styled therein as "Southeast Rural Volunteer Fire Department, a volunteer fire department; Joseph Booth, Utilization of Funds Member; Ronald E. Olson, Gaming Manager, Plaintiffs, v. Nebraska Department of Revenue, Charitable Gaming Division, and M. Berri Balka, Nebraska

State Tax Commissioner, Defendants," the appellee department, by summary judgment, denied, for the license period 1993-94, the applications of the appellants Southeast Volunteer, Booth, and Olson for the renewal of like licenses. The district court affirmed the decision of the department in each of the cases, and the applicants-appellants appealed to the Nebraska Court of Appeals, asserting, in summary, that the district court erred in (1) failing to find, with respect to the first appeal, that the department's rulings were erroneous and (2) ruling, with respect to the second appeal, that summary judgment was an appropriate remedy. We, on our own motion, under our authority to regulate the caseloads of the Court of Appeals and this court, removed the matter to our docket. We now affirm the judgment of the district court in the first appeal and reverse its judgment with respect to the second appeal, and remand that matter with direction.

II. SCOPE OF REVIEW

There being no substantial dispute with respect to the facts, these appeals involve the interpretation of statutes and regulations, which presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below, according deference to an agency's interpretation of its own regulations, unless plainly erroneous or inconsistent. See *Inner Harbour Hospitals v. State, ante* p. 793, 559 N.W.2d 487 (1997).

III. FACTS

Southeast Volunteer provided personnel to Southeast Rural Fire Protection District, which was organized pursuant to statute for the purpose of providing fire protection to certain residents of Lancaster County, Nebraska. Southeast Volunteer also assisted Southeast District by raising money as the result of conducting bingo games and selling pickle cards. Southeast Volunteer held licenses to conduct bingo games and a lottery by the sale of pickle cards for the period from October 1, 1989, through September 30, 1990. It sold pickle cards at the location at which it conducted its bingo games in Lincoln and also mar-

keted pickle cards through licensed pickle card operators in the state. Although the bingo games did not produce a profit, the revenue derived from the sale of pickle cards during the games did. These activities provided the major source of Southeast Volunteer's revenue. That revenue was placed first in either the bingo bank account, the pickle card bank account for pickle cards sold at the bingo game, or the pickle card bank account for pickle cards sold to pickle card operators. The revenue was then transferred to Southeast Volunteer's general bank account, from which it was used to make expenditures on behalf of Southeast Volunteer or Southeast District.

Southeast District's board of directors, consisting of five publicly elected members, had oversight authority over Southeast Volunteer. Four of these board members, including Olson and Booth, were firefighters with Southeast Volunteer and had been such for periods ranging from approximately 18 to more than 20 years. Olson was president and Booth was secretary-treasurer of Southeast District during the time Southeast Volunteer held its gaming licenses, and its gaming activities were managed by Olson, who was licensed as a gaming manager, and by Booth, who was licensed as a utilization of funds member.

Southeast District and Southeast Volunteer decided that in order to encourage firefighters to remain with Southeast Volunteer and develop a pool of competent and experienced firefighters, Southeast District would institute a retirement plan for the firefighters. The plan became effective July 1, 1990, and provided that firefighters with at least 5 years of service could draw their share of the account to use upon retirement (at 59½ years of age) or upon becoming disabled, and that their families could draw the firefighter's share upon the firefighter's death. Those drawing money under the plan could take their share in installments, a lump sum, or a combination of their choice. The firefighters participating in the plan could choose how their portion would be invested. Southeast Volunteer funded the plan retroactively and donated general fund money to the plan in the sums of $90,000 on July 1, 1990, and $44,999.96 on July 1, 1991.

Southeast Volunteer also made other expenditures. From July 1, 1990, to March 26, 1992, Olson received $47,560.97 in salary from Southeast Volunteer, paid out of the general fund of the organization. Olson was the only member of Southeast Volunteer who was paid a salary on a yearly basis; he received $36,000 annually for operating and managing the bingo facility. Olson's duties as operations manager were as follows: making the facility ready for the game; ensuring that the rent and bills were paid; hiring and overseeing the gaming workers; keeping records and reporting on the gaming activities, including preparing tax returns and payroll; accepting deliveries; preparing food; keeping inventory of bingo paper and pickle cards; getting the cash register drawers ready; overseeing the conduct of the bingo games and pickle card sales; cleaning up the facility at the end of a bingo occasion (such an occasion being a single gathering or session at which a series of bingo games are played); repairing and maintaining the building; and renting the bingo facility to third parties. In addition, Olson and Booth had authority to sign checks on Southeast Volunteer's accounts.

On February 15, 1992, Olson, with the approval of Booth, received a check from Southeast Volunteer's general fund in the amount of $30,060. That payment was characterized by Southeast Volunteer as an advance on Olson's salary as operations manager. Olson used the payment to consolidate debts and refinance his home mortgage at a lower interest rate.

Even though Olson was president and Booth was secretary-treasurer of Southeast District's board, the $30,060 payment was never discussed with or formally approved by the board; however, it appears that at least one other board member knew of the advance. Neither did Olson provide a written security agreement, nor was there any written agreement concerning the terms and conditions of repayment. After the Department of Revenue began its audit, Olson, in July 1992, began repaying the money through salary reductions. He paid no interest.

Olson and Booth, and they alone, decided that Olson should be paid, in addition to his regular salary as operations manager, $100 per bingo occasion for serving as the gaming manager and $60 per occasion for serving as the caller-cashier. During the period from July 1, 1990, to March 26, 1992, Olson was paid a

total of $14,427 for performing the duties of gaming manager and $8,767 for working as caller-cashier.

IV. ANALYSIS

1. First Appeal

In urging that the department's decision with respect to the first appeal, involving the 1992-93 licensing period, should be overturned as erroneous, the applicants assert that (a) the gaming funds Southeast Volunteer donated to the retirement plan were proper payroll expenses and thus not prohibited by § 9-211(3) or 9-309(3), (b) the salary advance to Olson was not prohibited by the foregoing statutes, (c) the multiple payments to Olson for working both as the gaming manager and as caller-cashier did not violate § 9-243, and (d) the punishment exacted in the form of denying the issuance of the licenses is excessive.

(a) Retirement Plan

The applicants first argue that Southeast Volunteer's donations to the retirement plan are within Southeast District's powers and Neb. Rev. Stat. § 35-508 (Reissue 1993), which provides:

> The board of directors shall have the following general powers:
>
> (1) To determine a general fire protection and rescue program for the district;
>
> . . . .
>
> (10) To organize, establish, equip, maintain, and supervise a paid, volunteer, or combination paid and volunteer fire department or company to serve the district;
>
> (11) To employ and compensate such personnel as necessary to carry out the general fire protection and rescue program of the district.

They contend that the funds donated to the retirement plan compensate members of Southeast Volunteer as authorized by § 35-508(11) and that, as such, the retirement plan is a proper nonpickle card related payroll expense. Leaving aside that the argument appears to incorrectly assume that Southeast Volunteer and Southeast District are one and the same entity, the argument further overlooks that the beneficiaries of the

retirement plan are not on the payroll of either Southeast District or Southeast Volunteer. The contributions therefore cannot be related payroll expenses.

However, the applicants further argue that donating money to the retirement plan is a lawful purpose under both §§ 9-211 and 9-309 and the department's Bingo, Lottery, Raffle and Lottery by Pickle Card Regulations, 316 Neb. Admin. Code, ch. 35 (1992). At the relevant time, § 9-211 (Reissue 1991) provided, in relevant part:

> (1) Lawful purpose, for a licensed organization making a donation of its profits derived from activities under the Nebraska Bingo Act solely to and for its own organization, shall mean donating such profits for any activity which benefits and is conducted by the organization, including any charitable, benevolent, humane, religious, philanthropic, recreational, social, educational, civic, or fraternal activity conducted by the organization for the benefit of its members.
>
> . . . .
>
> (3) No donation of profits under this section shall (a) inure to the benefit of any individual member of the licensed organization making the donation except to the extent it is in furtherance of the purposes described in this section . . . .

Section 9-309 (Reissue 1991) provides, in relevant part:

> (1) Lawful purpose, for a licensed organization making a donation of its net profits derived from its lottery by the sale of pickle cards solely for its own organization, shall mean donating such net profits for any activity which benefits and is conducted by the organization, including any charitable, benevolent, humane, religious, philanthropic, youth sports, educational, civic, or fraternal activity conducted by the organization for the benefit of its members.
>
> . . . .
>
> (3) No donation of net profits under this section shall (a) inure to the benefit of any individual member of the licensed organization making the donation except to the extent it is in furtherance of the purposes described in this section . . . .

The Nebraska Administrative Code provides as examples of permitted activities under §§ 9-211 and 9-309 the following:

> Civic or fraternal activities shall include those activities which confer a benefit on the membership as a whole such as donating money to pay the expenses for officers to travel to regional or national conventions at which organization business is discussed or donating money to fund ceremonies commemorating religious or patriotic holidays. Civic or fraternal activities may also include the construction, acquisition, improvement or maintenance of organization facilities or the payment of general operating expenses of the organization such as non-pickle card related payroll expenses, taxes, insurance or utilities.

316 Neb. Admin. Code, ch. 35, § 303.02A(1)(e) (1992).

Although not controlling, guidance is found in the principles involved in determining whether entities are tax exempt under the provisions of the federal Internal Revenue Code, granting such status to entities operated exclusively for charitable purposes and whose earnings do not inure to the benefit of any individual. In this regard, we look first to *Orange County Agr. Soc., Inc. v. C.I.R.*, 893 F.2d 529 (2d Cir. 1990). To fulfill its purpose of promoting the interests of agriculture and horticulture, the taxpayer therein sponsored an annual county fair. To acquire additional parking during the fairs, it leased adjacent land from Middletown-WallKill Improvement Corporation (M-W). M-W was owned by the taxpayer's three largest shareholders, and the taxpayer's president had served as the president of M-W. In addition to paying rent for the land used for parking, the taxpayer made numerous unsecured and interest-free loans to M-W. In rejecting tax-exempt status, the *Orange County Agr. Soc., Inc.* court found significant that part of the taxpayer's earnings inured to the benefit of private interests in contravention of the requirements of the code, writing:

> There is no evidence in the record indicating whether the full amounts [the taxpayer] loaned to M-W have been or will ever be repaid. . . .
>
> Courts have frequently held that loans extended on advantageous terms by an exempt organization to its founders or shareholders, or to an entity controlled by

> them, indicate private inurement in violation of [the provisions of the code]:
>
> "Although control of financial decisions by individuals who appear to benefit personally from certain expenditures does not necessarily indicate inurement of benefit to private individuals, those factors coupled with little or no facts in the administrative record to indicate the reasonableness and appropriateness of the expenses are sufficient to convince us that there is indeed prohibitive private inurement."

Id. at 534. See, also, *Church of Scientology of California v. C.I.R.*, 823 F.2d 1310 (9th Cir. 1987), *cert. denied* 486 U.S. 1015, 108 S. Ct. 1752, 100 L. Ed. 2d 214 (1988) (holding that cumulative effect of founder's use of church to promote royalty income for founder, his unfettered control over millions of dollars of church assets, and his receipt of untold thousands of dollars' worth of payments for founding church strongly demonstrated inurement to his benefit).

Insight into the applicants' claim that their donations to the retirement plan benefited the residents and property owners of Southeast District is provided in *Police Benev. Ass'n of Richmond, Va. v. U.S.*, 661 F. Supp. 765 (E.D. Va. 1987), *aff'd* 836 F.2d 547 (4th Cir.), which involved a nonstock corporate police benevolent association composed of active and retired police officers. The stated purpose of the association was to "'accumulate a fund, the income from which will be used to provide pensions for the maintenance, support and welfare of active members of the [association] who are retired from the Bureau of Police . . . .'" *Id.* at 766. Its articles further provided that "'[n]o part of the assets or net earnings of the [association] shall inure to the benefit of, or be distributable to, any member, director or officer of the [association].'" *Id.* In accordance with those stated objectives, the association paid pension benefits to its members. In concluding that the association did not merit tax-exempt status, the court rejected the association's contention that its purposes were charitable in that the payment of pension benefits relieved the government of some of the burdens caused by retirement and by having to constantly train new recruits. The court concluded that these were not charitable pur-

poses because the association provided a pecuniary benefit for the individuals who chose to join and contribute, and the benefit to the government was incidental.

In another such case, *Policemen's Benevolent Association of Westchester County, Inc.*, 42 T.C.M. (CCH) 1750 (1981), the issues, as framed by the court, were whether the association was operated exclusively for exempt purposes and whether part of its net earnings inured to the benefit of private individuals. Among other expenditures, the association had paid retirement benefits to some of its members. It argued that it had a charitable purpose and that its retirement payments were for a public purpose. In denying tax-exempt status, the court noted that the prohibition of private inurement is entwined with the test to determine tax-exempt status, writing:

> Even though a precise definition of "charitable" is not possible, one salient factor underlies a charitable purpose—the serving of a public rather than a private purpose. . . . Accordingly, in determining whether petitioner's payment of retirement benefits to its members causes it to fail the . . . operational test, we must ascertain the purpose, public or private, those payments achieve.
>
> Petitioner maintains that its retirement benefits program is designed to lessen the burdens of government and to increase police morale both of which benefit the public. We agree that some general public purposes are served, although they are to a large degree intangible. However, we are unable to find petitioner's primary purpose was to benefit the public. Rather, we find petitioner's dominant motivation was to pass economic benefit to its members—a distinctly private purpose. No one other than petitioner's members, even other Westchester County policemen, are eligible for the retirement benefits. Moreover, payment of benefits is in no way based on need. In effect, petitioner is operating a publicly-funded, non-qualified pension plan, and any intended benefit to the public is merely incidental.

Id. at 1752.

We find the foregoing principles applicable to the issues presented here and adopt them. Thus, the retirement plan contributions do not constitute a use for the lawful purposes permitted

by §§ 9-211 and 9-309, for they inure to the benefit of Southeast Volunteer's individual members and, contrary to Southeast Volunteer's claim, cannot be said to constitute a charitable activity by facilitating the recruitment and retention of volunteer firefighters for Southeast District. The legal reality is that the benefits inure directly to the benefit of Southeast Volunteer's firefighter members and only incidentally to residents and property owners of Southeast District.

(b) Salary Advance

The foregoing analysis demonstrates that the salary advance to Olson is equally indefensible; it inured solely to Olson's benefit, in violation of the aforecited statutes and regulations.

(c) Multiple Payments

We thus reach the matter of the payments to Olson for acting both as gaming manager and as caller-cashier. At the relevant time, § 9-243 (Reissue 1991) provided:

> Any member designated responsible for the proper utilization of gross receipts shall not receive any compensation greater than an amount equal to five dollars per hour for each hour such person acted as such. Any person conducting bingo and any designated supervising member shall not receive any compensation greater than thirty dollars per bingo occasion or limited period bingo occasion, except that any person whose primary duty is calling bingo or acting as a cashier shall not receive any compensation greater than an amount equal to sixty dollars per bingo occasion or limited period bingo occasion. A gaming manager shall not receive any compensation greater than an amount equal to one hundred dollars per bingo occasion or limited period bingo occasion regardless if such compensation is paid entirely from the licensed organization's bingo account or in part from other gaming activities authorized or regulated under Chapter 9 and conducted by the licensed organization.

At the relevant time, a gaming manager was defined in § 9-209.01 (Reissue 1991) as

> any person who is responsible for the supervision and operation of a bingo game on behalf of a licensed organization, including the conduct or operation of any lottery by the sale of pickle cards or any other kind of gambling activity at a bingo game which is authorized or regulated under Chapter 9. He or she shall be the authority on the premises where the bingo game is conducted and shall supervise and direct other people working at such bingo game.

The gaming manager's duties are described in 316 Neb. Admin. Code, ch. 35, § 216.04 (1992), as follows:

> A licensed gaming manager shall be present for the duration of each bingo occasion he or she manages. The gaming manager shall be the ultimate authority on the premises of the bingo occasion. The gaming manager shall have the following duties:
>
> 216.04A To supervise and direct all bingo workers as well as other individuals assisting in the conduct of gaming activities at the bingo occasion;
>
> 216.04B Ensuring that no one under the age of 18 years of age participates in the conduct or playing of bingo . . . or lotteries . . . and that . . . no alcoholic beverages are served in the area of the premises in which bingo is conducted;
>
> 216.04C Resolving any disputes which may occur during the conduct of the bingo occasion;
>
> 216.04D Ensuring that the organization awards at least fifty percent of its gross receipts from the conduct of bingo in prizes and that . . . the total prizes awarded for a bingo occasion do not exceed $4,000.00;
>
> 216.04E Ensuring that all receipts received from the conduct of gaming activities at the bingo occasion are turned over to a supervising member or utilization of funds member of the licensed organization for deposit into the appropriate bank account of the organization;
>
> 216.04F Ensuring that complete and accurate records of all gaming activities conducted at the bingo occasion are kept; and

> 216.04G Ensuring that all gaming activities at the bingo occasion are conducted in accordance with the Nebraska Bingo Act, Nebraska Pickle Card Lottery Act . . . or any rules or regulations promulgated under those Acts.

The terms "caller" and "cashier" are not defined in the statutes, and we have not been directed to any regulation defining them.

In resolving this issue, we recall that in construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Van Ackeren v. Nebraska Bd. of Parole, ante* p. 477, 558 N.W.2d 48 (1997); *Rauert v. School Dist. 1-R of Hall Cty., ante* p. 135, 555 N.W.2d 763 (1996); *Village of Winside v. Jackson*, 250 Neb. 851, 553 N.W.2d 476 (1996). Statutory language is to be given its plain and ordinary meaning; in addition, the courts will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results. *Kuhlmann v. City of Omaha, ante* p. 176, 556 N.W.2d 15 (1996); *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993). Moreover, 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. *CenTra, Inc. v. Chandler Ins. Co.*, 248 Neb. 844, 540 N.W.2d 318 (1995). Finally, when a challenged statute is susceptible of more than one reasonable construction, a court uses the construction that will achieve the purposes of the statute and preserve the statute's validity. *Callan v. Balka*, 248 Neb. 469, 536 N.W.2d 47 (1995); *Ehlers v. Perry*, 242 Neb. 208, 494 N.W.2d 325 (1993).

With these rules in mind, we note that there is no language in the statutes, and we are directed to none in the regulations, which expressly states one person cannot perform the duties of both gaming manager and caller-cashier. However, as neither is there any express language that one person can do both jobs, the department argues that the language stating "[a] gaming manager shall not receive any compensation greater than an amount equal to one hundred dollars per bingo occasion" means that

$100 was the maximum that a person acting as gaming manager could be paid no matter what duties such a person performed. See § 9-243 (Reissue 1991). However, the plain and ordinary meaning of this language is that $100 was the maximum allowed for performing the gaming manager's duties. The statute did not provide that a gaming manager called upon to also perform other nonlicensed duties must perform them without pay. Had the Legislature so intended, it could easily have so provided.

(d) Sanction

Thus, in considering the appropriateness of the license denials, we are concerned only with unlawful donations to the relevant plan and the unlawful salary advance to Olson.

At the relevant time, § 9-226 (Reissue 1991) provided, in relevant part:

> The department shall have the following powers, functions, and duties:
>
> . . . .
>
> (2) To deny any license application or renewal application for cause. Cause for denial of an application for or renewal of a license shall include instances in which the applicant or licensee or any person with a substantial interest therein: (a) Violated the provisions, requirements, conditions, limitations, or duties imposed by the Nebraska Bingo Act . . . the Nebraska Pickle Card Lottery Act . . . or any rules or regulations adopted and promulgated pursuant to the acts . . . .

Section 9-262(1) (Reissue 1991) reads:

> Except when another penalty is specifically provided, any person, distributor, licensed organization, other licensee, or employee or agent of any person or licensee who violates any provision of the Nebraska Bingo Act shall be guilty of a Class I misdemeanor for the first offense and a Class IV felony for any second or subsequent violation. Any licensed organization guilty of violating any provision of the Nebraska Bingo Act more than once in a twelve-month period shall have its license canceled or revoked.

Section 9-352(1) contains almost the identical language with regard to the pickle card activities.

Thus, it is clear that the department had the authority to deny the licenses at issue. The question is whether such denials are arbitrary or capricious. A decision is arbitrary when it is made in disregard of the facts or circumstances and without some basis which would lead a reasonable person to the same conclusion. *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996); *Central Platte NRD v. City of Fremont*, 250 Neb. 252, 549 N.W.2d 112 (1996). A capricious decision is one guided by fancy rather than by judgment or settled purpose; such a decision is apt to change suddenly; it is freakish, whimsical, humorsome. *Ponderosa Ridge LLC, supra*; *Central Platte NRD, supra*; *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994).

The record demonstrates that the denials were not guided by fancy or made with a disregard of the facts or circumstances. Rather, they were made in accordance with the provisions of the relevant statutes. Accordingly, the sanctions are clearly not excessive, and in fact, conform to the law, are supported by competent evidence, and are not arbitrary, capricious, or unreasonable.

2. Second Appeal

With regard to the second appeal, covering the 1993-94 licensing period, the applicants assert that the district court erred in ruling that summary judgment is appropriate in a proceeding before the department.

Both § 9-226.01 (Reissue 1991) of the Nebraska Bingo Act and § 9-322.02 (Reissue 1991) of the Nebraska Pickle Card Lottery Act require the department to give notice of its intention to deny an application, and provide for proceedings which are to be considered contested cases pursuant to the Administrative Procedure Act, § 84-913, which provides, in relevant part: "In any contested case all parties shall be afforded an opportunity for hearing after reasonable notice. . . . Opportunity shall be afforded all parties to present evidence and argument with respect thereto."

In *Buckingham v. Creighton University*, 248 Neb. 821, 539 N.W.2d 646 (1995), we held that as the Workers' Compensation Court is not statutorily authorized to grant motions for summary judgment, it cannot grant such judgments. We reasoned that as the compensation court is of statutory creation, its powers are appropriately limited to those delineated in the statute.

Administrative bodies likewise have only that authority specifically conferred upon them by statute or by construction necessary to achieve the purpose of the relevant act. *Grand Island Latin Club v. Nebraska Liq. Cont. Comm., ante* p. 61, 554 N.W.2d 778 (1996); *CenTra, Inc. v. Chandler Ins. Co.*, 248 Neb. 844, 540 N.W.2d 318 (1995); *Chrysler Corp. v. Lee Janssen Motor Co.*, 248 Neb. 281, 534 N.W.2d 568 (1995). Neither the Nebraska Bingo Act, the Nebraska Pickle Card Lottery Act, nor the Administrative Procedure Act authorizes the granting of summary judgment.

That being so, the department erroneously disposed of the issues involved in the 1993-94 licensing period by summary judgment, and the district court erred in affirming that decision.

V. JUDGMENT

Accordingly, as noted in part I, we affirm the district court's judgment in the first appeal, and in the second appeal, we reverse the judgment of the district court and remand the matter thereto with the direction that it remand the matter to the department for further proceedings.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTION.

ESTATE OF DALE STINE, GREG STINE, PERSONAL REPRESENTATIVE, APPELLEE AND CROSS-APPELLANT, V. CHAMBANCO, INC., APPELLANT AND CROSS-APPELLEE.

560 N.W.2d 424

Filed February 28, 1997. No. S-95-531.

1. **Contracts: Appeal and Error.** The construction of a contract is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below.

2. **Motions to Dismiss: Directed Verdict.** A motion to dismiss for want of evidence in a bench trial is treated the same as a motion to direct a verdict in a jury trial.
3. **Motions to Dismiss.** When a trial court sustains a motion to dismiss, it resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw only one conclusion.
4. **Contracts.** In interpreting a contract, it must first be determined, as a matter of law, whether the contract is ambiguous.
5. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
6. **Contracts.** A determination as to whether ambiguity exists in a contract is to be made on an objective basis, not by the subjective contentions of the parties; thus, the fact that the parties have suggested opposing meanings of the disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous.
7. **Contracts: Intent: Words and Phrases.** The existence of a condition precedent depends upon the intent of the parties as gathered from the words they have employed.
8. ____: ____: ____. Terms such as "if," "provided that," "when," "after," "as soon as," "subject to," "on condition that," and similar phrases are evidence that performance of a contractual provision is a condition.
9. **Contracts.** If the contents of a document are not ambiguous, the document is not subject to interpretation and will be enforced according to its terms.
10. ____. Where an agreement provides for the payment of money upon the happening of certain contingencies, the cause of action will usually not arise until occurrence of the conditions.
11. **Contracts: Liability.** As a general rule, a condition must be exactly fulfilled before liability can arise on the contract.

Petition for further review from the Nebraska Court of Appeals, IRWIN, SIEVERS, and INBODY, Judges, on appeal thereto from the District Court for Holt County, WILLIAM CASSEL, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Forrest F. Peetz, of Peetz & Peetz, for appellant.

Boyd W. Strope, of Strope, Krotter & Gotschall, P.C., for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ.

GERRARD, J.

INTRODUCTION

Dale Stine and Chambanco, Inc., entered into an agreement for the sale of shares of stock in Ewing Agency, Inc. This agree-

ment provided for an additional $25,000 payment to Stine that would be payable when Chambanco received that sum pursuant to a separate agreement between Stine and Ewing Agency. Stine is now deceased; Chambanco has not paid this additional payment to the estate of Stine.

Following a bench trial, the district court entered judgment in favor of the estate of Stine and against Chambanco. Even though the trial court found that the contract language at issue was not ambiguous and that it created a condition precedent to Chambanco's obligation to pay, it concluded that the condition ought to be construed to run for a reasonable period of time and that Chambanco already had a reasonable time to pay.

Chambanco appealed to the Nebraska Court of Appeals, and that court, with one judge dissenting, determined in a memorandum opinion that the trial court committed plain error in finding that the contract between Stine and Chambanco is not ambiguous. See *Estate of Stine v. Chambanco, Inc.*, 4 Neb. App. xviii (case No. A-95-531, August 23, 1996). As a result, the Court of Appeals reversed the judgment and remanded the cause for further proceedings, and ordered the district court to receive parol evidence in order to determine the intentions of the parties. *Id.* Chambanco successfully petitioned this court for further review.

Because we conclude that the agreement creates a condition precedent, we determine that Chambanco's obligation to pay the additional amount under the agreement has not yet arisen. Accordingly, we reverse the decision of the Court of Appeals and remand this matter to that court with directions to remand the cause to the district court with directions to dismiss.

FACTUAL BACKGROUND

This action involves a dispute over a contract whereby Chambanco purchased shares of stock in Ewing Agency from Stine. Ewing Agency was formed by Stine and two other individuals, H.D. Huff and Ed Chandler, for the purpose of purchasing a bank. Stine, Huff, and Chandler invested time and labor in the formation of Ewing Agency, but did not invest money. Stine, Huff, and Chandler recruited numerous other individuals to invest money in Ewing Agency.

The individuals who invested money in Ewing Agency received both stock and debentures, which could be redeemed to recover their cash investment. Stine, Huff, and Chandler received stock, but did not receive debentures because of alleged adverse tax consequences that would have been associated with receipt of a debenture without a corresponding investment of money.

Stine, Huff, Chandler, and the remaining investors entered into a stock purchase agreement on October 3, 1975. The stock purchase agreement included a right of first refusal, which generally provided that if any shareholder intended to sell or encumber his or her stock, the stock had to be offered first to Ewing Agency and then to the other shareholders of Ewing Agency. If either Ewing Agency or the other shareholders elected to exercise their right to purchase the stock, then the purchase price was computed according to a formula set out in the stock purchase agreement.

The stock purchase agreement also included an adjustment provision to compensate Stine, Huff, and Chandler for their "sweat equity," which provided for a payment in lieu of the fact that they received no debentures. The adjustment provision provided as follows:

> 4. Adjustment. In the event of an offer [pursuant to the right of first refusal set out in the stock purchase agreement] made by Dale Stine, H. D. Huff or [Ed] Chandler, or in the event of the death of Dale Stine, H. D. Huff or Ed Chandler, the purchase price as computed in accordance with paragraph 3 [of the stock purchase agreement] shall be increased by $25,000 as to Dale Stine and as to H. D. Huff, and shall be increased by $8,250 as to Ed Chandler.

On January 17, 1986, Stine entered into a contract with Chambanco for the sale of his shares of Ewing Agency stock. Ralph Adams, who was also a shareholder of Ewing Agency, signed the contract as a representative of Chambanco. Stine presented this agreement with Chambanco to Ewing Agency and to the other shareholders of Ewing Agency, pursuant to the stock purchase agreement, and both Ewing Agency and the other shareholders declined to exercise their right of first refusal. As

a result, Stine and Chambanco proceeded according to their contract.

The January 17, 1986, contract between Stine and Chambanco included the following provision, which is the source of controversy in this case:

> 2. The purchase price for such shares shall be the amount of One Hundred Twenty-Five Thousand Dollars ($125,000.00), payable in cash on the date of closing; provided, however, that the purchase price shall be reduced by the amount of Eight Thousand Five Hundred Dollars ($8,500.00) in the event [of an unrelated contingency] . . . . Buyer further recognizes that Seller's stock is subject to a Stock Purchase Agreement with Ewing Agency, Inc. and the remaining stockholders, one of the provisions of which Agreement entitles Seller to the payment of Twenty-Five Thousand dollars ($25,000.00) over and above the formula price set forth in said Agreement. Said right to payment follows the stock of Seller. Buyer agrees to pay to Seller the sum of Twenty-Five Thousand Dollars ($25,000.00) *when received* by Buyer from Ewing Agency, Inc., or any other source.

(Emphasis supplied.)

Stine and Chambanco also executed an amendment to their contract on February 12, 1986. The amendment provided that Chambanco would pay Stine interest on the purchase price of the stock at a rate of 10½ percent from January 17, 1986, through the date of payment. This amendment also includes a handwritten notation in the bottom left-hand margin which reads, "I agree to no interest from Ralph Adams. Dale Stine."

On December 28, 1986, Chambanco paid Stine $125,000. Subsequently, Chambanco purchased the majority of the remaining stock in Ewing Agency. Stine never received the additional $25,000 from anyone, and there is no evidence that Chambanco ever paid Stine any interest on the $125,000.

Stine died on July 25, 1992. The personal representative for Stine's estate made a demand for the $25,000, which was refused by Chambanco. The personal representative then brought suit against Chambanco and Ewing Agency, seeking

payment of the $25,000, plus interest as provided in the amendment to the contract between Stine and Chambanco.

The personal representative filed a motion for partial summary judgment, and Chambanco and Ewing Agency filed a motion for summary judgment. The district court granted the personal representative's partial summary judgment, finding that the action was one seeking legal, not equitable, relief; that the statute of frauds was not a defense to the action; and that proper consideration was given for the contract between Stine and Chambanco. The district court denied Chambanco and Ewing Agency's motion. The district court also found that the stock purchase agreement and the contract between Stine and Chambanco were not ambiguous and that parol evidence would not be admissible at trial to alter the meanings of the two contracts.

At trial, Robert Routh, the attorney who drafted the documents involved in this case, testified on behalf of the estate. The estate also introduced numerous exhibits. Chambanco and Ewing Agency both moved for a directed verdict at the conclusion of the estate's case, and the court overruled the motions. Chambanco and Ewing Agency both rested without presenting evidence.

The district court set out its findings of fact and conclusions of law in a written order. The district court found that Chambanco was still legally "alive" and had not sold or encumbered the shares of stock purchased from Stine. The district court further found that Stine's sale to Chambanco triggered Stine's right to receive the $25,000 adjustment payment under the stock purchase agreement. The district court also found that Chambanco had not received the sum of $25,000 "attributable to Dale Stine's right of payment from Ewing Agency, Inc., or from any other source." The district court concluded, however, that the language in the contract between Stine and Chambanco "clearly shows the intent of the parties" was that Chambanco would receive the $25,000 within a reasonable time. Finally, the district court found that the contractual obligation of the contract between Stine and Chambanco was only against Chambanco, and, therefore, Ewing Agency was dismissed from

the action. Accordingly, the district court entered judgment against Chambanco for $25,000.

Chambanco timely appealed to the Court of Appeals, alleging that the district court erred in denying Chambanco's motion for directed verdict, in finding that Chambanco had an obligation to pay Stine $25,000, and in resolving an issue not preserved in the pretrial order. The estate cross-appealed in the Court of Appeals, alleging that the district court erred in failing to award interest pursuant to the amendment to the contract between Stine and Chambanco. As noted in the introduction, the Court of Appeals determined that the contract between Stine and Chambanco was ambiguous, and reversed the judgment and remanded the cause to the district court for further proceedings to determine the intentions of the parties.

ASSIGNMENTS OF ERROR

Chambanco asserts that the Court of Appeals erred in (1) concluding that the district court committed plain error in finding that the terms of the subject contract were unambiguous and (2) ordering further proceedings to determine the intention of the parties.

SCOPE OF REVIEW

The construction of a contract is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below. *Daehnke v. Nebraska Dept. of Soc. Servs.*, *ante* p. 298, 557 N.W.2d 17 (1996); *Stephens v. Radium Petroleum Co.*, 250 Neb. 560, 550 N.W.2d 39 (1996).

ANALYSIS

While Chambanco's motion for directed verdict is more properly termed a motion to dismiss for want of evidence, since this was a bench trial, such motion is treated the same as a motion to direct a verdict in a jury trial. See, *Kreus v. Stiles Service Ctr.*, 250 Neb. 526, 550 N.W.2d 320 (1996); *Hill v. City of Lincoln*, 249 Neb. 88, 541 N.W.2d 655 (1996). When a trial court sustains a motion to dismiss, it resolves the controversy as a matter of law and may do so only when the facts are such that

reasonable minds can draw only one conclusion. *Hill v. City of Lincoln, supra.*

Paragraph 2 of the agreement between Stine and Chambanco provides that "[Chambanco] agrees to pay to [Stine] the sum of Twenty-Five Thousand Dollars ($25,000.00) when received by [Chambanco] from Ewing Agency, Inc., or any other source." Both parties acknowledged at argument in this court that the controverted language is unambiguous. Chambanco asserts that the district court correctly determined that this contractual language creates a condition precedent. Conversely, the personal representative contends that this language creates a promise to pay a present and existing debt. In essence, the personal representative asserts that the October 3, 1975, stock purchase agreement and the January 17, 1986, contract, when read together, create an obligation to pay $150,000—i.e., $125,000 paid on December 28, 1986, and the additional $25,000 to be paid within a reasonable period of time.

In interpreting a contract, we must first determine, as a matter of law, whether the contract is ambiguous. *Daehnke v. Nebraska Dept. of Soc. Servs., supra*; *C.S.B. Co. v. Isham*, 249 Neb. 66, 541 N.W.2d 392 (1996). A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Daehnke v. Nebraska Dept. of Soc. Servs., supra*; *Winfield v. CIGNA Cos.*, 248 Neb. 24, 532 N.W.2d 284 (1995). A determination as to whether ambiguity exists in a contract is to be made on an objective basis, not by the subjective contentions of the parties; thus, the fact that the parties have suggested opposing meanings of the disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous. *Daehnke v. Nebraska Dept. of Soc. Servs., supra*; *Murphy v. City of Lincoln*, 245 Neb. 707, 515 N.W.2d 413 (1994).

As a matter of law, we agree with the parties that the January 17, 1986, Stine-Chambanco contract is unambiguous. The contract requires Chambanco to pay Stine $25,000 *when* Chambanco receives the money from Ewing Agency or any other source. We determine that this language is not susceptible of at least two reasonable but conflicting interpretations or

meanings. See *Daehnke v. Nebraska Dept. of Soc. Servs., supra.* Thus, the Court of Appeals erred when it found plain error in the district court's ruling that the contract language at issue is unambiguous.

However, we must determine whether Stine and Chambanco intended to create a condition or a promise with the phrase, "[Chambanco] agrees to pay to [Stine] [$25,000] when received by [Chambanco] from Ewing Agency, Inc., or any other source." We have held that the existence of a condition precedent depends upon the intent of the parties as gathered from the words they have employed. *Lee Sapp Leasing v. Catholic Archbishop of Omaha*, 248 Neb. 829, 540 N.W.2d 101 (1995). Terms such as "if," "provided that," "*when,*" "after," "as soon as," "subject to," "on condition that," and similar phrases are evidence that performance of a contractual provision is a condition. *Harmon Cable Communications v. Scope Cable Television*, 237 Neb. 871, 468 N.W.2d 350 (1991).

In the instant case, the obligation to pay the other $25,000 to Stine or his estate is triggered *when* it is received from Ewing Agency or some other source, and there is no dispute that payment has never been received by Chambanco. There is absolutely nothing ambiguous about this contractual language, and parol evidence will not be allowed to vary the meaning of a document under such circumstances. If the contents of a document are not ambiguous, the document is not subject to interpretation and will be enforced according to its terms. *Lee Sapp Leasing v. Catholic Archbishop of Omaha, supra.*

The district court correctly found that the January 17, 1986, agreement provided that Stine's right to the additional payment would follow the stock into Chambanco's hands. However, where an agreement provides for the payment of money upon the happening of certain contingencies, the cause of action will usually not arise until occurrence of the conditions. *Id.* As a general rule, a condition must be exactly fulfilled before liability can arise on the contract. *Harmon Cable Communications v. Scope Cable Television, supra.* In the present case, Chambanco has not received $25,000 from Ewing Agency or any other source. Consequently, it is undisputed that the condition has not been fulfilled and that the obligation to pay has not yet arisen.

In departing from the general rule, and finding that it was the intent of the parties that Chambanco would receive the $25,000 within a reasonable time, the district court relied on this court's holding in *In re Estate of Backes*, 122 Neb. 531, 240 N.W. 596 (1932). However, the instrument at issue in *In re Estate of Backes* was a promissory note, evidencing a present and existing indebtedness at the time it was executed and delivered, that provided for payment when the maker sold a specified tract of land in the future. The future event was merely a convenient time for payment. In contrast, the contract in the instant case did not create a present and existing obligation. Instead, the contract created a condition precedent that must be fulfilled before any obligation to pay arises. Because the condition has not occurred, the district court erred in (1) finding that the contract should be construed such that Chambanco had an obligation to pay Stine within a reasonable time and (2) not granting Chambanco's motion to dismiss.

CONCLUSION

For the foregoing reasons, we conclude that the contract language at issue is unambiguous and creates a condition precedent to Chambanco's obligation to pay the additional $25,000. Because Chambanco has not received payment from Ewing Agency or any other source, its obligation to pay the additional $25,000 has not yet arisen. Thus, we reverse the decision of the Court of Appeals and remand this matter to that court with directions to remand the cause to the district court with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE,
v. TOM L. SOMMERFELD, APPELLANT.
560 N.W.2d 420

Filed February 28, 1997. No. S-96-302.

1. **Constitutional Law: Statutes: Appeal and Error.** A challenge to the constitutionality of a statute presents a question of law, which must be determined by an appellate court independently from the conclusion reached by a trial court.

2. **Appeal and Error.** Not only must a claimed prejudicial error be assigned, it must also be discussed in the brief of the asserting party; an appellate court will not consider assignments of error which are not discussed in the brief.
3. **Constitutional Law: Statutes: Appeal and Error.** As a general rule, in a challenge to the overbreadth and vagueness of a law, an appellate court's first task is to analyze overbreadth.
4. **Constitutional Law: Statutes.** A statute may be unconstitutionally overbroad only if its overbreadth is substantial, that is, when the statute would be unconstitutional in a substantial portion of the situations to which it is applicable.
5. **Constitutional Law: Statutes: Standing.** If the statutory proscription does not reach a substantial amount of constitutionally protected conduct, there is no standing to challenge a statute on the basis the statute is overbroad, and such challenge must fail.
6. **Constitutional Law: Criminal Law: Statutes.** The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.
7. **Constitutional Law: Statutes.** A statute will not be deemed vague if it uses ordinary terms which find adequate interpretation in common usage and understanding; in determining whether a statute is vague and therefore does not give a defendant adequate notice that the conduct is proscribed, the statute must be examined in light of the conduct with which the defendant is charged.
8. ____: ____. The prohibition against vagueness does not invalidate a statute simply because it could have been drafted with greater precision; the test is whether the defendant could reasonably understand that the conduct was proscribed by the statute.

Appeal from the District Court for Buffalo County, JOHN P. ICENOGLE, Judge, on appeal thereto from the County Court for Buffalo County, GERALD R. JORGENSEN, Judge. Judgment of District Court affirmed.

Thomas W. Tye II, of The Tye Law Firm, for appellant.

Don Stenberg, Attorney General, and Jay C. Hinsley for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and BOSLAUGH and GRANT, JJ., Retired.

CAPORALE, J.

Pursuant to verdict, the county court adjudged the defendant-appellant, Tom L. Sommerfeld, guilty of storing vehicles in such a manner as to violate Neb. Rev. Stat. § 60-311.18 (Reissue 1993), and thereafter sentenced him. After an unsuc-

cessful appeal to the district court, Sommerfeld appealed to the Nebraska Court of Appeals, asserting, in summary and as argued, that the district court erred in failing to hold § 60-311.18 unconstitutional under the state and federal Constitutions as being impermissibly overbroad and vague. Under our authority to regulate the caseloads of the Court of Appeals and this court, we, on our own motion, removed the matter to our docket. We now affirm.

A challenge to the constitutionality of a statute presents a question of law, which must be determined by an appellate court independently from the conclusion reached by a trial court. *State v. Carpenter*, 250 Neb. 427, 551 N.W.2d 518 (1996).

Section 60-311.18 reads:

> Subject to land-use regulations of a county or municipality, a collector may store any vehicles, licensed or unlicensed, operable or inoperable, on his property if such vehicles and parts cars and any outdoor storage areas are maintained in such a manner that they do not constitute a health hazard, and the vehicles are located away from ordinary public view or are screened from ordinary public view by means of a fence, rapidly growing trees, shrubbery, opaque covering, or other appropriate means.

The evidence demonstrates that Sommerfeld keeps historic and other vehicles on an unimproved residential lot, namely, several old automobiles, several antiquated tractors, a steam engine, and various farm equipment, all within a few feet of a public road. All of the items are easily visible from the road, as there is nothing obstructing the view. Indeed, it is Sommerfeld's position that he does not store the vehicles but, rather, displays them, and he testified that he did not want to screen the items from public view. He admitted that the items "are very visible" and "very much" in the ordinary public view.

We note first that although in addition to claiming that § 60-311.18 is constitutionally infirm, Sommerfeld also assigns as error the district court's failure to find that the county court erred in failing to receive certain evidence, in receiving certain evidence, and in failing to sustain his motions for directed verdict. However, Sommerfeld does not discuss any of these

alleged errors in his brief. Not only must a claimed prejudicial error be assigned, it must also be discussed in the brief of the asserting party; an appellate court will not consider assignments of error which are not discussed in the brief. *Landmark Enterprises v. M.I. Harrisburg Assocs.*, 250 Neb. 882, 554 N.W.2d 119 (1996). That being so, we concern ourselves only with the constitutional claims.

In that regard, we note that as a general rule, in a challenge to the overbreadth and vagueness of a law, the court's first task is to analyze overbreadth. *Carpenter, supra.* An attack on the overbreadth of a statute asserts that language in the statute impermissibly infringes on a constitutionally protected right. *Id.*

According to Sommerfeld, "the displaying of one's personal property is constitutionally protected conduct that should not be infringed upon . . . ." Brief for appellant at 12. Specifically, Sommerfeld argues that article I, § 3, of the Nebraska Constitution and the Fifth and Sixth Amendments to the U.S. Constitution protect the displaying of historical vehicles on one's own property.

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Sommerfeld fails to explain how § 60-311.18 violates his Sixth Amendment rights.

Article I, § 3, provides: "No person shall be deprived of life, liberty, or property, without due process of law." Similarly, the Fifth Amendment provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." Again, Sommerfeld cites to no statute or case law supporting his argument that the displaying of personal property in open view is a property or liberty interest.

A statute may be unconstitutionally overbroad only if its overbreadth is substantial, that is, when the statute would be unconstitutional in a substantial portion of the situations to which it is applicable. *State ex rel. Dept. of Health v. Jeffrey*, 247 Neb. 100, 525 N.W.2d 193 (1994). If the statutory proscription does not reach a substantial amount of constitutionally protected conduct, there is no standing to challenge a statute on the basis the statute is overbroad, and such challenge must fail. *State v. Carpenter*, 250 Neb. 427, 551 N.W.2d 518 (1996). Because § 60-311.18 is not shown to reach a substantial amount of constitutionally protected conduct, Sommerfeld lacks standing to challenge it based on overbreadth.

Sommerfeld next contends that the county court erred in determining that § 60-311.18 is not unconstitutionally vague. The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *Carpenter, supra*. The more important aspect of the vagueness doctrine is not actual notice, but the requirement that a legislature establish minimal guidelines to govern law enforcement. *Carpenter, supra*.

Sommerfeld argues that § 60-311.18 did not put him on notice of what conduct was proscribed, pointing out that " '[t]he test for determining whether a statute is vague is whether it forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' " Brief for appellant at 8, quoting *State v. Schmailzl*, 243 Neb. 734, 502 N.W.2d 463 (1993). However, Sommerfeld fails to complete the quotation, which goes on to declare:

> " 'A statute will not be deemed vague if it uses ordinary terms which find adequate interpretation in common usage and understanding. . . . In determining whether a statute is vague and therefore does not give a defendant adequate notice that his conduct is proscribed, the statute must be examined in light of the conduct with which the defendant is charged. . . .

> " '. . . The prohibition against vagueness does not invalidate a statute simply because it could have been drafted with greater precision. The test is whether the defendant could reasonably understand that his conduct was proscribed by the statute.' "

Schmailzl, 243 Neb. at 736-37, 502 N.W.2d at 465.

Nonetheless, Sommerfeld contends that the phrases "ordinary public view" and "or other appropriate means" and the word "store" are subject to multiple interpretations, are not defined by statute, and are thus unconstitutionally vague. He asks whether a vehicle stored "one quarter mile off the highway in the middle of the sandhills" is in ordinary public view. Brief for appellant at 9. Regarding the phrase "or other appropriate means," Sommerfeld asks whether surrounding a historic vehicle with nonhistoric vehicles would fit the definition. But as noted earlier, in determining whether a statute is vague, it must be examined in light of the conduct with which the defendant is charged. *Schmailzl, supra.* Sommerfeld cannot maintain that the statute is vague when applied to the conduct of others. See *Carpenter, supra.*

In contending that § 60-311.18 is unconstitutionally vague as applied to him, Sommerfeld states that he "has made several attempts to comply with the statute, yet he does not know what are appropriate means and what are not appropriate means." Brief for appellant at 11. However, the record does not support this contention, and Sommerfeld points to no evidence indicating how he attempted to comply with the statute. On the contrary, his own testimony establishes that he intended to keep the vehicles in public view at all times.

In order to have standing to attack a vague statute, one must not have engaged in conduct which is clearly proscribed by the statute. *Carpenter, supra*; *State v. Conklin*, 249 Neb. 727, 545 N.W.2d 101 (1996). Here, Sommerfeld engaged in conduct which is clearly proscribed by § 60-311.18; he thus has no standing to attack the statute as vague.

For the foregoing reasons, the judgment of the district court, as noted in the first paragraph hereof, is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. CHARLES L. CASKEY, RESPONDENT.

560 N.W.2d 414

Filed February 28, 1997. No. S-96-500.

1. **Disciplinary Proceedings: Appeal and Error.** A proceeding to discipline an attorney is a trial de novo on the record, in which the Nebraska Supreme Court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Disciplinary Proceedings: Proof: Appeal and Error.** A disciplinary complaint against an attorney will only be sustained if the Nebraska Supreme Court finds it to be established by clear and convincing evidence.
3. **Disciplinary Proceedings: Words and Phrases.** An act of moral turpitude by an attorney is an act that is contrary to honesty and good morals.
4. **Disciplinary Proceedings: Taxes.** An attorney's knowing and willful failure to file a tax return, for which he or she has the legal obligation for filing, constitutes illegal conduct involving moral turpitude.
5. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed upon an attorney, it is necessary that the following factors be considered: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) his or her present or future fitness to continue in the practice of law.
6. ____. Multiple acts of misconduct by an attorney are distinguishable from isolated incidents and are therefore deserving of more serious sanctions.
7. ____. Each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances.
8. ____. It is necessary to consider mitigating factors in determining the appropriate discipline imposed on an attorney.

Original action. Judgment of suspension.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

David A. Domina, of Domina & Copple, P.C., for respondent.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and BUCKLEY, D.J.

PER CURIAM.

Formal charges against the respondent, Charles L. Caskey, were filed in this court on May 13, 1996. Caskey was charged

with violating Canon 1, DR 1-102(A)(1), (3), and (6), of the Code of Professional Responsibility in that he was convicted of the crime of failure to maintain records and pay taxes under Neb. Rev. Stat. § 77-27,115 (Reissue 1996), a Class II misdemeanor.

Caskey has practiced law in Nebraska since June 16, 1969, when he was duly admitted to the practice of law by this court. On July 31, 1995, Caskey was charged with the crime of failure to maintain records and pay taxes in the district court for Lancaster County, Nebraska. On October 17, 1995, pursuant to a plea agreement, Caskey pled guilty to the aforementioned charge, and the district court accepted his guilty plea. The district court sentenced Caskey to a term of probation for 2 years and ordered him to pay restitution to the Nebraska Department of Revenue in the sum of $5,289.85 for back taxes, penalties, and interest, plus any additional interest accrued prior to the date of payment. Caskey did not appeal the conviction or sentence.

The formal charges brought by the relator, Nebraska State Bar Association, allege the foregoing acts of Caskey constituted violations of his oath of office as an attorney and the following provisions of the Code of Professional Responsibility: "DR 1-102 Misconduct. (A) A lawyer shall not: (1) Violate a Disciplinary Rule. . . . (3) Engage in illegal conduct involving moral turpitude. . . . (6) Engage in any other conduct that adversely reflects on his or her fitness to practice law."

Caskey admits the acts committed by him violated DR 1-102(A)(1). However, Caskey denies that his conduct involved moral turpitude as set forth in DR 1-102(A)(3). Caskey further admits that the conduct in which he engaged *reflects* on his fitness to practice law but that he has endeavored, and continues to endeavor, to overcome this adverse reflection. Thus, Caskey admits a violation of DR 1-102(A)(6), but he contends that he is fit to practice law.

Following an evidentiary hearing, the referee found that Caskey had violated DR 1-102(A)(1), (3), and (6) of the Code of Professional Responsibility. The referee recommended that Caskey be suspended from the practice of law for 6 months and that he be required to divest himself of all business interests out-

side the practice of law, except for his title and abstracting business. Exceptions to the referee's report were filed by Caskey on October 10, 1996.

STANDARD OF REVIEW

A proceeding to discipline an attorney is a trial de novo on the record, in which this court reaches a conclusion independent of the findings of the referee; provided, however, that where the credible evidence is in conflict on a material issue of fact, this court considers and may give weight to the fact that the referee heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. NSBA v. Brown, ante* p. 815, 560 N.W.2d 123 (1997).

FACTS

Caskey is 53 years old and has maintained a general law practice in Stanton, Nebraska, since his admission to the bar in 1969. Prior to the institution of the present proceedings, Caskey had received two private reprimands for conflict of interest violations, the first on June 21, 1978, and the second on March 31, 1986.

In November 1991, at the request of three investors, Caskey agreed to incorporate a pallet reconstruction business called SDF, Inc. Caskey prepared the articles of incorporation, signed the articles as the incorporator, and filed the articles with the Secretary of State. Caskey was paid approximately $100 to $150 in fees for his professional services incorporating the business.

SDF was in financial trouble within 2 months of its creation. In approximately February 1992, the three original investors walked away from the pallet reconstruction business, the employees were laid off, and the business came to a standstill.

Several creditors approached Caskey in February 1992 and asked him if there was a chance of getting paid for the credit they had extended to SDF. At about the same time, a former employee asked Caskey if he could manage the manual labor to allow himself and others to receive a paycheck. Caskey claims that he felt a personal obligation to the community of Stanton to provide employment and to repay certain community vendors

for materials and supplies that the vendors had sold to the new business. Caskey assumed the management of SDF by performing the bookkeeping services of depositing receipts and paying the overhead from February through May 1992.

SDF continued to be under severe financial pressure during the 4-month term, and the costs of overhead and taxes continued to exceed its revenues. Caskey loaned $2,500 to SDF in March 1992 to provide extra funds and allow it to pay some of its creditors.

The corporate bookkeeping functions from February through May 1992 were performed in Caskey's law office by his legal secretary, Myrthalean Novotny. Caskey signed the signature card for SDF at a local bank. To the extent possible, Caskey paid the corporate bills with checks that he signed on behalf of the corporation.

Novotny testified that the revenues generated by the reconstruction business continued to be inadequate to pay its creditors, the wages, and the Nebraska Department of Revenue for income taxes withheld from the wages. Novotny also testified that she was instructed by Caskey to pay first the wages and the business expenses before paying the Department of Revenue. She further testified Caskey was fully aware that the quarterly withholding tax reports were not filed until sometime late in 1993 and that the withholding taxes were not paid. Caskey confirmed this testimony and admits that he alone made the decision to prioritize payments.

The reconstruction business of SDF again came to a standstill in June 1992, and the employees were laid off. Caskey testified that he made the decision in September 1992 to reopen the business under a new name by utilizing a previously incorporated business of which he was the sole stockholder. This new operating company, Stanton Leasing, made an effort from September 1992 until approximately June 1994 to operate at a profit. It, too, proved unsuccessful; however, withholding taxes were paid by Stanton Leasing to the Department of Revenue, albeit late, and were not at issue in the criminal proceedings.

The bill of exceptions from the district court criminal proceedings reveals that Caskey pled guilty as a result of his liability and responsibility as an officer and director of SDF to pay

the withholding taxes. However, Caskey's testimony before the referee was, at best, confusing. Caskey was unclear as to whether or not he was actually an officer or director of the corporation. He testified that there were no corporate minutes to reflect his appointment or acceptance to serve as an officer and director. Caskey curiously questioned whether or not the corporation was validly incorporated and operated. He did admit in his testimony that there were annual reports filed with the Secretary of State reflecting that he was SDF's treasurer and other documents reflecting that he took minutes at meetings as secretary of SDF. In addition to the March 1992 loan, Caskey claimed that he loaned SDF a total of $10,000. There were no promissory notes or corporate minutes reflecting the approval or terms of these alleged loans. Thus, while it is clear that Caskey acted as more than the attorney for SDF, the nature and extent of these additional roles is certainly less clear from the record.

Both Caskey and Novotny testified that Caskey did not pay himself wages or a dividend, did not repay himself for the alleged loans to SDF, and did not profit financially from the business venture. As of the date of the hearing before the referee, Caskey had complied with the district court order by paying all of the corporate taxes alleged to be owed to the Department of Revenue.

ASSIGNMENTS OF ERROR

Caskey takes exception to the referee's report, asserting that the referee erred (1) in finding that Caskey's conduct involved moral turpitude, a violation of DR 1-102(A)(3); (2) in failing to define the phrase "[e]ngage in illegal conduct involving moral turpitude" as used in DR 1-102(A)(3); and (3) in recommending that a period of suspension be imposed upon Caskey as a sanction.

ANALYSIS

A disciplinary complaint against an attorney will only be sustained if this court finds it to be established by clear and convincing evidence. *State ex rel. NSBA v. Johnston, ante* p. 468, 558 N.W.2d 53 (1997). Caskey admits to violating

DR 1-102(A)(1) and (6), and, on de novo review, we independently determine that the evidence clearly and convincingly establishes that Caskey indeed did violate a disciplinary rule and engaged in conduct that adversely reflects on his fitness to practice law.

However, Caskey denies that the illegal conduct which led to the criminal conviction involved moral turpitude. Caskey urges us to adopt a definition of moral turpitude such that illegal conduct involves moral turpitude "only where it inherently involves excessive selfishness . . . [in] disregard [of] the rights of others for the sake of the actor's self-gratification." Brief for respondent at 22-23. We decline this invitation. This court has consistently defined an act of moral turpitude as an act that is contrary to honesty and good morals, and we reaffirm that definition in the instant case. See *State ex rel. NSBA v. Veith*, 238 Neb. 239, 470 N.W.2d 549 (1991).

In *State ex rel. NSBA v. Veith*, 238 Neb. at 247, 470 N.W.2d at 555, we wrote: " ' "The most common definition of an act of moral turpitude is one that is 'contrary to honesty and good morals.' [citations.]" . . . " 'The paramount purpose of the "moral turpitude" standard is not to punish practitioners but to protect the public, the courts, and the profession against unsuitable practitioners. . . .' " ' " (Quoting *In re Scott*, 52 Cal. 3d 968, 802 P.2d 985, 277 Cal. Rptr. 201 (1991).)

We have repeatedly determined that the knowing failure to file a personal income tax return constitutes illegal conduct involving moral turpitude. *State ex rel. NSBA v. Duchek*, 224 Neb. 777, 401 N.W.2d 484 (1987); *State ex rel. NSBA v. Hahn*, 218 Neb. 508, 356 N.W.2d 885 (1984); *State ex rel. Nebraska State Bar Assn. v. Tibbels*, 167 Neb. 247, 92 N.W.2d 546 (1958); *State ex rel. Nebraska State Bar Assn. v. Fitzgerald*, 165 Neb. 212, 85 N.W.2d 323 (1957). Caskey contends that the aforementioned cases are distinguishable because the cases involved attorneys who willfully failed to file personal income tax returns and thereby benefited from their misconduct. Caskey claims that he had an altruistic motive, "*i.e.*, he sought to benefit only others and not himself by keeping a pallet company afloat for the sake of its unskilled workers and its creditors in

the local community." (Emphasis in original.) Brief for respondent at 21-22. This argument is unconvincing.

First, it is difficult to conclude that Caskey's motives were purely altruistic in this matter when he acted variously as attorney, officer, manager, and creditor of SDF. Second, even if we accept Caskey's altruism argument at face value, this court will not condone the practice of Nebraska attorneys acting as self-appointed Robin Hoods for the alleged benefit of creditors in their local communities. Such actions promote disrespect for the law and bring disrepute to the bar. We hold that an attorney's knowing and willful failure to file a tax return, for which he or she has the legal obligation for filing, constitutes illegal conduct involving moral turpitude.

In the instant case, Caskey knew that the quarterly withholding tax reports were not filed and that the withholding taxes were not paid; further, Caskey specifically instructed Novotny to first pay employee wages and business expenses before paying withholding taxes to the Department of Revenue, in violation of Nebraska law. We conclude that the evidence clearly and convincingly establishes that Caskey's illegal actions were willful and contrary to honesty and good morals, in violation of DR 1-102(A)(3).

Consequently, we must determine the appropriate sanction to be imposed. To determine whether and to what extent discipline should be imposed, it is necessary that the following factors be considered: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) his or her present or future fitness to continue in the practice of law. *State ex rel. NSBA v. Brown, ante* p. 815, 560 N.W.2d 123 (1997).

It is undisputed that Caskey, over a period of several months and on more than one occasion, knowingly failed to file quarterly withholding tax reports with the Department of Revenue and deliberately chose not to pay the quarterly payroll taxes that were due. This court has consistently taken into account that multiple acts of misconduct are distinguishable from isolated incidents and are therefore deserving of more serious sanctions. See, *State ex rel. NSBA v. Johnston, ante* p. 468, 558 N.W.2d 53

(1997); *State ex rel. NSBA v. Van, ante* p. 196, 556 N.W.2d 39 (1996). There should be no question that the knowing failure to file tax returns and to pay taxes is a serious violation of the ethical obligations of an attorney. Because of the serious nature of the offense, the need to deter other attorneys from like conduct, and the desire to maintain the reputation of the bar as a whole, we have, in previous cases involving the failure to file personal income tax returns, imposed discipline consisting of suspension from the practice of law for 1 year. *State ex rel. NSBA v. Duchek*, 224 Neb. 777, 401 N.W.2d 484 (1987); *State ex rel. NSBA v. Hahn*, 218 Neb. 508, 356 N.W.2d 885 (1984); *State ex rel. Nebraska State Bar Assn. v. Tibbels*, 167 Neb. 247, 92 N.W.2d 546 (1958); *State ex rel. Nebraska State Bar Assn. v. Fitzgerald*, 165 Neb. 212, 85 N.W.2d 323 (1957).

However, each case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances. *State ex rel. NSBA v. Bruckner*, 249 Neb. 361, 543 N.W.2d 451 (1996); *State ex rel. NSBA v. Woodard*, 249 Neb. 40, 541 N.W.2d 53 (1995). It is necessary to consider mitigating factors in determining the appropriate discipline imposed on an attorney. *State ex rel. NSBA v. Johnson*, 249 Neb. 563, 544 N.W.2d 803 (1996). Unlike the cases in which we have imposed a 1-year suspension for the failure to file personal income tax returns, Caskey did not monetarily benefit from his misconduct in the instant case. Caskey immediately notified the Counsel for Discipline of his conviction and has cooperated fully in these disciplinary proceedings. The evidence suggests, through the testimony of numerous witnesses, that Caskey has been a selfless, respected attorney and person, and has served as a valuable part of his community for the past 27 years.

Nonetheless, Caskey was fully aware that he was violating Nebraska law and continued to do so over a period of several months. We also consider the fact that Caskey has been reprimanded twice for conflict of interest violations. Balancing the factors that mitigate in favor of Caskey maintaining his privilege to practice law against the nature of his offense, the need to deter others from similar misconduct, the need to maintain the reputation of the bar as a whole, and the need to protect the

public, we determine that Caskey should be suspended from the practice of law for a period of 6 months.

CONCLUSION

It is therefore the judgment of this court that Charles L. Caskey be suspended from the practice of law for a period of 6 months, effective immediately, after which period Caskey may apply for readmission to the bar. Caskey is directed to pay costs in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 1991).

JUDGMENT OF SUSPENSION.

CAPORALE, J., concurring in part, and in part dissenting.

I agree that the respondent Charles L. Caskey's misconduct involves moral turpitude and that for the reasons discussed in the majority opinion, he must be suspended from the practice of law. However, I disagree that the period of suspension should be only 6 months.

I respectfully suggest that the majority fails to give sufficient weight to Caskey's two prior reprimands for having failed to recognize conflicts of interest, for, as charged, the failure to recognize a conflict of interest is at the core of this offense as well. No matter how altruistic Caskey wishes to consider his motives, the harsh reality is that he elected to ignore the creditor preferred by the law, see Neb. Rev. Stat. § 77-2757 (Reissue 1996), and, instead, preferred the creditors in the community in which he maintained his law practice, thereby enhancing his own standing among those living and doing business therein and from whom he might reasonably expect to draw his clientele.

As the majority recognizes, multiple acts of misconduct are deserving of more serious sanctions than is an isolated act of misconduct. See *State ex rel. NSBA v. Johnston, ante* p. 468, 558 N.W.2d 53 (1997). I suggest this is especially applicable when multiple infractions involve the same type of misconduct, for that demonstrates an inability to learn from one's mistakes.

Indeed, not only did Caskey resolve a conflict of interest in his own favor, he invaded trust funds belonging to the state. § 77-2757. However, as the relator did not charge Caskey with that far more serious misconduct, I do not consider it in assessing what I consider to be the appropriate sanction.

For the misconduct with which he was charged, I would suspend Caskey from the practice of law for a period of 1 year.

JACK MALICKY, APPELLEE AND CROSS-APPELLEE, V. KYLE K. HEYEN, INDIVIDUALLY AND DOING BUSINESS AS DETECTOR DOGS, INTERNATIONAL, APPELLANT, AND STATE OF NEBRASKA, APPELLEE, AND TRACI M. COMSTOCK, APPELLANT, AND DAVID E. CYGAN, APPELLEE AND CROSS-APPELLANT.
560 N.W.2d 773

Filed March 7, 1997. No. S-94-691.

1. **Trial: Appeal and Error.** The standard of review on a trial court's determination of a request for sanctions is whether the trial court abused its discretion.
2. **Trial: Courts: Pleadings.** It is the duty of the courts to prevent dilatory proceedings in the administration of justice. General tactics of delay and the filing of repetitious and irrelevant documents may establish bad faith and warrant sanctions.
3. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives the litigant of a substantial right or a just result in matters submitted for disposition to a judicial system.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Reversed.

Traci M. Comstock, of Comstock Law Offices, P.C., for appellants.

Charles H. Wagner, of Edstrom, Bromm, Lindahl, Wagner & Miller, for appellee Malicky.

David Edward Cygan, pro se.

CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and ROWLANDS, D.J.

ROWLANDS, D.J.

In this appeal from an order imposing sanctions, defendant, Kyle K. Heyen, and defense attorneys, Traci M. Comstock and David E. Cygan, contend that the district court erred in assess-

ing sanctions against Comstock and Cygan for their conduct before the court.

We reverse the decision of the district court to grant sanctions, finding that the trial judge abused his discretion.

This appeal was originally filed in the Nebraska Court of Appeals. We transferred it to this court's docket pursuant to our power to regulate the caseloads of the Court of Appeals and this court.

ASSIGNMENTS OF ERROR

Heyen, Comstock, and Cygan have appealed the order imposing sanctions. Cygan, who is considered an appellee and cross-appellant by virtue of Neb. Ct. R. of Prac. 1C (rev. 1996), assigned as error the district court's assessment of sanctions against him. Heyen and Comstock assigned 18 errors. The disposition of this case requires that we review only one of the errors: The district court erred by assessing costs, expenses, and fees as sanctions against Comstock and Cygan.

STANDARD OF REVIEW

The standard of review on a trial court's determination of a request for sanctions is whether the trial court abused its discretion. *James v. Harvey*, 246 Neb. 329, 518 N.W.2d 150 (1994); *Booth v. Blueberry Hill Restaurants*, 245 Neb. 490, 513 N.W.2d 867 (1994); *Paro v. Farm & Ranch Fertilizer*, 243 Neb. 390, 499 N.W.2d 535 (1993).

FACTS

The underlying action in the district court was a suit to recover damages. Plaintiff, Jack Malicky, filed an action against Heyen, alleging that a guard dog trained by Heyen caused Malicky serious injuries during a training exercise. Trial was completed in 5 days. On October 1, 1993, the jury returned a verdict for Heyen. This verdict was not appealed.

On October 7, 1993, Charles H. Wagner, Malicky's counsel, filed a motion to assess attorney fees and costs pursuant to Neb. Rev. Stat. § 25-824 (Reissue 1995) against Heyen. On November 2, Heyen's counsel Comstock filed a motion for sanctions against Malicky and Wagner. These motions were argued, and on February 16, 1994, the district court issued a 10-page order

finding that various pretrial and trial motions, as well as actions of Comstock and Cygan, were improper and in bad faith. The district court also found that Comstock and Cygan had abused the legal process and asserted frivolous legal positions. The court determined that these actions extended the trial by 2 days. The court then assessed court costs, jointly and severally, against Comstock and Cygan in the amount of $1,638.52 for jury fees, mileage, meals, and bailiff expenses. In addition, Malicky was awarded $4,500 in attorney fees, to be paid by Comstock and Cygan. Comstock's and Cygan's motions for a new trial on the issue of sanctions were overruled. This appeal followed.

ANALYSIS

The authority to issue sanctions is explicitly granted by § 25-824, which states that

> (2) . . . in any civil action commenced or appealed in any court of record in this state, the court shall award as part of its judgment and in addition to any other costs otherwise assessed reasonable attorney's fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith.
>
> . . . .
>
> (4) The court shall assess attorney's fees and costs if, upon the motion of any party or the court itself, the court finds that an attorney or party brought or defended an action or any part of an action that was frivolous or that the action or any part of the action was interposed solely for delay or harassment. If the court finds that an attorney or party unnecessarily expanded the proceedings by other improper conduct, including, but not limited to, abuses of civil discovery procedures, the court shall assess attorney's fees and costs.

It is obvious from the record that all counsel involved in this action engaged in a pattern of ad hominem conduct, only a portion of which will be discussed herein. At the onset of this litigation, the district court entered an order of progression, which directed discovery to be completed on or before May 1, 1993. A

trial management conference was scheduled for May 3, and a proposed trial management order was to be completed by counsel before the conference. At the May 3 conference, both Cygan and Wagner were unprepared, and a trial management order had not been drafted. The conference was continued to June 7, at which time both counsel again were unprepared and had no proposed trial management order. The conference was continued to August 23, and trial was set to begin September 27. At the August 23 conference, a trial management order still had not been prepared by either party. Also on August 23, Comstock entered her appearance on behalf of Heyen; however, she did not attend the conference. Following August 23, various notices and amended notices to take depositions were filed by both parties.

On September 17, 1993, Wagner filed for attorney fees and expenses, stating that he had appeared for the taking of a deposition pursuant to notice given by Cygan. The notice indicated that the deposition was to be taken on August 25, 1993, at 4:30 p.m. When Wagner arrived at the designated location on August 25, no court reporter, witness, or counsel was present.

In addition, Heyen's counsel filed numerous motions, notices, and requests with the court. Three separate motions for partial summary judgment were filed on September 20, 1993, which was 7 days prior to trial. Neb. Rev. Stat. § 25-1332 (Reissue 1995) expressly provides that a motion for summary judgment shall be served at least 10 days before the time fixed for the hearing. Furthermore, Heyen's counsel filed four motions in limine 3 days prior to trial. The trial judge was clearly correct in his written order, wherein he determined on his own motion the day prior to the commencement of trial, that each of the motions was filed out of time. Five more motions in limine were filed the morning of trial. Section 25-824 authorizes sanctions against any attorney who brings or defends an action in bad faith. It is the duty of the courts to prevent dilatory proceedings in the administration of justice. *Aetna Cas. & Surety Co. v. Dickinson*, 216 Neb. 660, 345 N.W.2d 8 (1984). General tactics of delay and the filing of repetitious and irrelevant documents may establish bad faith and warrant sanctions. See *Holt County Co-op Assn. v. Corkle's, Inc.*, 214 Neb. 762,

336 N.W.2d 312 (1983). In the instant case, the trial judge summarily, on his own motion and without a formal hearing, overruled the repetitious and untimely pleadings filed by Comstock and Cygan. This was the correct procedure to employ. A subsequent assessment of sanctions was unnecessary under the particular circumstances of this case.

There is also evidence in the record that Wagner attempted to demean Comstock in the presence of the jury, calling her "sophomoric" and referring to her objections as "sermonettes."

In determining sanctions, the court uses its discretion in determining the appropriate cost or fee permitted by § 25-824(2). *Nebraska Pub. Emp. v. City of Omaha*, 244 Neb. 328, 506 N.W.2d 686 (1993). We determine that the district court was incorrect in imposing sanctions and that it abused its discretion in the amount it imposed. A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives the litigant of a substantial right or a just result in matters submitted for disposition to a judicial system. *Booth v. Blueberry Hill Restaurants*, 245 Neb. 490, 513 N.W.2d 867 (1994).

A detailed analysis of the record reveals that the sanctions imposed were not appropriate. The trial judge ordered that Comstock and Cygan pay to Seward County the sum of $1,638.52 for jury fees, mileage, meals, and bailiff expenses. There is absolutely no evidence in the record how the trial judge arrived at this amount, and the award is vacated. With reference to the award of attorney fees to Malicky, the affidavit of Wagner, which was received into evidence, stated Wagner's opinion that an hourly rate of $90 was fair and reasonable. In awarding $4,500, it is apparent that the trial judge penalized Comstock and Cygan for 50 hours of Wagner's time, including 2 days of trial time when the trial lasted 5 days rather than the 3 days which had been estimated.

At the continued trial management conference held June 7, 1993, Wagner estimated that the trial would last 2½ days, while Cygan predicted 3 days. Jury selection and opening statements in this case consumed most of the first day of trial. Malicky

called five witnesses, including two physicians, who testified at length by deposition, as well as a vocational rehabilitation expert. Malicky rested his case at 4:55 p.m. on the third day of trial. Heyen presented his case on the fourth and part of the fifth days of trial, followed by a short rebuttal by Malicky. Closing arguments, jury instructions, and deliberations resulting in a verdict for Heyen consumed the remainder of the fifth day.

Although we do not condone the lack of civility demonstrated by the attorneys in this proceeding, nor do we excuse the filing of repetitious pleadings out of time or the improper arguments of Comstock and Wagner in the presence of the jury, the trial judge abused his discretion in finding that the trial lasted 2 unnecessary days solely because of the actions of Comstock and Cygan. Therefore, after a careful review of the proceedings in the district court, we reverse the district court's award of sanctions.

REVERSED.

WHITE, C.J., participating on briefs.

SANDRA KAY SHOCKLEY, APPELLEE AND CROSS-APPELLANT, V. ALLEN JOSEPH SHOCKLEY, APPELLANT AND CROSS-APPELLEE.

560 N.W.2d 777

Filed March 7, 1997. No. S-95-106.

1. **Divorce: Property Division: Appeal and Error.** The division of property in dissolution cases is a matter initially entrusted to the discretion of the trial judge. On appeal, such matters will be reviewed de novo on the record and affirmed in the absence of an abuse of discretion.
2. **Divorce: Appeal and Error.** Because appeals in domestic relations matters are heard de novo on the record, an appellate court is empowered to enter the order which should have been made as reflected by the record.
3. **Divorce: Attorney Fees: Appeal and Error.** In a dissolution of marriage case, an award of attorney fees is discretionary, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.
4. **Divorce: Property Division: Pensions.** The marital estate includes only that portion of the pension which is earned during the marriage.
5. ____: ____: ____. Contributions to pensions before marriage or after dissolution are not assets of the marital estate.
6. ____: ____: ____. A trial court may exercise discretion in valuing pension rights and dividing such rights between the parties.

7. **Divorce: Property Division: Proof.** The burden of proof to show the source of all funds claimed as premarital is on the party claiming that those funds are premarital.
8. ____: ____: ____. Where there is nothing on the record to show the source of premarital funds, they should be considered part of the marital estate.
9. **Divorce: Property Division.** In cases where the growth of the marital estate cannot be attributed to one party more than to another, the trial court may divide the estate equally.
10. **Attorney Fees: Appeal and Error.** On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.
11. **Divorce: Attorney Fees: Appeal and Error.** The award of attorney fees for services of counsel on appeal depends on multiple factors that include the nature of the case, the amount of property divided and alimony awarded, the earning capacity of the parties, the services performed and results obtained, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed as modified.

Michael T. Levy for appellant.

Susan A. Anderson, of Anderson Law Office, for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and LUTHER, D.J.

WHITE, C.J.

Allen Joseph Shockley (Husband) appeals and Sandra Kay Shockley (Wife) cross-appeals the district court of Douglas County's valuation and division of the marital estate in these divorce proceedings. Since we find that the court did indeed err in valuing certain assets of the marital estate, we affirm as modified.

The parties were married on September 15, 1984, and a divorce decree was entered on November 15, 1994. Husband and Wife stipulated that their assets were to be valued as of the date of filing—September 16, 1992.

Both parties worked for U S West before and during the marriage. Husband worked for 5.5 years of the parties' marriage and then took early retirement on March 1, 1990, after completing 26.5833 years of service and earning approximately $39,000 per year. He retired on an incentive plan which added 5 years to his age and 5 years to his years of service (5+5 enhancement) to compute his lump-sum settlement. Husband

placed the proceeds of this settlement into his SCI IRA No. AYR-R09001-A5 account. These were the only funds in that account through the date of filing; the account had a value of $235,254.07 as of that date.

Prior to the marriage, Husband withdrew $14,227 in stock distributions from his employee stock option plan (ESOP). He testified that that amount was placed in two accounts—his Schwab One No. 8120-4039 and his SCI No. OIR-277750-A5. Husband also testified that he took distribution of the remainder of his ESOP and his payroll stock option plan (PAYSOP) at his retirement and rolled that stock into his Schwab One IRA No. 8120-44201.

Wife continued to work at U S West throughout these proceedings and was earning approximately $41,000 per year as of the date of filing. On that date, Wife had completed 25.1667 years of service, 8.0833 years of that employment during her marriage. She did not withdraw anything from her ESOP or PAYSOP before the date of filing.

The trial court found that the marital estate had a value of $193,339.80 and allocated $86,929 to Wife and $106,410.80 to Husband. The trial court ordered Husband to pay Wife $9,740.90 to equalize the distribution and $1,000 toward Wife's attorney fees.

On appeal and as summarized, Husband argues that the district court erred in (1) valuing both parties' pensions, (2) failing to deduct premarital assets from two of Husband's investment accounts, (3) valuing a 1964 Ford Falcon awarded to Husband, and (4) ordering Husband to pay $9,740.90 to equalize the estate and $1,000 toward Wife's attorney fees. On cross-appeal, Wife alleges that the district court erred in (1) valuing Husband's pension, (2) valuing one of Husband's IRA accounts, and (3) failing to award Wife an adequate cash settlement.

The division of property in dissolution cases is a matter initially entrusted to the discretion of the trial judge. On appeal, such matters will be reviewed de novo on the record and affirmed in the absence of an abuse of discretion. See, *Priest v. Priest, ante* p. 76, 554 N.W.2d 792 (1996); *Venter v. Venter*, 249 Neb. 712, 545 N.W.2d 431 (1996); *Ritz v. Ritz*, 229 Neb. 859, 429 N.W.2d 707 (1988).

Because appeals in domestic relations matters are heard de novo on the record, an appellate court is empowered to enter the order which should have been made as reflected by the record. *Pendleton v. Pendleton*, 242 Neb. 675, 496 N.W.2d 499 (1993). In a dissolution of marriage case, an award of attorney fees is discretionary, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Venter v. Venter, supra.*

The parties' first assignments of error involve the district court's valuation of their respective pensions. We find that the court did err in its calculation of the marital portion of Husband's pension.

We note at the outset that the marital estate includes only that portion of the pension which is earned during the marriage. *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994). Contributions to pensions before marriage or after dissolution are not assets of the marital estate. *Priest v. Priest, supra.* A trial court may exercise discretion in valuing pension rights and dividing such rights between the parties. *Hildebrand v. Hildebrand*, 239 Neb. 605, 477 N.W.2d 1 (1991); *Sonntag v. Sonntag*, 219 Neb. 583, 365 N.W.2d 411 (1985).

In this case, the trial court found that Wife's pension with U S West had a total lump-sum value of $18,118.92 as of the date of filing and found the marital portion to be 32.12 percent (Wife's 8.0833 years of service during the marriage, divided by her 25.1667 total years of service). Husband argues that the trial court should have instead determined the marital portion by assuming that Wife would retire after 30 years of service and included those future years of service in finding the marital portion. We have long held that contributions to pensions before marriage or after dissolution are not assets of the marital estate and are not subject to a division. *Priest v. Priest, supra.* The trial court did not err in determining the marital portion of Wife's pension using the present value of that pension and Wife's actual number of years of service as of the date of filing.

The trial court did, however, err in valuing Husband's pension. Husband took early retirement in a lump sum during the course of the marriage. U S West offered a 5+5 enhancement for eligible employees in which the company added 5 years to the

number of years of service and 5 years to the employee's age in determining the pension. Husband was eligible for early retirement only because the 5+5 enhancement increased his years of service from 26.5833 years to 31.5833 years. Wife had to give up her survivor annuity in order for Husband to be eligible for this program. The lump sum was placed in an investment account, SCI IRA No. AYR-R09001-A5, and had a value of $235,254.07 as of the date of filing.

The district court determined the marital portion of Husband's pension by utilizing a two-step procedure. First, the court determined the marital percentage of 20.7 percent without including the 5+5 enhancement (Husband's preenhancement 5.5 years of service during marriage, divided by his 26.5833 years of employment). The court multiplied that percentage by the total value of the investment account and found the marital portion to be $48,700. Second, the court determined the value of the buyout incentives. It did so by multiplying the total value of the investment account by a marital percentage of 33.25 percent (Husband's 10.5 years of service as determined by U S West and including the 5-year enhancement, divided by Husband's 31.5833 years of employment including the 5-year enhancement), yielding $78,000. The court then subtracted the $48,700 amount to leave $29,300, multiplied that by the 20.7 percent marital percentage, and found the resulting $5,947.80 to be the enhanced value of Husband's pension due to buyout incentives. In other words, instead of using the marital percentage derived either from including the 5+5 enhancement (33.25 percent) or from excluding the enhancement (20.7 percent), the court determined that the marital portion of Husband's buyout incentive was approximately one-fifth of the difference between the marital portion including the 5+5 enhancement and the marital portion excluding the 5+5 enhancement.

Both parties dispute the methodology utilized by the trial court in determining the marital portion of Husband's pension. Wife argues that because U S West accorded Husband 5 additional years of employment during the course of the marriage and used that additional 5 years to determine his lump-sum award, the trial court should have utilized the 33.25 percentage, which included the enhancement, to determine the marital por-

tion. Husband, on the other hand, argues that the only pension value that should be assigned to him is the $48,700 because Wife contributed nothing to the early retirement incentives and his actual years of employment did not include the 5+5 enhancement.

We agree with Wife's position in this case. In determining Husband's lump-sum settlement, U S West accorded him an additional 5 years of employment with the company as a part of the 5+5 enhancement. That 5 years should have been included by the trial court in figuring the marital portion of the pension because Husband was given that enhancement during the course of the marriage. Husband's enhanced years of service during the marriage (10.5), divided by his enhanced total years of employment (31.5833), yields a marital portion of 33.25 percent, or $78,222. The marital portion of Husband's pension, including the buyout incentives, should be increased by $23,574.20.

The parties next allege that the trial court also erred in valuing the marital portion of Husband's ESOP and PAYSOP. We agree.

Husband had withdrawn part of his ESOP prior to the parties' marriage, withdrew the rest of his ESOP and his PAYSOP during the course of the marriage, and each time rolled over the stock into investment accounts. The court found that three accounts represented the stock withdrawn during the marriage and determined the marital portion of 20.7 percent by dividing the number of years of Husband's employment during the marriage (5.5) by the number of total years of employment (26.5833). (The 5+5 enhancement did not extend to Husband's ESOP and PAYSOP.) The court then found the marital portion of the Schwab One IRA No. 8120-44201 worth $80,809.17 to be $16,719.42, the Schwab One No. 8120-4039 worth $49,849.96 to be $10,313.96, and the SCI No. OIR-277750-A5 worth $8,235.50 to be $1,703.92.

Husband argues that the premarital withdrawal and rollover of stock should be valued at $14,227, that this amount should be subtracted from the total value of the last two accounts, and that the marital portion of those accounts should actually total $9,078.70 rather than $12,017.88. Wife argues that Husband does not provide sufficient proof that the premarital assets can

be traced to these two accounts and that it is his burden to do so. Wife also argues that in the event that the court finds the last two accounts to be premarital property, then the court should find those two accounts to be solely premarital property and should find that the entire $80,809.17 in the first account is marital property.

The parties' joint tax return for the year they were married lists $14,227 as Husband's premarital stock. Husband testified that this amount represented the stock withdrawn from his ESOP prior to the parties' marriage and that it was placed in two investment accounts—Schwab One No. 8120-4039 and SCI No. OIR-277750-A5. Husband also testified that the first account reflected only amounts withdrawn from his ESOP and PAYSOP during the marriage and that the SCI No. OIR-277750-A5 account was opened in December 1992, and was solely composed of stock that had been withdrawn prior to the marriage.

The burden of proof to show the source of all funds claimed as premarital is on the party claiming that those funds are premarital. *Frost v. Frost*, 227 Neb. 414, 418 N.W.2d 220 (1988). Where there is nothing on the record to show the source of premarital funds, they should be considered part of the marital estate. See *id.* We find that Husband has met his burden of proof in demonstrating that the $14,227 represents the premarital withdrawal from his ESOP and in showing that those funds were placed in the above Schwab One and SCI accounts. Accordingly, the marital portion (20.7 percent) of these two accounts awarded to Husband should be reduced to $9,078.70.

Wife argues that the third account, Schwab One IRA No. 8120-44201, should be included in the marital estate in its entirety. We disagree. The marital estate includes only property accumulated and acquired during the marriage through the joint efforts of the parties. *Reichert v. Reichert*, 246 Neb. 31, 516 N.W.2d 600 (1994). While the Schwab One IRA account does represent the full amount of the withdrawal from Husband's ESOP and PAYSOP at the time of retirement, the stock in these accounts was accumulated throughout the duration of Husband's employment. As a result, the marital estate would include only that portion earned during the marriage, and the trial court properly determined that percentage.

In Husband's third assignment of error, he disputes the trial court's valuation of the 1964 Ford Falcon awarded him. He argues that the court improperly valued the Falcon at $4,000, rather than determining its value to be $2,700—the amount for which Husband testified that his daughter sold another 1964 Ford Falcon. The trial court valued all of the vehicles in this case by averaging the wholesale and retail values of the vehicles as listed in the September through December 1992 "N.A.D.A." manual. We find that the trial court did not abuse its discretion in so valuing the vehicle. Thus, Husband's assignment of error in this regard is without merit.

Both parties also assign as error the cash award ordered by the trial court. Husband and Wife argue that the amount of the cash award was incorrect because the court erred in its valuation of the marital estate.

We have held on numerous occasions that in cases where the growth of the marital estate cannot be attributed to one party more than to another, the trial court may divide the estate equally. *Jirkovsky v. Jirkovsky*, 247 Neb. 141, 525 N.W.2d 615 (1995); *Kullbom v. Kullbom*, 209 Neb. 145, 306 N.W.2d 844 (1981). In cases such as this, where the evidence clearly demonstrates that both parties contributed equally to the acquisition of the marital estate, the trial court did not err in awarding each party an equal portion of the marital estate. However, as noted above, the trial court erred in its valuation of the marital estate. Because the correct valuation of Husband's pension and ESOP and PAYSOP increases his share of the marital estate to $127,046.12, he must pay Wife $20,058.56, rather than $9,740.90, to equalize the marital estate as ordered by the trial court.

Finally, we reach the question of attorney fees. Husband argues that the trial court erred in ordering him to pay $1,000 toward Wife's attorney fees. We disagree. On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion. *Venter v. Venter*, 249 Neb. 712, 545 N.W.2d 431 (1996). We find no abuse of discretion in this award.

Wife has also filed a motion with this court requesting an award of attorney fees for the services of her counsel on appeal.

The award of attorney fees for services of counsel on appeal depends on multiple factors that include the nature of the case, the amount of property divided and alimony awarded, the earning capacity of the parties, the services performed and results obtained, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case. *Priest v. Priest, ante* p. 76, 554 N.W.2d 792 (1996). After considering each of these factors, we conclude that each party shall pay his or her own attorney fees for services rendered in pursuing this appeal.

Since we find that the trial court erred in its valuation of Husband's pension and his ESOP and PAYSOP, we affirm the district court's order as modified by this opinion.

AFFIRMED AS MODIFIED.

SHELLY SLAGLE, PERSONAL REPRESENTATIVE OF THE ESTATE OF MARIA SLAGLE, DECEASED, APPELLANT, V. J.P. THEISEN & SONS, INC., DEFENDANT, D.P. SAWYER, INC., ALSO KNOWN AS CONSTRUCTION SIGNING OR CONSTRUCTION SIGNING LITES AND BARRICADES, DEFENDANT AND THIRD-PARTY PLAINTIFF, AND STATE OF NEBRASKA, THIRD-PARTY DEFENDANT, APPELLEES.

560 N.W.2d 758

Filed March 7, 1997. No. S-95-156.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Statutes.** In construing a statute, a court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
4. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that the different provisions of the act are consistent, harmonious, and sensible.

5. **Statutes: Presumptions: Legislature: Intent.** In construing a statute, it is presumed that the Legislature intended a sensible, rather than an absurd, result.
6. **Highways: Contractors and Subcontractors: Damages: Liability.** Neb. Rev. Stat. § 39-1345.01 (Reissue 1993) exempts contractors from liability for damages caused to public works by the public allowed to travel on a highway under construction, except where the specifications contemplated that the public would travel on the highway during construction.
7. ____: ____: ____: ____. Neb. Rev. Stat. § 39-1345.02 (Reissue 1993) provides an exception to the general rule set forth in Neb. Rev. Stat. § 39-1345.01 (Reissue 1993). Section 39-1345.02 states that if the contractors follow the specifications, but those specifications are inadequate, faulty, or insufficient and so the traveling public still damages the public works despite the implementation of the specifications, the contractors will not then be liable for those damages.
8. **Summary Judgment.** A court may not enter a summary judgment on an issue not presented by the pleadings.

Appeal from the District Court for Custer County: RONALD D. OLBERDING, Judge. Reversed and remanded for further proceedings.

Robert W. Mullin, of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister, P.C., for appellant.

William T. Wright, of Jacobsen, Orr, Nelson, Wright, Harder & Lindstrom, P.C., for appellee J.P. Theisen & Sons.

Gary J. Nedved, of Bruckner, O'Gara, Keating, Hendry, Davis & Nedved, P.C., for appellee D.P. Sawyer.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and FLOWERS, D.J., and BOSLAUGH, J., Retired.

WHITE, C.J.

Shelly Slagle, as the personal representative of the estate of Maria Slagle, appeals from the trial court's grant of summary judgment in favor of defendants J.P. Theisen & Sons, Inc. (Theisen) and D.P. Sawyer, Inc. (Sawyer). We reverse, and remand for further proceedings.

For several weeks prior to April 1992, Highway 70 had been under construction but open to traffic. However, on April 1, the State of Nebraska prepared and approved a signing and traffic control plan which authorized the removal of a bridge in the construction zone. This signing plan provided for three "road

closed" barricades at the east and west ends of Highway 70, a "road closed" sign on each end, a detour sign pointing away from the project at each end, and "road closed to through traffic" signs posted on what the State determined to be the three main county roads intersecting Highway 70. The signing plan was implemented on April 1, prior to the removal of the bridge, which occurred that afternoon. Sawyer, the signing and barricade subcontractor for the project, also asked for and received authorization from the project manager to place a barricade on each side of the bridge excavation with a "bridge out" sign and flashing light and located in the approximate middle of the road.

On her way to work on April 2, Maria Slagle (Maria) entered Highway 70, although the record is unclear as to whether Maria entered Highway 70 by driving between the barricades at the west end of the project, by driving past the barricades on one of the main intersecting county roads, or by entering Highway 70 via one of the unmarked and less traveled intersecting county roads. The record is clear, however, that at approximately 5:30 a.m. Maria drove around the "bridge out" sign and barricade at the bridge excavation site, drove off a 6-inch drop located 6 feet past the sign, continued over 74 feet of dirt and torn-up pavement, launched off the side of the excavation, and was killed.

Shelly Slagle (Slagle), as the personal representative of the estate of Maria Slagle, filed a wrongful death action, alleging essentially that Theisen—the contractor on the project—and Sawyer negligently placed barricades and signs at the site of the accident so as to fail to provide adequate warning of danger to drivers using the roadway. Theisen and Sawyer both filed motions for summary judgment, arguing that Neb. Rev. Stat. § 39-1345.02 (Reissue 1993) exempts them from liability in this case.

On February 7, 1995, the trial court granted Theisen's and Sawyer's motions for summary judgment, finding that both parties were exempt from liability under § 39-1345.02 because they had followed precisely the signing plans provided by the State. The trial court also found that Maria was contributorily negligent in excess of 50 percent as a matter of law so as to bar any recovery.

Slagle timely filed an appeal in the Nebraska Court of Appeals. We removed the case to this court pursuant to our power to regulate the docket of the Court of Appeals.

On appeal and as summarized, Slagle alleges that the trial court erred in (1) determining that § 39-1345.02 applied to traffic control plans at construction sites and exempted Theisen and Sawyer from liability because they followed the signing plans provided by the State and (2) granting summary judgment as to Maria's contributory negligence when that issue was not presented by the pleadings.

Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Larkin v. Ethicon, Inc., ante* p. 169, 556 N.W.2d 44 (1996). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Olson v. SID No. 177, ante* p. 380, 557 N.W.2d 651 (1997); *Larkin, supra.*

Slagle alleges first that the trial court erred in determining that § 39-1345.02 applied to traffic control plans at construction sites and exempted Theisen and Sawyer from liability because they followed the signing plans provided by the State. The interpretation of this statutory section is an issue of first impression before this court. Slagle argues that § 39-1345.02 applies to exempt contractors from liability only when a road under construction is open to traffic and that traffic causes damage to the actual construction project. We agree with this interpretation of the statute.

In construing a statute, a court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *Village of Winside v. Jackson*, 250 Neb. 851, 553 N.W.2d 476 (1996); *In re Interest of Jaycox*, 250 Neb. 697, 551 N.W.2d 9 (1996). Further, the components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the

intent of the Legislature so that the different provisions of the act are consistent, harmonious, and sensible. *Anderson v. Nashua Corp.*, 246 Neb. 420, 519 N.W.2d 275 (1994); *In re Application of City of Lincoln*, 243 Neb. 458, 500 N.W.2d 183 (1993). In construing a statute, it is presumed that the Legislature intended a sensible, rather than an absurd, result. *In re Interest of Jaycox, supra.*

Neb. Rev. Stat. § 39-1345.01 (Reissue 1993) and § 39-1345.02 were passed together as part of the same bill, L.B. 1006, in 1969. See 1969 Neb. Laws, ch. 310, §§ 1 and 2, pp. 1114-15. Section 39-1345.01 states:

> Whenever the Department of Roads . . . permits the public use of a highway undergoing construction, repair, or maintenance in lieu of a detour route, the contractor shall not be held responsible for *damages to those portions of the project upon which the department has permitted public use*, when such damages are the result of no proximate act or failure to act on the part of the contractor, *except in those instances where traffic upon the portion being constructed was contemplated in the specifications.*

(Emphasis supplied.) Section 39-1345.02 provides, "A contractor shall not be held responsible, either during construction or after construction is completed, for damages which may result from or be due to inadequate, faulty, or insufficient design, plans, or specifications."

Theisen and Sawyer argue that § 39-1345.02 on its face exempts contractors for *any* damages which occur due to faulty design, plans, or specifications, and include in their interpretation of the statute damages allegedly suffered by and to members of the traveling public. Slagle argues that the definition of damages in § 39-1345.01 limiting damages to only those caused to the actual construction project also applies to the word "damages" as it appears in § 39-1345.02.

Sections 39-1345.01 and 39-1345.02 are component sections of a series of statutes. We are bound to interpret "damages" as that word is used in both sections so as to reach a sensible, harmonious, and not an absurd result, as well as a result which best achieves the purposes of the statute. See, *Village of Winside, supra*; *Anderson, supra; In re Application of City of Lincoln, supra.*

Clearly, § 39-1345.01 exempts contractors from liability for damages caused to the public works by the public allowed to travel on the highway under construction, except where the specifications contemplated that the public would travel on the highway during construction. Just as clearly, § 39-1345.02 provides an exception to the general rule set forth in § 39-1345.01. Section 39-1345.02 states that if the contractors follow the specifications, but those specifications are inadequate, faulty, or insufficient and so the traveling public still damages the public works despite the implementation of the specifications, the contractors will not then be liable for those damages.

Since we find that the language of §§ 39-1345.01 and 39-1345.02 clearly exempts contractors from liability only in the circumstances in which damage is caused to the public works by the traveling public and does not apply to damages suffered by the traveling public, we find the trial court's grant of summary judgment to Theisen and Sawyer on this basis to have been in error.

Slagle's second assignment of error alleges that the trial court erred in finding that Maria was contributorily negligent when that issue was not presented by the pleadings. We agree.

We have stated unequivocally that a court may not enter a summary judgment on an issue not presented by the pleadings. *Frerichs v. Nebraska Harvestore Sys.*, 226 Neb. 220, 410 N.W.2d 487 (1987). Neither Theisen's nor Sawyer's motion for summary judgment requested a ruling by the trial court as to Maria's alleged contributory negligence. Absent such a reference in these pleadings, the trial court could not and should not have ruled on this issue. Therefore, we find that the trial court's finding that Maria was contributorily negligent in excess of 50 percent as a matter of law was also in error.

Because we find that § 39-1345.02 does not exempt contractors from liability for damages allegedly suffered by a member of the traveling public on a highway under construction and because we find that the issue of Maria's contributory negligence was not before the trial court, we reverse the grant of summary judgment in favor of Theisen and Sawyer and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

VELMA DICKIE, APPELLEE, V. FLAMME BROTHERS, INC., APPELLANT.

560 N.W.2d 762

Filed March 7, 1997. No. S-95-281.

1. **Equity: Appeal and Error.** In an appeal from an equitable action, the reviewing court reviews the action de novo on the record and reaches a conclusion independent of the factual findings of the lower court. However, where credible evidence is in conflict on a material issue of fact, the reviewing court considers and may give weight to the circumstance that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Receivers.** A receiver is an officer of the court and, thus, is subject to the control and powers specifically granted by the court and authorized by statute.
3. **Receivers: Liability.** Obedience to the order and direction of the court assures a receiver that he will not be held personally liable.
4. **Receivers: Debtors and Creditors: Property.** Once appointed, a receiver becomes entitled to the custody and control of a debtor's property.
5. **Receivers: Property.** A receiver is generally obliged to preserve and protect property for the benefit of all parties.
6. **Receivers: Property: Liability.** The duty of a receiver requires that the receiver proceed with the same care and diligence that an ordinary prudent person would use in caring for and handling property under like circumstances. Only when the receiver fails to abide by such a standard will he be held responsible for the consequences of his actions as an officer of the court.
7. **Receivers: Corporations.** A receiver is to collect, sell, distribute, and dispose of corporate assets.
8. **Receivers: Corporations: Actions.** Inherent in the task of monitoring the corporate estate is the bringing and defending of pertinent lawsuits.
9. **Receivers: Corporations: Property.** A receiver is responsible for taking an inventory of a corporation's assets and liabilities. The inventory should list all real and personal property owned by the corporation as of the date of the receiver's appointment, the value of the assets listed, and a statement of all mortgages and security interests in the items of property.
10. **Receivers: Corporations: Property: Appeal and Error.** A receiver is obligated to file a final report, which must identify the source of money received, the property for which the money was paid, and the reason for the payments made. The final report shall allow a reviewing court to readily understand what has occurred in connection with the corporation's property up to the date of the filing of the report.
11. **Receivers: Final Orders.** An appointment of a receiver is considered to constitute a final order.
12. **Receivers: Sales: Final Orders.** Confirmations of a sale by a receiver constitute a final order.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Reversed and remanded.

Richard Register for appellant.

James A. Gallant, receiver.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ.

WHITE, C.J.

Flamme Brothers, Inc., the appellant, is a Nebraska corporation which was incorporated on October 1, 1979. All of the common stock is owned by Velma Dickie, the appellee; her two sons, Vernon Flamme and Donald Flamme; Vernon Flamme's wife, Sharon; and Donald Flamme's wife, Veronica. On September 19, 1986, Dickie filed a petition in district court for an involuntary dissolution of the corporation. Dickie alleged as a basis for dissolution that the directors were deadlocked in the management of corporate affairs and that the shareholders were unable to break the deadlock. At that time, Vernon Flamme was serving as president of the corporation.

Donald and Veronica Flamme, intending to resist Dickie's claims, filed a motion for leave to intervene on October 26, 1986. The court granted their motion on November 3 and ordered them to file a petition in intervention within 14 days. Pursuant to their answer, Donald and Veronica Flamme denied that the directors were deadlocked in the management of corporate affairs. In addition, they raised two affirmative defenses: (1) There was no true majority or controlling ownership in the corporation, and (2) Dickie failed to state a cause of action against the corporation.

In March 1987, Donald and Veronica Flamme filed a counterclaim stating, in part, that since Dickie, Vernon, and Sharon Flamme had proceeded with liquidation, Donald and Veronica Flamme believed it would be in the best interests of the corporation for the court or a receiver to carry out the liquidation proceedings. Donald and Veronica Flamme requested that (1) the involuntary dissolution be set for trial, (2) the court appoint a receiver, (3) all activities be subject to an accounting, (4) any acts of unauthorized persons be set aside, and (5) the court preserve corporate assets.

In the spring of 1987, the corporation liquidated a substantial amount of farming equipment and real property. Proceeds were

held by Fremont National Bank, which was designated as trustee for Platte Valley Bank and Flamme Brothers.

At a pretrial conference held on September 1, 1987, the case was generally discussed, and the court stated that it would appoint James A. Gallant as receiver. The court ordered that "[t]he Receiver shall conduct an inventory, and initial report and a plan for liquidation of the assets within 30 days of appointment." Gallant was appointed as receiver on September 22.

As of September 1987, obligations were owed by the corporation to Platte Valley Bank, the Federal Land Bank, and the Farmers Home Administration (FmHA). On October 9, receiver entered into three settlement agreements in an attempt to satisfy these significant outstanding corporate debts. The first agreement was entered into by Wolf Insurance Agency and the corporation. The corporation was indebted to Wolf Insurance Agency in the sum of $24,777.62, with interest accruing at a rate of 12 percent per annum from March 17, 1987. The parties agreed that the corporation would be released from all debt owed to Wolf Insurance Agency for the sum of $10,593.45, which had been deposited into a trust account with Fremont National Bank.

The second agreement was entered into by Platte Valley Bank; the corporation; Ames Elevator, Inc.; and Vernon and Sharon Flamme. The agreement, in part, addressed the manner in which the corporation would satisfy its debt to Platte Valley Bank. The debt totaled $698,600. A portion of said debt, $400,000, had been guaranteed by FmHA. Pursuant to the agreement, the proceeds from sales conducted in the spring of 1987 and held by Fremont National Bank were to be paid to Platte Valley Bank. In addition, the corporation was to pay a total of $78,500. Also, Platte Valley Bank would be entitled to collateral currently owned by the corporation and listed in exhibits incorporated into the contract. Finally, the contract recognized that five center pivot irrigation systems, which constituted collateral for the loan guaranteed by FmHA, were to be sold with the real property mortgaged by the Federal Land Bank and owned by the corporation. Platte Valley Bank would be entitled to the portion allocated to the pivots. Such portion

would have to be acceptable to the FmHA and based on appraisals from qualified expert appraisers.

Pursuant to the agreement, Platte Valley Bank agreed to engage in the process generally known as "PIK and Roll." According to such arrangement, Platte Valley Bank would extend an ongoing line of credit in favor of the corporation for any sum up to $30,000 to be used to purchase PIK certificates. Platte Valley Bank would be repaid upon the retirement of the PIK certificates and the sale of 1986 grain.

The third agreement was entered into by Ames Elevator, Donald and Veronica Flamme, Vernon and Sharon Flamme, Dickie, and receiver. Pursuant to this agreement, the four Flammes and receiver agreed in part (1) that they would enter into an agreement with the FmHA that would allow all assets secured to the FmHA to be sold by receiver; (2) that they would concur as to the value to be placed on each parcel of real property; (3) that the decision of receiver agreed upon with the Federal Land Bank and FmHA would be binding upon the Flammes; (4) that the corporate and jointly owned farm ground would be placed as soon as possible on an open listing basis; (5) that any private parties that had an interest in the parcels would be excepted from the open listing agreement; (6) that attorney fees and accounting fees necessary to wind up the affairs of the corporation would be paid from the remaining assets of the corporation upon liquidation (as security for said fees, the parties were granted a lien against the land legally described as the east half of the southeast quarter of Section 8, Township 18, Range 6 in Dodge County, Nebraska, and part of the east half of the northeast quarter, Section 7, Township 18, Range 6 in Dodge County, Nebraska); (7) that Donald and Vernon Flamme would be paid by the corporation the sum of $8,000 for unpaid land rental from 1986; and (8) that Vernon and Sharon Flamme would be paid by the corporation the sum of $5,250 for unpaid salary through March 31, 1987.

Receiver filed a motion for approval of the first and second settlement agreements on November 2, 1987. Said agreements were approved by the court on that same day. Receiver filed an additional motion for approval of the third agreement on November 16. Said agreement was approved by the court that same day.

In April 1988, receiver filed a motion for approval of sale of irrigation equipment and pipe to Vernon Flamme. Such sale was conditioned upon the approval of the FmHA and Platte Valley Bank. The sale was approved by the court on April 18.

As of September 1987, the corporation owned several tracts of land: (1) part of the east half of the northeast quarter of Section 17, Township 18 North, Range 6 East of the 6th P.M., in Dodge County, Nebraska; (2) the east half of the southeast quarter of Section 8, Township 18 North, Range 6 East of the 6th P.M., in Dodge County, Nebraska; (3) the north 16 acres of the west half of the northwest quarter of Section 16, Township 18 North, Range 6 East of the 6th P.M., in Dodge County, Nebraska (lying north of east-west road); (4) the east half of the southwest quarter of Section 8, Township 18 North, Range 6 East of the 6th P.M., in Dodge County, Nebraska; the east half of the northwest quarter of Section 17, Township 18 North, Range 6 East of the 6th P.M., in Dodge County, Nebraska (except 5.61 acres on east side); the north three-quarters of the west half of the southeast quarter of Section 8, Township 18 North, Range 6 East of the 6th P.M., in Dodge County, Nebraska; and the northwest quarter of Section 9, Township 18, Range 6 East of the 6th P.M., in Dodge County, Nebraska. These parcels of property, as well as two parcels jointly owned by Vernon and Donald Flamme, and equipment located on all parcels, were sold to the North Bend Land Company on November 25, 1987. A report of sale of land was filed by receiver on May 18, 1988. The court approved receiver's report.

In October 1991, receiver moved the court for an order to dispose of remaining miscellaneous personal property of the corporation. At the hearing for said motion, receiver testified that the items consisted of a rusted irrigation pivot, a 12-row tool bar, a dock, a tank, and a 471 Detroit motor. According to receiver, such property had only salvage value. The court agreed and ordered receiver to contact a used equipment or junk dealer.

On November 25, 1991, receiver filed his final report, which alleged that he followed the liquidation plan set out in the settlement agreements, the secured assets were disposed of and moneys distributed, the real property was sold with the approval of the district court, and all grain on loan was delivered to the

U.S. Department of Agriculture. Receiver also provided a list of receipts, disbursements, and remaining debts. Donald Flamme filed an "Objection for Final Report of Receiver" on November 26. The district court approved the final report on December 17. Donald Flamme filed a motion for new trial on December 18. The motion was overruled. Donald Flamme timely appealed.

On June 3, 1994, the Nebraska Supreme Court reversed the judgment and remanded the cause for further proceedings. See *Dickie v. Flamme Bros.*, 246 Neb. 66, 516 N.W.2d 618 (1994). According to the Supreme Court, the district court was to require receiver to submit a verified inventory within 30 days listing all property owned by the corporation as of the date of receiver's appointment, together with the value of the assets listed, and a statement of all mortgages and security interests in the items of property. The district court was also instructed to require receiver to file an amended final report identifying the source of money received, the property for which the money was paid, and the reason for the payments made. Subsequent to the filing of the amended final report, the district court was to conduct a hearing to determine if the report should be approved.

Receiver filed an inventory and a final report on July 25, 1994. On August 15, Donald Flamme again objected to the inventory and final report. Receiver amended the inventory and final report on September 1.

The district court entered an order on February 28, 1995, approving the amended final report and dissolving the corporation. A motion for new trial was filed shortly thereafter, but was denied on March 14. A notice of appeal was timely filed on March 15.

Flamme Brothers contends that the district court erred by (1) accepting receiver's amended inventory, which did not account for all of the property owned by and obligations of the corporation, specifically identified as farm-stored grain, PIK certificates, personal property, insurance proceeds for grain, rights of actions for recovery of fraudulently conveyed property, rights of actions for failure by officers to pay employment taxes and properly handle grain, secured debts, and unsecured debts; (2) failing to require receiver to timely proceed on or abandon known rights of actions arising from missing, fraudulently con-

veyed property and arising from improper actions of corporate officers; (3) failing to set aside the confirmation and sale of real estate owned by the corporation; (4) failing to hold receiver responsible for failure to marshal the assets; and (5) accepting receiver's amended final report, which allowed the sale of personal property by persons other than receiver, did not specifically set forth the explanations for the transactions conducted by receiver and his "de facto agents" (identified as "secured creditors and Vernon Flamme"), and failed to explain the decrease in the corporation's net worth.

In an appeal from an equitable action, the reviewing court reviews the action de novo on the record and reaches a conclusion independent of the factual findings of the lower court. However, where credible evidence is in conflict on a material issue of fact, the reviewing court considers and may give weight to the circumstance that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *Moulton v. Board of Zoning Appeals, ante* p. 95, 555 N.W.2d 39 (1996).

A receiver is an officer of the court and, thus, is subject to the control and powers specifically granted by the court and authorized by statute. See, Neb. Rev. Stat. § 21-2097 (Reissue 1991); *Lewis v. Gallemore*, 175 Neb. 279, 121 N.W.2d 388 (1963). Obedience to the order and direction of the court assures the receiver that he will not be held personally liable. *Wells v. Farmers State Bank of Overton*, 124 Neb. 386, 246 N.W. 714 (1933).

Once appointed, a receiver becomes entitled to the custody and control of a debtor's property. *Brooks, Receiver, v. Wooten-Epes Co.*, 202 Ark. 204, 149 S.W.2d 553 (1941); *Gottwals v. Manske*, 60 Nev. 76, 99 P.2d 645 (1940). A receiver is generally obliged to preserve and protect such property for the benefit of all parties. Such a duty requires that the receiver proceed with the same care and diligence that an ordinary prudent person would use in caring for and handling property under like circumstances. *Vander Vorste v. N'western Nat. Bank*, 81 S.D. 566, 138 N.W.2d 411 (1965); *Morris v. Pierce*, 188 Okla. 396, 110 P.2d 294 (1940); *Taylor v. Santa Fe Northwestern Ry. Co.*, 38 N.M. 457, 34 P.2d 1102 (1934). Only when the receiver fails to

abide by such a standard will he be held responsible for the consequences of his actions as an officer of the court. *Vander Vorste, supra*; *City of St. Louis v. Goldenberg*, 529 S.W.2d 33 (Mo. App. 1975).

A receiver is required to perform numerous tasks in satisfying his duty of due care. He is to collect, sell, distribute, and dispose of corporate assets. See, § 21-2097; *Dobler v. Bawden*, 238 Iowa 76, 25 N.W.2d 866 (1947). Inherent in the task of monitoring the corporate estate is the bringing and defending of pertinent lawsuits. See § 21-2097. In addition, the receiver is responsible for taking an inventory of the corporation's assets and liabilities. *Gough v. State Realty Co.*, 210 La. 1055, 29 So. 2d 60 (1946). The inventory should list all real and personal property owned by the corporation as of the date of the receiver's appointment, the value of the assets listed, and a statement of all mortgages and security interests in the items of property. *Dickie v. Flamme Bros.*, 246 Neb. 66, 516 N.W.2d 618 (1994). The receiver is also obligated to file a final report. The final report must identify the source of money received, the property for which the money was paid, and the reason for the payments made. The final report should allow a reviewing court to readily understand what has occurred in connection with the corporation's property up to the date of the filing of the report. *Id.*

After conducting a thorough review of the extensive record involved in the instant case, we find that the amended inventory and amended final report inadequately disclose the entire holdings of Flamme Brothers and the procedures followed by receiver. The foregoing assets and liabilities must be specifically accounted for by receiver within 30 days, as ordered by the district court. The district court shall then conduct a hearing, after notice, to determine if the inventory and final report should be approved. Failure to include such necessary information, or failure to provide an adequate explanation for the absence of a requested entry, will require the district court to surcharge receiver for damages the corporation has incurred while he served as receiver.

There is ample evidence in the record to demonstrate that the corporation purchased a John Deere combine, serial No.

564144, in April 1983. As of 1987, the corporation still owed approximately $36,000 of the purchase price. Donald Flamme testified that the combine dealer, RLD, Inc., repossessed the combine and that Vernon Flamme bought the combine from the dealer on the same day Gallant was appointed receiver. It is not entirely clear whether such an asset was necessarily owned by the corporation as of the date of receiver's appointment. What is clear, however, is that receiver never investigated the status of the combine once it was brought to his attention by Donald Flamme.

Donald Flamme testified that the corporation had owned a significant amount of equipment, which was used on property not owned by the corporation. Thus, the corporation was entitled to rent for the use of such equipment. Rent accruing from the time receiver was appointed was never collected and accounted for as a corporate asset.

Receiver, in his inventory, notes that approximately 20,000 bushels of corn owned by the corporation and stored in flat storage had been mismeasured by the Agricultural Stabilization and Conservation Service (ASCS). Receiver fails, however, to account for additional grain that was allegedly destroyed, moved, or stolen after his appointment. Veronica Flamme testified that grain stored in the corporation's "Columbian" bin, which had not been properly fumigated, was destroyed by bugs. In addition, the corporation was assessed for the unauthorized disposition of corn and soybeans. Evidence of this missing grain was not accounted for in the inventory.

With regard to the issue of PIK certificates, receiver stated in his deposition that he was never in possession of such certificates. Veronica Flamme, however, testified that she had discovered that PIK certificates owned by the corporation had been signed and used by receiver to pay off grain loans. It appears that the corporation may have owned a significant number of PIK certificates at the time of receiver's appointment. However, this asset, and the value of this asset, is not accounted for in the inventory.

As of the date of receiver's appointment, Internal Revenue Service and ASCS assessments were made against the corporation. The inventory and final report fail to indicate whether

receiver discovered responsible parties and determined the validity of such claims. The record demonstrates that receiver also failed to investigate whether missing grain, the subject of ASCS assessments, had been insured, even at the urging of Donald Flamme.

In the spring of 1987, corporate land and equipment were sold, and proceeds from the sales were placed in trust at Fremont National Bank. Proceeds totaling $435,124.89 were paid out on October 13, 1987, but were never accounted for in the inventory, nor was disbursement of those proceeds explained in the final report.

Donald Flamme testified that the corporation owned a Voltse pump. Although Donald Flamme informed receiver of this item, it was never included in the inventory. Receiver also failed to account for a 3,000 bushel grain bin and a Sunflower plow which Donald Flamme alleged were corporate assets.

Receiver lists in the inventory "miscellaneous property of junk value." However, he neglects to list specifically what property that entry includes.

Finally, receiver's inventory neglects to list each of the corporate creditors, the status of each creditor, and the specific assets in which secured creditors had an interest. The settlement agreement and exhibits to the settlement agreement list numerous secured assets which are never accounted for by receiver.

The court understands that a significant number of assets were distributed pursuant to the agreements entered into on October 9, 1987. Curiously, however, the property distributed (specifically, the escrow account, collateral secured by creditors, PIK certificates, and the irrigation system) has not been listed on the inventory, nor has its distribution been explained in the final report.

This case is quite troublesome for the reason that receiver, in many respects, appears to have neglected to satisfy his duties and responsibilities. Throughout the record there are numerous instances where receiver did not investigate the assets of the corporation. For instance, the following conversation transpired between Richard Register, attorney for Flamme Brothers, and receiver during receiver's deposition:

Q. [Register] All right. So base — but did you ever take a listing and say there is [sic] this many pipes, this many center pivots, this many pumps on each particular land?

A. [Receiver] I did not do that, no, because all of that was secured by the Platte Valley Bank and I basically used the exhibit from the settlement agreement . . . .

. . . .

Q. Okay. Who represented to you that — that they had a lien on every one of the pipes? Who was that?

A. Mr. Wieser from the Platte Valley Bank and from the checking that I had done, I mean I can't go out there and count each piece of pipe.

Receiver also testified as follows:

Q. [Register] Okay. And this grain had been moved and was no longer where it was supposed to be; in fact it was no longer anywhere, wasn't it?

. . . .

Q. . . . . I am talking about the 60,000 in overdisbursements in which there was no grain in the bins.

A. [Receiver] Ah, I don't know what you are talking about.

Q. Did you even ask him about them? Did you even ask —

A. There were penalties assessed.

Q. And did they seize the personal assets of Vern and Donald Flamme to cover these overdisbursements?

A. How would I know.

Q. Well, isn't it your job to know whether the corporate debts are being paid for by seized assets of persons?

A. No.

Q. You don't think that's your job?

A. No.

We disagree with receiver's conclusion that he is not responsible for inventorying secured property, and we do not applaud his failure to properly protect the assets of the corporation.

Examination of the record in the instant case demonstrates that the inventories and final reports submitted and approved by the district court are incomplete. Therefore, we again remand this cause to the district court for further proceedings. The court

shall conduct a hearing after notice to determine if the amended inventory and amended final report comply with this decision. Only when the amended inventory and amended final report sufficiently address every discrepancy set out in this opinion will receiver's bond be exonerated and Flamme Brothers be dissolved.

Flamme Brothers requests that this court order that a new receiver be appointed to distribute the assets of the corporate estate. We are not able to address such a request.

An appointment of a receiver is considered by this court to constitute a final order. *Robertson v. Southwood*, 233 Neb. 685, 447 N.W.2d 616 (1989). In the instant case, receiver was appointed on September 22, 1987. Although Flamme Brothers would have had the opportunity to appeal such appointment within 30 days, an appeal was not filed. Therefore, we are unable to address such an error.

Flamme Brothers also requests that this court determine whether the sale of corporate real estate was proper. Again, we are unable to make such a determination. As appointments of a receiver constitute a final order, so do confirmations of a sale by a receiver constitute a final order. See *Lewis v. Gallemore*, 173 Neb. 441, 113 N.W.2d 595 (1962).

On May 17, 1988, the district court approved receiver's sale of corporate real property. Flamme Brothers failed to appeal within 30 days of that confirmation. Therefore, we are unable to address any errors regarding the sale of real property.

REVERSED AND REMANDED.

MARTY DANIELS, APPELLANT, V. PAMIDA, INC., AND LIBERTY MUTUAL INSURANCE COMPANY, APPELLEES.

561 N.W.2d 568

Filed March 7, 1997. No. S-95-360.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

2. **Workers' Compensation.** The Nebraska Workers' Compensation Act is an employee's exclusive remedy against an employer for an injury arising out of and in the course of employment.
3. **Workers' Compensation: Employer and Employee: Liability.** When a general employer lends an employee to a special employer, the special employer becomes liable for workers' compensation only if: (a) the employee has made a contract of hire, express or implied, with the special employer; (b) the work being done is essentially that of the special employer; and (c) the special employer has the right to control the details of the work. When all three of the above conditions are satisfied in relation to both employers, both employers are liable for workers' compensation.

Appeal from the District Court for Douglas County: MICHAEL W. AMDOR, Judge. Affirmed.

Scott M. Kirshenbaum, of Law Offices of Ronald J. Palagi, P.C., for appellant.

Thomas D. Wulff and Douglas E. Baker, of Welch, Wulff & Childers, for appellees.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and LUTHER, D.J.

GERRARD, J.

INTRODUCTION

Appellant, Marty Daniels, filed a petition alleging a cause of action in negligence against appellee Pamida, Inc. Both parties moved the district court for summary judgment. This appeal follows the district court order which overruled Daniels' motion and sustained Pamida's motion. Finding no error, we affirm.

FACTUAL BACKGROUND

Daniels was employed by A-Help, Inc., at the time of his injury. A-Help is a labor broker in the business of providing temporary labor services to employers such as Pamida. A-Help assigned Daniels to work in Pamida's warehouse, where on December 17, 1992, Daniels was injured when he was struck by a box that was knocked off of a shelf as a result of the alleged negligent operation of a forklift by a Pamida employee. Daniels filed a workers' compensation claim against A-Help and received a lump-sum settlement approved by the Nebraska Workers' Compensation Court on November 18, 1993. Pamida was not a party to this settlement agreement.

On April 15, 1994, Daniels filed the instant negligence action against Pamida regarding the same injury redressed by the lump-sum settlement approved by the compensation court. In this negligence petition, Daniels alleged that he was employed by A-Help and assigned as a temporary laborer to work in Pamida's warehouse. While so employed, he was injured as a result of the negligent conduct of a Pamida employee. Pamida answered by asserting that Daniels' exclusive remedy was to be found in workers' compensation and that Daniels had already been compensated pursuant to the Nebraska Workers' Compensation Act.

Both parties moved the district court for summary judgment. Evidence presented by Pamida indicated that when A-Help employees such as Daniels are assigned to work for Pamida, such employees are at all times under the exclusive control of Pamida. Therefore, as to employees such as Daniels, Pamida must be considered their employer within the meaning of the Nebraska Workers' Compensation Act. Pamida also points to its contractual arrangements with A-Help in which Pamida agreed to pay a fee and, in exchange, A-Help agreed to compensate its employees for their hours worked at Pamida as well as provide all payroll services and workers' compensation insurance coverage.

Daniels' evidence included his affidavit wherein he states that he was employed by A-Help, that he reported to A-Help, that A-Help assigned him to those companies requiring temporary labor services, and that A-Help provided payroll services to him. Daniels also averred that he had the right to refuse and terminate any assignment. Daniels affirmatively asserted that he was never an employee of Pamida and that he specifically refused to sign a lump-sum settlement agreement with A-Help that included Pamida as an additional employer.

The trial court agreed with Pamida and found, as a matter of law, that Daniels' exclusive remedy was to be found in workers' compensation. Accordingly, the trial court granted Pamida's motion for summary judgment, denied Daniels' motion for summary judgment, and dismissed Daniels' petition with prejudice.

ASSIGNMENTS OF ERROR

Daniels assigns that the district court erred in (1) granting Pamida's motion for summary judgment, finding Daniels to be an employee of Pamida at the time of the injury, and (2) overruling his motion for summary judgment, finding Daniels' exclusive remedy to be in workers' compensation.

SCOPE OF REVIEW

Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Bohl v. Buffalo Cty., ante* p. 492, 557 N.W.2d 668 (1997); *First Place Computers v. Security Nat. Bank, ante* p. 485, 558 N.W.2d 57 (1997).

ANALYSIS

The Nebraska Workers' Compensation Act is an employee's exclusive remedy against an employer for an injury arising out of and in the course of employment. *Tompkins v. Raines*, 247 Neb. 764, 530 N.W.2d 244 (1995). Therefore, if Pamida is an employer vis-a-vis Daniels within the meaning of the Nebraska Workers' Compensation Act, then Daniels' exclusive remedy is in workers' compensation. An employer is broadly defined as "every person, firm, or corporation, including any public service corporation, who is engaged in any trade, occupation, business, or profession . . . and who has any person in service under any contract of hire, express or implied, oral or written." Neb. Rev. Stat. § 48-114 (Reissue 1993).

Daniels asserts that this matter is controlled by our decision in *Horvath v. M.S.P. Resources, Inc.*, 246 Neb. 67, 517 N.W.2d 89 (1994), which Daniels contends stands for the proposition that his cause of action is not barred by the exclusive remedy requirement of workers' compensation. Daniels' reliance on *Horvath v. M.S.P. Resources, Inc.*, is misplaced.

In *Horvath v. M.S.P. Resources, Inc.*, the plaintiff was employed by an independent maintenance and repair contractor (MSP) and worked in a building owned by ConAgra used for meatpacking and processing. The plaintiff was injured when a

rail carrying carcasses of beef collapsed on top of him. The plaintiff sued ConAgra in tort and made MSP a party to the action due to its workers' compensation subrogation interest. The district court granted ConAgra's motion for summary judgment, citing *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991), and concluding that the plaintiff's cause of action was barred by the exclusivity of the Nebraska Workers' Compensation Act.

On review in *Horvath v. M.S.P. Resources, Inc., supra*, we noted that an assertion of workers' compensation exclusivity is a defense to be pled in the defendant's answer and that in this case, the defendant had failed to so plead. We then wrote, "Since the case is to be reversed for the reasons hereinafter set out, it might be well that the case be properly pled and properly submitted." *Id.* at 70, 517 N.W.2d at 91. Ultimately, we held that summary judgment was improperly granted as there was a genuine issue of material fact in regard to the defendant's alleged defective condition.

The issue of whether Pamida is an employer within the meaning of the Nebraska Workers' Compensation Act is controlled by our holding in *Schwartz v. Riekes & Sons*, 195 Neb. 737, 240 N.W.2d 581 (1976). In *Schwartz v. Riekes & Sons*, the plaintiff was employed by Manpower, Inc., a provider of temporary labor services to the defendant. As part of its agreement with the defendant, Manpower would provide payroll services and workers' compensation coverage for the workers assigned for which Riekes would pay Manpower a fee. While working for Riekes, Schwartz was under the exclusive direction of the foreman for Riekes and was to perform the tasks or labors assigned to him by such foreman.

While engaged in the labors assigned by the defendant, Schwartz was injured due to the alleged negligent conduct of the defendant's employee. Schwartz agreed to a lump-sum workers' compensation settlement with Manpower in regard to his injury. This settlement did not include the defendant. Schwartz then filed a negligence cause of action against the defendant.

The defendant moved the district court for summary judgment; the motion was sustained. We affirmed. Quoting exten-

sively from *St. Claire v. Minnesota Harbor Service, Inc.*, 211 F. Supp. 521 (1962), we concluded that the relevant test was one of control.

> "It is therefore the opinion of this Court that where the primary employer (Manpower here) does no more than provide personnel for the use of the ultimate employer (the defendant here), where the fees received by the primary employer from the ultimate employer include provision for Workmen's Compensation coverage for the employees supplied, where this Workman's Compensation was in force at the time of the accident, and where the injury occurred (1) while the employee was under the control of the ultimate employer (the defendant here) and (2) while the employee was engaged in a task which all the parties (the plaintiff, the defendant and Manpower) must be deemed to have contemplated that the employee would perform (i.e., while the plaintiff was within the scope of his employment), then the injured employee cannot sue the ultimate employer as a third-party tort-feasor."

Schwartz v. Riekes & Sons, 195 Neb. at 741-42, 240 N.W.2d at 584. Concluding that Riekes was an employer within the meaning of the Nebraska Workers' Compensation Act, we stated:

> Manpower was simply in the business of selling the services of its general employees. It did not attempt to exercise any supervision or control over them in the slightest degree once it had assigned them to work for the defendant Riekes. Riekes had the sole right to designate the work to be done by plaintiff and where and how it was to be done. Defendant Riekes also had full power and authority to dispense with plaintiff's services at any time. The defendant Riekes, not Manpower, was in full control of the situation in regard to the services to be rendered by plaintiff. The facts reflect that an implied contract of employment existed between plaintiff and the defendant Riekes. The plaintiff voluntarily went to work for Riekes and performed tasks assigned to him.

Id. at 742, 240 N.W.2d at 584.

While the principles which underlie our decision in *Schwartz v. Riekes & Sons* remain vital, we are persuaded that the relevant

test for determining whether one is an employer within the meaning of the Nebraska Workers' Compensation Act can be succinctly restated.

In *Danek v. Meldrum Mfg. & Eng. Co.*, 312 Minn. 404, 252 N.W.2d 255 (1977), the Minnesota Supreme Court considered the issue of whether the plaintiff, employed by a labor broker, was also an employee of a manufacturer when the plaintiff was injured while operating the manufacturer's punch press machine. In considering whether the plaintiff should be regarded as a loaned employee in the service of the manufacturer, thus precluding the plaintiff from maintaining a tort action for personal injuries against the manufacturer, or whether the plaintiff should be regarded as remaining solely in the service of the labor broker-employer, the court adopted a three-part test based on the "loaned-servant" doctrine as set forth in 1B Arthur Larson & Lex K. Larson, The Law of Workmen's Compensation § 48.00 (1996).

The loaned-servant doctrine provides that if an employer loans an employee to another for the performance of some special service, then that employee, with respect to that special service, may become the employee of the party to whom his services have been loaned. Restatement (Second) of Agency § 227 (1958). This common-law principle applies to cases arising particularly under the Nebraska Workers' Compensation Act and allows an employee to be simultaneously in the general employment of one employer and in the special employment of another. Thus, the loaned employee not only remains the employee of the person who loaned him or her but also may be the employee of the person to whom he or she is loaned. *Danek v. Meldrum Mfg. & Eng. Co., supra* (citing 3 William R. Schneider, Schneider's Workmen's Compensation (perm. ed.) § 779 (1943)). In such cases, the employee may look to one or to the other or to both employers for compensation, since he or she is at the same time under a general and a special employment relationship. *Id.*

Whether the employee should be regarded as a loaned employee in the service of the special employer or whether he or she should be regarded as remaining solely in the service of his or her general employer depends upon several factors when

considered within the context of workers' compensation cases. As set forth in 1B Larson & Larson, *supra*, three conditions must be satisfied before the loaned-servant doctrine may be applied to a special employer to whom an employee has been sent by a general employer. Those conditions are as follows:

> When a general employer lends an employee to a special employer, the special employer becomes liable for workmen's compensation only if:
>
> (a) the employee has made a contract of hire, express or implied, with the special employer;
>
> (b) the work being done is essentially that of the special employer; and
>
> (c) the special employer has the right to control the details of the work.
>
> When all three of the above conditions are satisfied in relation to both employers, both employers are liable for workmen's compensation.

Id. at 8-434. See, also, *Nussbaum v. Wright*, 217 Neb. 712, 350 N.W.2d 559 (1984).

Because the foregoing three-part test encompasses a sound approach in determining whether a special employer may be regarded as an employer within the meaning of the Nebraska Workers' Compensation Act, we adopt the rule in these types of labor broker cases. In applying the rule to the instant case, we determine that there are no genuine issues of material fact to be resolved. The evidence demonstrates that A-Help paid Daniels' wages and provided all payroll services such as withholding taxes and Social Security contributions. A-Help directed Daniels to report to the customer of its choice. However, Daniels had the right to refuse to report to any assignment as well as the right to terminate any assignment given. Daniels voluntarily went to work for Pamida and performed the tasks assigned to him. There is no question that Daniels had made at least an implied contract of hire with Pamida, and, therefore, part (a) of the three-factor test has been satisfied.

A-Help employees were under the exclusive control of Pamida once on Pamida's premises. Pamida then exercised the right to control the details of the work, how the work was to be done, the number of hours the A-Help employee could work,

the time at which the employee was to report to work, and the number and length of breaks to be taken during the workday. Pamida supplied all necessary tools, and the A-Help employees engaged solely in the business of Pamida. There is no dispute that the work done by Daniels was Pamida's work and that Pamida controlled the details of such work. Therefore, the evidence further demonstrates that parts (b) and (c) of the three-factor test have also been satisfied, and we conclude, as a matter of law, that Pamida was an employer vis-a-vis Daniels within the meaning of the Nebraska Workers' Compensation Act.

CONCLUSION

Because we determine as a matter of law that Pamida was Daniels' employer within the meaning of the Nebraska Workers' Compensation Act, we conclude that the district court was correct in finding Daniels' exclusive remedy to be in workers' compensation and affirm the judgment of dismissal.

AFFIRMED.

CENTRAL NEBRASKA BROADCASTING CO., INC., A NEBRASKA CORPORATION, APPELLANT, V. HEARTLAND RADIO, INC., A NEBRASKA CORPORATION, ET AL., APPELLEES.

560 N.W.2d 770

Filed March 7, 1997. No. S-95-374.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Judgments: Appeal and Error.** On questions of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Injunction.** An injunction is an extraordinary remedy and ordinarily should not be granted except in a clear case where there is actual and substantial injury.
4. ____. Injunctive relief should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.
5. ____. As an injunction is an extraordinary remedy, it is available in the absence of an adequate remedy at law and where there is a real and imminent danger of irreparable injury.

6. **Injunction: Damages: Words and Phrases.** An injury may be said to be irreparable when it is of such a character or nature that the party injured cannot be adequately compensated therefor in damages, or when the damages which may result therefrom cannot be measured by any certain pecuniary standard, or it is shown that the party who must respond is insolvent and for that reason incapable of responding in damages.
7. **Words and Phrases.** An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.

Appeal from the District Court for Kearney County: STEPHEN ILLINGWORTH, Judge. Affirmed.

Jack W. Besse, of Knapp, Fangmeyer, Aschwege & Besse, for appellant.

Larry Beucke, of Parker, Grossart, Bahensky & Beucke, and Clifford F. Mesner, of Mesner & Mesner, for appellees Heartland Radio and Fant Broadcasting Co.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and COADY, D.J.

CAPORALE, J.

The plaintiff-appellant, Central Nebraska Broadcasting Co., Inc., seeks to permanently enjoin the defendant-appellee Heartland Radio, Inc., from placing a broadcast antenna on a tower owned by the defendant-appellee Fant Broadcasting Company of Nebraska, Inc. Following the dissolution of a temporary restraining order and the denial of a temporary injunction, the district court sustained the joint motion for summary judgment filed by Heartland Radio and Fant Broadcasting, and thereby dismissed Central Nebraska's petition. Central Nebraska appealed to the Nebraska Court of Appeals, asserting, in summary, that the district court erred in (1) refusing to receive certain evidence and (2) dismissing its petition. Under our authority to regulate the caseload of this court and that of the Court of Appeals, we, on our own motion, removed the matter to our docket. We now affirm.

Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as

to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Slagle v. J.P. Theisen & Sons, ante* p. 904, 560 N.W.2d 758 (1997). To the extent questions of law are involved, an appellate court reaches a conclusion independent of the lower court's ruling. *PSB Credit Servs. v. Rich, ante* p. 474, 558 N.W.2d 295 (1997).

Central Nebraska owns and operates a radio station at Kearney, in connection with which it rents space on a tower owned by Fant Broadcasting and on which Central Nebraska houses a broadcasting antenna. Heartland Radio wishes to place an antenna on the same tower and at the same height as Central Nebraska's antenna, but on a different leg of the tower.

Central Nebraska's expert, a structural engineer engaged in the analysis and design of broadcast towers, is of the view that the tower is already overloaded and that placing the proposed antenna on it would create an imminent danger of structural failure in the sense that if the tower were subjected to an 85-mile-per-hour wind, a once-in-50-years occurrence, blowing from the most critical direction and the tower were encrusted with one-half inch of ice, the tower would fall.

In order to determine whether a material issue of fact exists in the instant case, it is necessary to review the requirements for obtaining a permanent injunction. As an injunction is an extraordinary remedy, it ordinarily should not be granted except in a clear case where there is actual and substantial injury. *Ben Simon's, Inc. v. Lincoln Joint-Venture*, 248 Neb. 465, 535 N.W.2d 712 (1995). Stated otherwise, injunctive relief should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice. *Id.* As an injunction is an extraordinary remedy, it is available in the absence of an adequate remedy at law and where there is a real and imminent danger of irreparable injury. *Otey v. State*, 240 Neb. 813, 485 N.W.2d 153 (1992); *Mueller v. Union Pacific Railroad*, 220 Neb. 742, 371 N.W.2d 732 (1985); *Grein v. Board of Education*, 216 Neb. 158, 343 N.W.2d 718 (1984).

With those rules in mind, we turn to the first assignment of error, in which Central Nebraska claims that the district court

erred by refusing to permit its general manager to testify that he recently saw evidence of people occupying a house located 50 to 75 yards from the tower.

In making that claim, Central Nebraska refers us to *Wasserburger v. Coffee*, 180 Neb. 149, 162, 141 N.W.2d 738, 747 (1966), *modified on reh'g on other grounds* 180 Neb. 569, 144 N.W.2d 209, citing *McCubbin v. Village of Gretna*, 174 Neb. 139, 116 N.W.2d 287 (1962), in which we wrote:

> The appropriateness of injunction against tort depends upon a comparative appraisal of all factors in a case, some of the primary factors being the following: (1) The character of the interest to be protected; (2) the public interest; (3) the relative adequacy to the plaintiff of injunction and of other remedies; and (4) the relative hardship likely to result to defendant if injunction is granted and to plaintiff if it is denied.

However, the instant case does not deal with an injunction against tort. In *Wasserburger*, the plaintiffs sought to enjoin the defendants from overappropriating a stream, causing interference with the plaintiff's use. In *McCubbin*, the plaintiff sought to enjoin the defendant from discharging sewage across his land, causing a swampy condition on the plaintiff's land. In the instant case, no tort is presently occurring, nor will a tort occur upon the placement of Heartland Radio's antenna on the tower. At best, it will cause Central Nebraska apprehension of a possible future injury.

Thus, *Wasserburger* is inapposite. That a house near the tower is or is not inhabited is irrelevant to the issues involved in determining whether Central Nebraska has established its right to injunctive relief.

That brings us to the second and last assignment of error, in which Central Nebraska asserts that the district court erred in granting the joint motion for summary judgment filed by Heartland Radio and Fant Broadcasting and thereby dismissing Central Nebraska's petition. In this regard, Central Nebraska argues that its damages in the form of the possible loss of good will, dependability, business momentum, reputation, staff morale, key staff, advertiser loyalty, and listener loyalty cannot be quantified, and, thus, its potential damages are irreparable in the sense that they cannot be adequately compensated at law.

Even assuming, but not deciding, that the testimony of Central Nebraska's expert establishes that adding the antenna proposed by Heartland Radio would present an imminent danger, the question remains as to whether the record raises a question of material fact as to whether any resulting injury would be irreparable. More than a century ago, we wrote that an injury may be said to be irreparable when it is of such a character or nature that the party injured cannot be adequately compensated therefor in damages, or when the damages which may result therefrom cannot be measured by any certain pecuniary standard, or it is shown that the party who must respond is insolvent and for that reason incapable of responding in damages. *Eidemiller Ice Co. v. Guthrie*, 42 Neb. 238, 60 N.W. 717 (1894) (reversing injunction granted owner of icehouse preventing millowners from interfering with flow of water on ground icehouse owner could be compensated by damages).

We have also written that an adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. *Standard Oil Co. v. O'Hare*, 122 Neb. 89, 239 N.W. 467 (1931).

All of the injuries Central Nebraska postulates would ultimately result in a potential reduction in advertising income. As its general manager noted, gain in income is a result of the gain in its reputation. Reputation and good will will affect the number of listeners, and the number of listeners directly affects the amount that Central Nebraska can charge per advertisement. Likewise, advertiser confidence in Central Nebraska's ability to stay on the air will also affect the amount that it is able to charge for advertising. In short, all of the injuries Central Nebraska envisions would result in a loss of income and thus in a loss of profits.

The legal reality is that when properly proved, lost profits are compensable in actions at law. E.g., *Diesel Service, Inc. v. Accessory Sales, Inc.*, 210 Neb. 797, 317 N.W.2d 719 (1982) (prospective profits from established business, prevented or interrupted by tortious conduct, recoverable when reasonably certain to have been realized except for tort and when lost profits can be ascertained and measured with reasonable certainty);

Alliance Tractor & Implement Co. v. Lukens Tool & Die Co., 204 Neb. 248, 281 N.W.2d 778 (1979) (lost profits from business may be recovered if evidence shows with reasonable certainty both occurrence and extent thereof); *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 261 N.W.2d 358 (1978) (even in case of new business venture, where evidence available to furnish reasonably certain factual basis for computation of probable losses, recovery of lost profits cannot be denied).

That being so and Central Nebraska not having established that either Heartland Radio or Fant Broadcasting is insolvent, it cannot be said that Central Nebraska has no adequate remedy at law. Heartland Radio and Fant Broadcasting were thus entitled to judgment as a matter of law.

Accordingly, as noted in the first paragraph of this opinion, the judgment of the district court is affirmed.

AFFIRMED.

McDONALD'S CORPORATION, A DELAWARE CORPORATION, APPELLEE, V. BERNIE R. GOLER AND BONNIE A. GOLER, HUSBAND AND WIFE, AND BEN WIXEN AND FRANCINE A. WIXEN, COTRUSTEES OF THE B & F WIXEN FAMILY TRUST U/A DATED AUGUST 27, 1980, APPELLANTS.

560 N.W.2d 458

Filed March 7, 1997. No. S-95-600.

1. **Contracts: Appeal and Error.** The construction of a contract is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below.
2. **Contracts.** A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.
3. ____. The terms of a contract are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them.
4. ____. Extrinsic evidence is not permitted to explain the terms of a contract that is not ambiguous.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Reversed and remanded for further proceedings.

Shannon R. Harner, of Hoppe & Harner Law Offices, for appellants.

David C. Mussman, of Erickson & Sederstrom, P.C., for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and COADY, D.J.

WRIGHT, J.

McDonald's Corporation (McDonald's) commenced this declaratory judgment action seeking interpretation of a commercial lease between McDonald's and the B & F Wixen Family Trust, which does business as Golwix Properties (Golwix). Golwix appeals from a summary judgment entered by the district court in favor of McDonald's.

SCOPE OF REVIEW

The construction of a contract is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below. *Daehnke v. Nebraska Dept. of Soc. Servs., ante* p. 298, 557 N.W.2d 17 (1996); *Stephens v. Radium Petroleum Co.*, 250 Neb. 560, 550 N.W.2d 39 (1996).

FACTS

Golwix owns property located at 48th and Van Dorn Streets in Lincoln, Nebraska, known as Van Dorn Plaza. On October 19, 1981, Golwix and McDonald's signed a ground lease, ground lease addendum, and tax addendum regarding Van Dorn Plaza. McDonald's has occupied the premises from the time that construction of its building was completed until the present.

Under the terms of the lease, McDonald's is responsible for a prorated monthly share of taxes, insurance, and maintenance expenses associated with its property. The lease also requires that McDonald's pay a certain share of expenses related to the common area of Van Dorn Plaza, as articulated in article 8 of the ground lease addendum. Article 8 provides in part:

> ARTICLE 8. COMMON AREA MAINTENANCE COSTS: Tenants shall pay to landlord in the manner provided tenant's pro-rata share as defined below under common area maintenance costs as such terms are defined as follows:

A. Maintenance Costs - All costs and expense of any kind and nature paid or incurred by landlord during the lease term, in conjunction with the common area, including appropriate reserves, and operating, managing, equipping, if and to the extent provided by landlord, protecting, insuring, lighting, repairing, replacing, and maintaining the common areas on the landlord's tract. ~~which have been submitted to and approved by Lessee in advance.~~ Such costs and expense shall include but not be limited to cleaning, removal of rubbage and other refuse, line painting, fire protection, exterior common areas, illumination and maintenance of signs, located on the common area tract, snow and ice clearance, cost and expense of planting, maintaining, replanting, and replacing flowers and other landscaping, water and sewer charges, if not included under utilities of Article 3 of the Addendum, premium for liability, property damage, fire, extended coverage, malicious mischief, vandalism, workmen's compensation, employees' liability and other insurance wages, unemployment taxes, social security taxes, required licenses and permits, costs and expenses of supplies, reasonable depreciation and rents paid for the leasing and equipment used in the operation of common areas, and an administrative cost equal to 15% of the total cost of operating and maintaining the common areas, except appropriate reserves, but costs of equipment, property chargeable to capital accounts, depreciation of the original costs of constructing the common area shall be excluded.

If in accordance with the terms of any agreement or agreements heretofore or hereafter entered into between landlord and other owners of any parcels of real estate and/or adjacent to the shopping center, all or portions of the common area in or adjacent to the shopping center are kept, maintained, and operated by a common contractor. The common area maintenance costs shall include any portion of the costs and expenses including fees of such contractors shall be allocated to landlord in accordance with such agreement, however, if said outside contractor is hired to do said work, then landlord shall not be entitled to

> assess charges for employee's liability, social security, workman's compensation. ~~and is not entitled to charge an administrative cost for itself.~~

The petition filed by McDonald's alleged that Golwix had attempted to charge McDonald's a pro rata share of management fees paid to Management, Inc., as well as a pro rata share of administrative costs equal to 15 percent of the total cost of operating and maintaining the common area of Van Dorn Plaza. McDonald's contended in its petition that the charges for management fees relating to the employment of Management, Inc., to manage Van Dorn Plaza were not proper and valid charges under the ground lease addendum. McDonald's requested that the court determine its rights and duties under the ground lease addendum; that

> the Defendants be barred from collecting or attempting to collect or asserting the validity of Plaintiff's pro rata share of the management fee for the services of Management, Inc.; [and] that the Court ascertain and determine any and all rights between Plaintiff and Defendants in regard to said management fees for the years 1990 to the present . . . .

In its answer, Golwix contended that the management fees paid to Management, Inc., were proper charges under the terms and conditions of the lease.

Both parties filed motions for summary judgment. The district court granted the motion of McDonald's for summary judgment, holding that Golwix had charged McDonald's for management fees which were not attributable to the management of the common area and that Golwix had charged McDonald's twice for the administrative costs of maintaining the common area by charging McDonald's 15 percent of Management, Inc.'s fee for operating the entire property. The court held that Golwix was barred from asserting the validity of Management, Inc.'s fee and from collecting or attempting to collect a pro rata share of the fee from McDonald's. The court ordered Golwix to reimburse all monies paid for fees that were improperly charged by Golwix and paid by McDonald's from 1990 to the date of the order.

Golwix appealed from the district court's grant of summary judgment to McDonald's.

ASSIGNMENTS OF ERROR

Golwix assigns the following errors: (1) The district court erred by finding that the terms of the ground lease addendum did not allow charge-back of management expenses for the common area to the tenants under article 8; (2) the district court erred by finding that Golwix charged McDonald's twice for administrative costs of maintaining the common area by charging McDonald's 15 percent of Management, Inc.'s fee for operating and maintaining the property; and (3) the district court erred by not reaching the question of whether an industry standard exists regarding payment of management company fees as a common area maintenance expense.

ANALYSIS

The parties agree that the contract documents at issue are not ambiguous, but each party offers a different explanation of what the documents permit with regard to maintenance costs. However, the fact that the parties have suggested opposing meanings for the disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous. See *Daehnke v. Nebraska Dept. of Soc. Servs., ante* p. 298, 557 N.W.2d 17 (1996).

The dispute centers upon article 8 of the ground lease addendum, which has been set forth above. We conclude that article 8 is not ambiguous. A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms. *Id.*; *C.S.B. Co. v. Isham*, 249 Neb. 66, 541 N.W.2d 392 (1996). The terms of a contract are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them. *Daehnke v. Nebraska Dept. of Soc. Servs., supra*; *Rains v. Becton, Dickinson & Co.*, 246 Neb. 746, 523 N.W.2d 506 (1994).

Article 8 requires McDonald's to pay a pro rata share of "[a]ll costs and expense of any kind and nature paid or incurred by landlord during the lease term, in conjunction with the common area, including . . . operating, managing . . . and maintaining the common areas on the landlord's tract" and "an administrative cost equal to 15% of the total cost of operating and

maintaining the common areas." Under the plain meaning of this language, McDonald's is obligated to pay a pro rata share of all costs and expenses incurred by Golwix in operating, maintaining, and managing the common area. Such costs would plainly include a pro rata share of the fee paid to Management, Inc., to the extent that the fee related to management of the common area. Moreover, this language clearly requires McDonald's to pay an additional administrative cost of 15 percent of the total cost of operating and maintaining the common area, which would include the fee paid to Management, Inc., to the extent that the fee related to the operation and management of the common area.

Article 8's use of the language "in conjunction with the common area" and similar references to the common area which appear throughout article 8 limit the fee to Management, Inc., to costs related to the common area. Golwix may not charge McDonald's for fees it pays to Management, Inc., that are expended on matters not specifically related to the operation, management, or maintenance of the common area. Accordingly, McDonald's can be charged for a pro rata share of the $31,500 fee paid by Golwix to Management, Inc., but only for that portion of the fee that is attributable to common area operation, management, or maintenance. Similarly, Golwix may not use costs that are not specifically related to the operation, management, or maintenance of the common area as a basis for determining the amount due under the 15-percent administrative fee.

Nevertheless, Golwix contends that a latent ambiguity exists in article 8 and that, as a result, Golwix should be permitted to charge back to McDonald's a pro rata share of Management, Inc.'s $31,500 fee irrespective of whether the entire fee was related to the operation, management, or maintenance of the common area. Golwix asserts that if the district court had considered extrinsic evidence of the parties' course of dealing with respect to fees permitted under article 8 and a shopping center industry standard regarding management fees, the court would have construed article 8 to obligate McDonald's to pay its share of Management, Inc.'s $31,500 fee.

We find this argument to be without merit. Regardless of whatever the industry standard might be, article 8 is plain and

unambiguous. It authorizes Golwix to bill McDonald's only for costs and expenses related to the common area. Extrinsic evidence is not permitted to explain the terms of a contract that is not ambiguous. See *Schrempp and Salerno v. Gross*, 247 Neb. 685, 529 N.W.2d 764 (1995). Article 8 is clear and unambiguous, is not subject to interpretation or construction, and must be enforced according to its terms. See, *Daehnke v. Nebraska Dept. of Soc. Servs., ante* p. 298, 557 N.W.2d 17 (1996); *C.S.B. Co. v. Isham*, 249 Neb. 66, 541 N.W.2d 392 (1996).

The parties agree that some of the duties carried out by Management, Inc., in exchange for its fee were not performed in conjunction with the common area, while others were so related. Therefore, we conclude that a factual issue remains as to the appropriate amount of the $31,500 management fee that is attributable to the costs of operating, managing, and maintaining the common area of Van Dorn Plaza.

For the reasons set forth herein, the judgment of the district court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE,
V. BILLIE JO MCCLEERY, APPELLANT.
560 N.W.2d 789

Filed March 7, 1997. No. S-95-1206.

1. **Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** In light of the U.S. Supreme Court's decision in *Ornelas v. U.S.*, ___ U.S. ___, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996), the traditional clearly erroneous standard of review of a trial court's determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search is no longer applicable. The clearly erroneous standard has now been supplanted by a two-stage standard in which the ultimate determinations of reasonable suspicion and probable cause are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge.
2. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable

cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.

3. **Criminal Law: Police Officers and Sheriffs: Investigative Stops: Probable Cause.** A law enforcement officer may legally conduct a *Terry* stop of a person suspected of criminal activity if the officer has a reasonable suspicion based upon articulable facts that the person has been, is, or is about to be involved in criminal activity.
4. **Criminal Law: Investigative Stops: Probable Cause.** Investigatory stops are permissible only upon a reasonable suspicion supported by specific and articulable facts that the person has been, is, or is about to be engaged in criminal activity.
5. **Police Officers and Sheriffs: Investigative Stops: Probable Cause.** In determining whether a police officer acted reasonably, it is not the officer's inchoate or unparticularized suspicion or hunch that will be given due weight, but the specific reasonable inferences which the officer is entitled to draw from the facts in light of the officer's experience.
6. **Police Officers and Sheriffs: Probable Cause.** Whether a police officer has a reasonable suspicion based upon sufficient, articulable facts requires taking into account the totality of the circumstances.

Petition for further review from the Nebraska Court of Appeals, IRWIN, SIEVERS, and INBODY, Judges, on appeal thereto from the District Court for Box Butte County, BRIAN SILVERMAN, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Jon Placke, Assistant Box Butte County Public Defender, for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and BOSLAUGH and GRANT, JJ., Retired.

WRIGHT, J.

Billie Jo McCleery has petitioned this court for further review of a Nebraska Court of Appeals decision that affirmed the county court's overruling of McCleery's motion to suppress evidence obtained as the result of the stop of her vehicle after she attempted to avoid a sobriety checkpoint.

SCOPE OF REVIEW

In light of the U.S. Supreme Court's decision in *Ornelas v. U.S.*, ___ U.S. ___, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996), the traditional clearly erroneous standard of review of a trial court's determinations of reasonable suspicion to conduct an investigatory stop and probable cause to perform a warrantless search is no longer applicable. The clearly erroneous standard has now been supplanted by a two-stage standard in which the ultimate determinations of reasonable suspicion and probable cause are reviewed de novo and findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge. *State v. Konfrst, ante* p. 214, 556 N.W.2d 250 (1996).

A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *Id.*

FACTS

Between 10 p.m. and midnight on December 2, 1994, the Alliance Police Department conducted a sobriety checkpoint at Third and Niobrara Streets in Alliance, Nebraska. Police officers stopped all vehicles traveling eastbound on Third Street or northbound on Niobrara Street.

Sgt. Rae Ann Christensen, participating in the checkpoint, first observed McCleery's vehicle as it turned north onto Niobrara Street. Christensen testified that when McCleery was approximately one-fourth of a block from the checkpoint, she "threw" her vehicle into reverse and started backing away, toward a grocery store parking lot. Several officers yelled at McCleery to stop, but McCleery continued into the grocery store parking lot until Lt. Timothy Kees, who was processing another vehicle in the lot, was able to stop her. The grocery store was closed.

Once Kees was able to stop McCleery's vehicle, Christensen contacted McCleery and asked for her operator's license and

vehicle information. McCleery had trouble producing her operator's license and produced an expired South Dakota registration before she produced a current certificate. During the course of the stop, Christensen noticed a slight odor of alcohol on McCleery's breath. Field sobriety tests were administered, which results, according to Christensen, indicated impairment. A preliminary breath test was conducted, which showed a .195 reading. At this point, McCleery was placed under arrest. A subsequent Intoxilyzer test was conducted. The result showed that McCleery had a blood alcohol content of .180.

McCleery was charged with driving while under the influence, in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 1993). Prior to trial, McCleery moved to suppress the evidence adduced at the stop of her vehicle, arguing that the police officers did not have a "reasonably articulable suspicion" McCleery had committed any crime and that therefore the stop of her vehicle was in violation of her constitutional rights. Christensen testified that McCleery was stopped because she was avoiding the checkpoint. The county court overruled the motion to suppress, and McCleery was found guilty of driving while under the influence. McCleery appealed to the district court, which also upheld the county court's decision. She then appealed to the Court of Appeals, which also upheld the county court's decision. We granted McCleery's petition for further review.

ASSIGNMENTS OF ERROR

In summary, McCleery asserts that the county court and the Court of Appeals erred in holding that the stop of her vehicle was lawful and that the evidence obtained as a result thereof was admissible.

ANALYSIS

The issue considered by the Court of Appeals was whether stopping one's vehicle one-fourth of a block from a sobriety checkpoint and then backing away from the checkpoint constitutes sufficient evidence for a trained officer to have a reasonable suspicion that the driver is, has been, or is about to be engaged in criminal behavior. We have held on previous occasions that in situations where a person on foot encounters the police, flight alone is insufficient to justify a *Terry* stop. See *State v. Ellington*, 242 Neb. 554, 495 N.W.2d 915 (1993).

In a memorandum opinion, the Court of Appeals affirmed the county court's overruling of McCleery's motion to suppress the evidence obtained as a result of the stop of her vehicle. See *State v. McCleery*, 4 Neb. App. xxii (case No. A-95-1206, Aug. 2, 1996). A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *State v. Konfrst, ante* p. 214, 556 N.W.2d 250 (1996).

McCleery contends that the police officers had no reasonable suspicion of criminal activity when their only observation was that she avoided the sobriety checkpoint. As noted by the Court of Appeals, a law enforcement officer may legally conduct a *Terry* stop of a person suspected of criminal activity if the officer has a reasonable suspicion based upon articulable facts that the person has been, is, or is about to be involved in criminal activity. See *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Terry v. Ohio held that the public's interest in law enforcement makes it reasonable to detain and question individuals under certain circumstances in which probable cause to arrest is lacking. Such investigatory stops are permissible only upon a reasonable suspicion supported by specific and articulable facts that the person has been, is, or is about to be engaged in criminal activity. In determining whether the officer acted reasonably, it is not the officer's inchoate or unparticularized suspicion or hunch that will be given due weight, but the specific reasonable inferences which the officer is entitled to draw from the facts in light of the officer's experience. *Id.* That same standard is applied in Nebraska in determining the propriety of an investigatory stop under Neb. Const. art. I, § 7. See, *State v. Ellington, supra*; *State v. Hicks*, 241 Neb. 357, 488 N.W.2d 359 (1992), *cert. denied* 507 U.S. 1000, 113 S. Ct. 1625, 123 L. Ed. 2d 183 (1993).

In *State v. Giessinger*, 235 Neb. 140, 454 N.W.2d 289 (1990), we held that there was a sufficiently reasonable suspicion for a stop based on an observation that the vehicle approaching a checkpoint pulled over onto the shoulder and the driver and the passenger then proceeded to switch places. We have, however, not addressed the validity of a stop where the driver stopped her vehicle one-fourth of a block from a sobriety checkpoint and then backed away from the checkpoint.

Whether a police officer has a reasonable suspicion based upon sufficient, articulable facts requires taking into account the totality of the circumstances. See *State v. Pillard*, 235 Neb. 642, 456 N.W.2d 755 (1990). In *State v. Ellington, supra*, from our examination of the record of the activity which the police officer observed, we found that the officer had failed to articulate specific facts to justify a *Terry* stop. There, the officer observed a person standing on the sidewalk in an area known for drug trafficking. The person was leaning toward a legally parked car with his arms extended into the passenger window, apparently conversing with the occupants. The person looked toward the police cruiser, quickly stepped away, and proceeded to walk away from the vehicle. We found that the record did not create a reasonable suspicion based on articulable facts that Ellington had been, was, or was about to be involved in criminal activity.

McCleery contends that the facts surrounding the stop of her vehicle are analogous to *State v. Ellington* insofar as the only possible evidence of illegal activity was that she attempted to avoid a police confrontation. See, also, *State v. Hicks, supra*. However, other courts have distinguished avoidance of a constitutionally permissible automobile checkpoint from the avoidance of the type of unexpected pedestrian encounter presented in *State v. Ellington*. For instance, as noted by the Court of Appeals, the court in *Snyder v. State*, 538 N.E.2d 961 (Ind. App. 1989), considered a situation similar to the stop of McCleery.

In *Snyder v. State*, police officers were conducting a "sobriety roadblock." When Snyder was approximately 100 yards away from the roadblock, he turned his vehicle around in the road to avoid the roadblock. Although Snyder had not commit-

ted any traffic violations, he was stopped by a state trooper. The trooper testified that the only reason he stopped Snyder was because he appeared to be trying to avoid the roadblock.

The court held that Snyder's attempt to avoid the roadblock by turning around raised a "specific and articulable fact" which gave rise to a reasonable suspicion on the part of the law enforcement officer that Snyder might be committing a crime. The court held that such suspicion entitled the officer to conduct a *Terry* stop and detain Snyder. The court reasoned: "If police officers stationed at roadblocks were not permitted to stop such drivers, the very drivers the police seek to deter could flagrantly avoid the roadblocks and the stops would lose their deterrent value." *Snyder v. State*, 538 N.E.2d at 965.

In considering the totality of the circumstances to determine whether a police officer has a reasonable suspicion based upon sufficient, articulable facts, the ultimate determinations of reasonable suspicion are reviewed de novo. See *State v. Konfrst, ante* p. 214, 556 N.W.2d 250 (1996). Findings of fact are reviewed for clear error, giving due weight to the inferences drawn from those facts by the trial judge. *Id.*

One fact surrounding the stop of McCleery was not addressed by the county court. The stipulation of facts at trial provided that Kees "would further testify that the check point was conducted in total compliance with the [Department of Transportation] and the Alliance Police Department policies." A U.S. Department of Transportation report on "The Use of Sobriety Checkpoints for Impaired Driving Enforcement" was entered into evidence. Therein, the "Sobriety Checkpoints Briefing Guide" provides in part:

> A motorist who wishes to avoid the checkpoint by legally turning before [entering] the checkpoint area should be allowed to do so unless a traffic violation(s) is observed or probable cause exists to take other action. The act of avoiding a sobriety checkpoint does not constitute grounds for a stop.

McCleery was not cited for committing any traffic violation, and neither officer testified that McCleery had committed any traffic violation.

We therefore consider whether under the totality of the circumstances in this case, the police officers had a reasonable suspicion that McCleery was committing a crime. The only reason given for stopping McCleery was that she appeared to be avoiding the checkpoint. McCleery was not cited for any driving violation. Under certain circumstances, the avoidance of a checkpoint might create a reasonable suspicion that would justify a *Terry* stop. However, since the State has admitted that the officer who initially stopped McCleery would testify that the checkpoint was conducted in total compliance with the Department of Transportation policy which states that avoidance of a checkpoint is not grounds for a stop, we cannot conclude that the officers had a reasonable suspicion in this case.

The decision of the Court of Appeals, which affirmed the conviction by the county court, is reversed. The Court of Appeals is directed to remand the cause to the county court with instructions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V.
LESTER L. GLANTZ, APPELLANT.
560 N.W.2d 783

Filed March 7, 1997. No. S-96-396.

1. **Trial: Evidence: Waiver: Appeal and Error.** If a party fails to make a timely objection to evidence, the party waives the right to assert on appeal prejudicial error concerning the evidence received without objection.
2. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested instruction, an appellant has the burden of showing that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the tendered instruction.
3. **Criminal Law: Motions to Dismiss: Evidence.** In determining whether a criminal defendant's motion to dismiss for insufficient evidence should be sustained, the State is entitled to have all of its relevant evidence accepted as true, the benefit of every inference that reasonably can be drawn from the evidence, and every controverted fact resolved in its favor.
4. **Rules of Evidence: Appeal and Error.** The Nebraska rules of evidence state that error may not be predicated upon a ruling which admits evidence unless a substantial

right of the party is affected and a timely objection stating the specific ground of objection was made.

5. **Jury Instructions.** As a general rule, in giving instructions to the jury, it is proper for the court to describe the offense in the language of the statute.
6. **Rules of the Supreme Court: Jury Instructions.** The Nebraska Supreme Court rule relating to the use of Nebraska Jury Instructions is designed for use when the instruction correctly states the law, and the pleadings and evidence call for such an instruction. Where applicable, a trial judge may utilize an appropriate instruction from the Nebraska Jury Instructions.
7. **Jury Instructions.** An instruction which does not correctly state the law or which is likely to confuse or mislead the jury should not be given.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays for appellant.

Don Stenberg, Attorney General, and Mark D. Starr for appellee.

WHITE, C.J., CAPORALE, WRIGHT, CONNOLLY, and GERRARD, JJ., and QUIST, D.J.

QUIST, D.J.

A jury found the defendant-appellant, Lester L. Glantz, guilty of attempted burglary and possession of burglar's tools. Glantz was also found to be a habitual criminal. He appeals, contending the district court erred by permitting testimony regarding the actions of a tracking dog into evidence and by improperly instructing the jury.

We transferred the case to this court's docket pursuant to Neb. Rev. Stat. § 24-1106 (Reissue 1995), which permits us to regulate the caseloads of the Court of Appeals and this court. We affirm the decision of the district court.

ASSIGNMENTS OF ERROR

Restated, Glantz contends the district court erred in (1) allowing the State to introduce evidence that a tracking dog followed a track from the crime scene to Glantz, (2) overruling his objection to the jury instructions used at trial while refusing his proposed jury instructions, and (3) finding the evidence was

sufficient to support the guilty verdicts and therefore overruling his motion to dismiss and motion for directed verdict.

STANDARD OF REVIEW

If a party fails to make a timely objection to evidence, the party waives the right to assert on appeal prejudicial error concerning the evidence received without objection. *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994); *State v. Coleman*, 241 Neb. 731, 490 N.W.2d 222 (1992); *State v. Rodgers*, 237 Neb. 506, 466 N.W.2d 537 (1991).

To establish reversible error from a court's failure to give a requested instruction, an appellant has the burden of showing that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the tendered instruction. *Traphagan v. Mid-America Traffic Marking, ante* p. 143, 555 N.W.2d 778 (1996); *Kirchner v. Wilson, ante* p. 56, 554 N.W.2d 782 (1996); *State on behalf of Joseph F. v. Rial, ante* p. 1, 554 N.W.2d 769 (1996); *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996).

In determining whether a criminal defendant's motion to dismiss for insufficient evidence should be sustained, the State is entitled to have all of its relevant evidence accepted as true, the benefit of every inference that reasonably can be drawn from the evidence, and every controverted fact resolved in its favor. *State v. Lopez*, 249 Neb. 634, 544 N.W.2d 845 (1996); *State v. McDowell*, 246 Neb. 692, 522 N.W.2d 738 (1994).

FACTS

On September 29, 1995, at approximately 10:30 p.m., an alarm sounded at the Highlands Golf Course clubhouse in Lincoln, Nebraska. The manager of the golf course, Daniel Williams, went to the clubhouse, turned off the alarm, waited for the police, helped search the area, secured the clubhouse, and returned home. At approximately 1 a.m., the alarm at the clubhouse again sounded. Williams went to the golf course, discovered the telephone lines were dead, exited the building, and waited for the police to arrive. Upon their arrival, the police discovered that the telephone lines in the telephone utility box had

been severed. Subsequently, Officer Thomas W. Ward arrived at the clubhouse with his police dog "Gordo." Officer Ward took Gordo to the utility box where the telephone lines had been cut, had Gordo smell the area, and began a track which led north of the box. Gordo led Officer Ward approximately 300 yards from the clubhouse, where two men were lying in the deep rough on the golf course. Officer Ward yelled to the men to show their hands, and after he repeated the command approximately three to five times, the men eventually raised their hands. Glantz' companion raised his hands, and Glantz raised just one hand. Officer Ward continued telling him to raise both hands, and eventually Glantz raised his other hand. Both men were told to stand, and when Glantz stood, an officer noticed tools in the matted area of the grass where the two men had been lying. The tools were identified as aviation snips and wirecutters. Other officers then searched in a nearly straight line back to the clubhouse, finding a flashlight and a pair of gloves. In addition, a greasy substance that had been discovered on the telephone utility box and on the door of the clubhouse was also found on the aviation snips and wirecutters.

Before the trial, Glantz filed a motion in limine, requesting the court prohibit the prosecution from discussing Gordo's actions with respect to the investigation of this case. The motion was overruled. As a result, during the trial, Officer Marlin Hohnstein testified to Gordo's actions at the clubhouse and on the golf course, including his track from the cut telephone wires to the location of Glantz. Glantz made a continuing objection to Officer Hohnstein's testimony, stating he objected to "any interpretation of what the dog did while the dog was there."

At the close of the trial, over Glantz' objection, the court gave instruction No. 6, which was patterned after NJI2d Crim. 3.8, on aiding and abetting. Instruction No. 6 did not include the statement that mere presence is not enough to establish guilt for aiding and abetting. As alternatives, Glantz offered proposed jury instructions Nos. 1 and 2, which did state that mere presence at the scene of a crime is not sufficient to establish guilt. The court refused to give Glantz' proposed instructions.

The jury returned a verdict, finding Glantz guilty of attempted burglary and possession of burglar's tools. Glantz'

motion for a new trial was denied, and he was found to be a habitual criminal. This appeal followed.

ANALYSIS

Glantz contends the district court erred in allowing the State to introduce evidence that Gordo followed a track from the scene of the crime to Glantz' location on the golf course. However, the record reflects that Glantz failed to make a timely objection to the State's offer of police testimony relating Gordo's actions on the golf course.

During the trial, Officer Hohnstein was questioned about Gordo's behavior at the clubhouse. Glantz objected to the question. At a side bar, Glantz stated that it was his intention to make a continuing objection to any *interpretation* of what Gordo did while he was at the clubhouse. The court inquired as to exactly what the officer was being asked by the prosecutor. The prosecutor answered that all he asked Officer Hohnstein was to describe Gordo's actions at the golf course. When asked if this was acceptable, Glantz' attorney responded, "Okay." If a party does not make a timely objection to evidence, the party waives the right to assert on appeal prejudicial error concerning the evidence that was received without objection. *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994); *State v. Coleman*, 241 Neb. 731, 490 N.W.2d 222 (1992); *State v. Rodgers*, 237 Neb. 506, 466 N.W.2d 537 (1991). The Nebraska rules of evidence state that error may not be predicated upon a ruling which admits evidence unless a substantial right of the party is affected and a timely objection stating the specific ground of objection was made. Neb. Rev. Stat. § 27-103(1)(a) (Reissue 1995). Glantz specifically objected to any testimony that *interpreted* Gordo's actions. Glantz did not object to testimony describing Gordo's actions. There was no objection to testimony stating what the officers *saw* Gordo do at the scene. Therefore, it is clear from the record that Glantz did not object to the testimony on Gordo's *actions* while tracking at the golf course. Absent such an objection at trial, Glantz waived his right to raise the issue on appeal.

Glantz contends the district court erred in overruling his objections to the court's jury instruction on aiding and abetting

and by refusing to give his requested instructions. To establish reversible error from a court's failure to give a requested instruction, an appellant has the burden of showing that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the tendered instruction. *Traphagan v. Mid-America Traffic Marking, ante* p. 143, 555 N.W.2d 778 (1996); *Kirchner v. Wilson, ante* p. 56, 554 N.W.2d 782 (1996); *State on behalf of Joseph F. v. Rial, ante* p. 1, 554 N.W.2d 769 (1996); *Reavis v. Slominski*, 250 Neb. 711, 551 N.W.2d 528 (1996).

Glantz claims instruction No. 6 given by the trial court did not instruct the jury that mere presence at the scene of a crime is insufficient to establish guilt for the crime of aiding and abetting.

As a general rule, in giving instructions to the jury, it is proper for the court to describe the offense in the language of the statute. *State v. Neujahr*, 248 Neb. 965, 540 N.W.2d 566 (1995); *State v. Friend*, 230 Neb. 765, 433 N.W.2d 512 (1988). The Nebraska statute on prosecuting for aiding and abetting, Neb. Rev. Stat. § 28-206 (Reissue 1995), states: "A person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender."

To abet means to encourage or to assist. Black's Law Dictionary 5 (6th ed. 1990).

In giving instructions to the jury in Glantz' case, the district court used NJI2d Crim. 3.8 to give instruction No. 6, which states:

> The Defendant can be guilty of attempted burglary even though he personally did not commit any act involved in the crime so long as he aided someone else to commit it. The defendant aided someone else if:
>
> 1. The defendant encouraged or intentionally helped another person to commit the attempted burglary; and
>
> 2. The defendant knew that the other person intended to commit the attempted burglary; and
>
> 3. The attempted burglary in fact was committed by that other person.

We conclude NJI2d Crim. 3.8 accurately describes the offense of aiding and abetting in terms of the statutory language of § 28-206.

The Nebraska Supreme Court rule relating to the use of the Nebraska Jury Instructions is as follows: "(a) Nebraska Jury Instructions, Second Edition (NJI 2d), is designed for use when the instruction correctly states the law and the pleadings and evidence call for such an instruction. Where applicable, a trial judge may utilize an appropriate NJI instruction." Neb. Ct. R. Regarding Nebraska Jury Instructions (rev. 1996). In the present case, the Nebraska Jury Instructions did contain an applicable instruction, the court correctly determined the jury should be instructed on the subject, and the instruction from the Nebraska Jury Instructions was properly used.

To determine whether jury instructions create prejudicial error, they must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal. *State v. White*, 249 Neb. 381, 543 N.W.2d 725 (1996); *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996); *State v. Neujahr, supra*. It is evident that NJI2d Crim. 3.8 correctly states the law; the instruction essentially repeats the statute.

Similarly, there is no showing that the instruction did or would mislead the jury. Instructions Nos. 5 and 8 informed the jury that before it could convict, it must find beyond a reasonable doubt that Glantz intended to burglarize the clubhouse. The instructions made it clear to the jury that an individual must intend that his actions assist in a crime in order to be guilty of aiding and abetting. This intent requirement sufficiently informed the jury that an individual not at all involved in the crime yet at the scene could not be found guilty of aiding and abetting.

An instruction which does not correctly state the law or which is likely to confuse or mislead the jury should not be given. *State v. Samuels*, 205 Neb. 585, 289 N.W.2d 183 (1980). Glantz proposed jury instructions which read as follows:

> [Proposed Jury Instruction No. 1]
>
> You are instructed that mere presence at the commission of a crime without aiding, abetting or procuring its commission with unlawful intent, is not sufficient to establish the guilt of such party, and even though you may

believe from the evidence beyond a reasonable doubt that Jeff Walters may have attempted to commit a burglary at the time and place alleged, and that the defendant was present at the time, yet, before you could find the defendant guilty of the crime charged herein you must be convinced by the evidence beyond a reasonable doubt among other things, that the defendant formed and shared with said Jeff Walters a common felonious intent and plan to commit burglary and assist therein. If you entertain a reasonable doubt thereto, then you should give the defendant the benefit of such doubt and acquit him of the charge made.

[Proposed Jury Instruction No. 2]

You are instructed that mere presence at the location of an alleged crime is not sufficient to establish the guilt of such party. Before you could find the defendant guilty of the crimes charged herein you must be convinced by the evidence beyond a reasonable doubt that the defendant formed a felonious intent and plan to commit burglary. If you entertain a reasonable doubt thereto, then you should give the defendant the benefit of such doubt and acquit him of the charge made.

Glantz' contention that absent his proposed instructions the jury would not understand that his mere presence at the clubhouse was not sufficient to find him guilty of aiding and abetting is unfounded. As previously discussed, the jury instructions fully informed the jury of the statutory elements of aiding and abetting. Furthermore, it is impossible for jury instructions to include everything that does *not* constitute aiding and abetting. Requiring the court to inform the jury of all actions that do not constitute a crime would be impossible and inefficient; in addition, an attempt to list many actions that do not amount to a criminal act would be misleading and confusing to a jury. We reject Glantz' argument, which, when followed to its logical conclusion, makes any jury instruction insufficient unless it informed the jury of every action that would *not* constitute a crime. For the aforementioned reasons, we conclude Glantz suffered no prejudice as a result of the instructions given or by the court's refusal to use his proposed instructions.

Glantz claims it was error for the district court to overrule his motion to dismiss and motion for directed verdict, arguing the evidence was not sufficient to support the guilty verdicts. An examination of the record reveals that there was sufficient evidence to convict Glantz of aiding and abetting. In determining whether a criminal defendant's motion to dismiss for insufficient evidence should be sustained, the State is entitled to have all of its relevant evidence accepted as true, the benefit of every inference that reasonably can be drawn from the evidence, and every controverted fact resolved in its favor. *State v. Lopez*, 249 Neb. 634, 544 N.W.2d 845 (1996); *State v. McDowell*, 246 Neb. 692, 522 N.W.2d 738 (1994). Accepting the relevant evidence as true, the facts show that Glantz was hiding on the golf course at 1:30 a.m. after an alarm had sounded in the clubhouse, that the clubhouse telephone wires were cut and wirecutters and aviation snips were found in the area where Glantz was hiding, that Glantz was slow to show his hands to the police officer, and that the same greasy substance that appeared on the clubhouse door appeared on the tools. We must give the State the benefit of every inference that can reasonably be drawn from the evidence. A thorough review of the record with reasonable inferences given to the State reveals there was sufficient evidence to convict Glantz of aiding and abetting. There being no error in the jury instructions and sufficient evidence to support the verdicts, the district court's judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE,
V. MICHAEL RYAN, APPELLANT.
560 N.W.2d 122

Order filed January 15, 1997. No. S-86-946.

This matter came on for hearing this 15th day of January, 1997, upon the supplemented motion of the plaintiff-appellee, State of Nebraska, to establish an execution date, and the resistance thereto and motion for sanctions of the defendant-appellant, Michael Ryan.

With respect to the State's motion for the establishment of an execution date, it appears that there is presently pending in the district court for Richardson County, at docket 7 page 41, case No. 2390, Ryan's motion to vacate his conviction and sentence, filed pursuant to the provisions of Nebraska's postconviction statutes, Neb. Rev. Stat. § 29-3001 through 29-3004 (Reissue 1995), which motion raises issues grounded in provisions of the Constitution of the United States. Notwithstanding the State's assertions, and irrespective of the number of successive filings permitted under the scheme of postconviction review created by the Nebraska Legislature in §§ 29-3001 through 29-3004, this court cannot ignore its obligation to uphold the Constitution of the United States, and therefore cannot establish an execution date in the face of unresolved federal constitutional questions. See *Victor v. Hopkins*, 90 F.3d 276 (8th Cir. 1996).

With respect to Ryan's motion for sanctions, notwithstanding that the foregoing conclusion concerning the State's motion for the establishment of an execution date was predictable, we have prior to this date specifically held only that it was inappropriate for the State to move for the setting of an execution date while a federal stay was pending. *State v. Joubert*, 246 Neb. 287, 518 N.W.2d 887 (1994).

WHEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED THAT:

(1) The State's motion for the establishment of an execution date be, and the same hereby is, overruled, without prejudice to its refiling at an appropriate future time; and

(2) Ryan's motion for sanctions be, and the same hereby is, overruled.

DATED AT LINCOLN, NEBRASKA, the day, month, and year first above written.

BY THE COURT

/s/ C. Thomas White, Chief Justice

STATE OF NEBRASKA, APPELLEE,
v. CLARENCE VICTOR, APPELLANT.
560 N.W.2d 122

Order filed January 15, 1997. No. S-88-982.

This matter came on for hearing this 15th day of January, 1997, upon the supplemented motion of the plaintiff-appellee, State of Nebraska, to establish an execution date, and the resistance thereto and motion for sanctions and motion to strike the State's reply brief of the defendant-appellant, Clarence Victor.

With respect to the State's motion for the establishment of an execution date, it appears that there is presently pending in the district court for Douglas County, at docket 122 page 46, Victor's motion to vacate his conviction and sentence, filed pursuant to the provisions of Nebraska's postconviction statutes, Neb. Rev. Stat. §§ 29-3001 through 29-3004 (Reissue 1995), which motion raises issues grounded in provisions of the Constitution of the United States. Notwithstanding the State's assertions, and irrespective of the number of successive filings permitted under the scheme of postconviction review created by the Nebraska Legislature in §§ 29-3001 through 29-3004, this court cannot ignore its obligation to uphold the Constitution of the United States, and therefore cannot establish an execution date in the face of unresolved federal constitutional questions. See *Victor v. Hopkins*, 90 F.3d 276 (8th Cir. 1996).

With respect to Victor's motion for sanctions, notwithstanding that the foregoing conclusion concerning the State's motion for the establishment of an execution date was predictable, we

have prior to this date specifically held only that it was inappropriate for the State to move for the setting of an execution date while a federal stay was pending. *State v. Joubert*, 246 Neb. 287, 518 N.W.2d 887 (1994).

With respect to Victor's motion to strike the State's reply brief, Victor correctly points out that our rules do not provide for such filing by the State.

WHEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED THAT:

(1) The State's motion for the establishment of an execution date be, and the same hereby is, overruled, without prejudice to its refiling at an appropriate future time;

(2) Victor's motion for sanctions be, and the same hereby is, overruled; and

(3) Victor's motion to strike the State's reply brief be, and and the same hereby is, sustained, and said reply brief is hereby stricken.

DATED AT LINCOLN, NEBRASKA, the day, month, and year first above written.

BY THE COURT

/s/ C. Thomas White, Chief Justice

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