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ROD REHM, P.C., A NEBRASKA PROFESSIONAL CORPORATION, AND RODNEY J. REHM, INDIVIDUALLY, APPELLEES, V. TAMARACK AMERICAN, A DIVISION OF GREAT AMERICAN INSURANCE COMPANY, A CORPORATION, APPELLANT.

623 N.W.2d 690

Filed March 30, 2001. No. S-99-1457.

1. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law.
2. **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.
3. ___. 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.
4. **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 discretion.
5. ___: ___. A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred.
6. **Judgments: Verdicts.** On a motion for judgment non obstante verdicto, or notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence.
7. ___: ___. In order to sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.
8. **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 the litigant complaining about evidence admitted or excluded.
9. **Judgments: Directed Verdict.** When the record contains evidence about which reasonable minds could differ and when the record further sustains a finding in favor of the plaintiff, the record precludes the entry of a directed verdict against the plaintiff.
10. **Judgments: Verdicts: Appeal and Error.** When the record contains evidence about which reasonable minds can differ, the trial court does not err in denying a motion for judgment notwithstanding the verdict.
11. **Insurance: Attorney Fees: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 44-359 (Reissue 1998), an insurance policy beneficiary who successfully sues his or her insurance company is entitled to a reasonable attorney fee at the trial level and on appeal.

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

Robert T. Grimit and Timothy E. Clarke, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellant.

Mandy L. Stringenz and E. Terry Sibbernsen, of E. Terry Sibbernsen, P.C., for appellees.

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

MILLER-LERMAN, J.

I. NATURE OF CASE

Rod Rehm, P.C., and Rodney J. Rehm (collectively Rehm) filed a declaratory judgment action in the district court for Lancaster County against Tamarack American (Tamarack), in which Rehm sought a declaration of rights and an order compelling Tamarack to provide Rehm with malpractice insurance coverage for a professional liability claim asserted against Rehm by Jeannine Quinn. Following trial, the jury found in favor of Rehm. Tamarack appeals from the jury verdict entered by the district court. Tamarack claims the district court erred in denying its motion for a directed verdict, in denying its motion for judgment notwithstanding the verdict and motion for a new trial, and in admitting certain expert testimony. For the reasons set forth below, we affirm the decision of the district court.

II. STATEMENT OF FACTS

On February 23, 1993, Quinn slipped and fell on a sidewalk adjacent to Sheridan Elementary School in Lincoln, Nebraska. As a result of her fall, Quinn fractured her ankle.

In June 1993, Quinn retained Rehm. Rehm contacted the Lincoln Public Schools (LPS) on Quinn's behalf. In August 1994, Rehm engaged in settlement negotiations with LPS' insurer in an effort to resolve the matter. The insurer offered Quinn $31,000 to settle the matter, but Quinn refused the offer, believing her injury to be more substantial than the settlement offer.

On September 30, 1994, Rehm filed a petition in Lancaster County District Court on behalf of Quinn, naming LPS as the sole defendant. The petition alleged, inter alia, that LPS was negligent in the maintenance of its sidewalk and that as a result of such negligence, Quinn was injured.

On April 19, 1995, LPS filed a motion for summary judgment, claiming it was entitled to judgment as a matter of law. LPS relied on the "sidewalk rule" as the basis for its motion for summary judgment.

Historically, under the common law, cities were responsible for the care and condition of sidewalks within municipal boundaries, and no duty devolved upon an abutting owner to keep the sidewalk adjacent to such owner's property in a safe condition. In contrast, the "sidewalk rule" recognizes that this common-law rule has been abrogated by city ordinance and/or by statute. Neb. Rev. Stat. § 15-734 (Reissue 1997) provides that "[t]he owner of property abutting on public streets is . . . primarily charged with the duty of keeping and maintaining the sidewalks thereon in a safe and sound condition, and free from snow, ice, and other obstructions . . . ." Section 15-734 further provides, however, that an abutting property owner is liable for injuries sustained as a result of such owner's failure to keep and maintain the sidewalk in a safe condition only upon the owner's failure to act after receiving notice from the city that the owner needs to remedy a dangerous condition present on the sidewalk. Thus, under the "sidewalk rule," the owner of property which abuts a public sidewalk is liable for injuries that are caused by a condition on the sidewalk if the owner has been notified by the city of the dangerous sidewalk condition and fails to act. See, generally, *Hill v. City of Lincoln*, 249 Neb. 88, 541 N.W.2d 655 (1996); *Stump v. Stransky*, 168 Neb. 414, 95 N.W.2d 691 (1959).

In support of its summary judgment motion, LPS stated that it did not own the sidewalk adjacent to Sheridan Elementary School, that the sidewalk was a public sidewalk, and that LPS had not received any notice from the city of Lincoln regarding the presence of snow or ice on the sidewalk. LPS argued that under § 15-734 and the cases applying the statute, absent notice from the city, LPS was not liable for Quinn's injuries.

The record indicates that at the time LPS filed its motion for summary judgment, certain statutes of limitation had run, and Quinn was no longer able to bring a claim against the city, the owner of the sidewalk, for the injuries she sustained as a result of the fall. In response to LPS' motion for summary judgment, on August 25, 1995, Rehm filed an amended petition on Quinn's

behalf, again naming LPS as the sole defendant. The amended petition asserted what Rehm believed were exceptions to the "sidewalk rule."

On November 17, 1995, the district court entered summary judgment in favor of LPS and dismissed Quinn's lawsuit. Rehm appealed the summary judgment order on Quinn's behalf to the Nebraska Court of Appeals, which affirmed the district court's order in a memorandum opinion. *Quinn v. Lincoln Pub. Schools*, 5 Neb. App. xvii (case No. A-95-1393, May 9, 1997). This court denied Quinn's petition for further review on June 25, 1997.

After Quinn's petition for further review was denied, she contacted another attorney (new counsel) concerning Rehm's representation of her in the negligence case. In a letter dated October 3, 1997, new counsel notified Rehm that Quinn was considering bringing a malpractice action against Rehm. New counsel stated that Rehm had "breached the standard of care" he owed to Quinn by (1) not recognizing all of the potential defendants in the case, in particular, the city; (2) not recognizing the legal significance of § 15-734; and (3) not filing a tort claim against the city within the statutory time period.

Following receipt of new counsel's letter, Rehm contacted Tamarack, which was his professional liability insurance carrier at that point in time. On October 14, 1996, Tamarack had issued a lawyer's professional liability insurance policy to Rehm, with a policy period of November 23, 1996, to November 23, 1998. Prior to the issuance of the Tamarack policy, Rehm testified that he had been insured for professional negligence by "HOME Insurance." Although Tamarack had not insured Rehm for professional negligence during the time Rehm had represented Quinn at the trial level, the Tamarack policy provided professional liability coverage to Rehm for acts which occurred prior to November 23, 1996, the policy's effective date, so long as the policy's coverage language was met. Specifically, subsection II.A.2 of the Tamarack policy, under the section entitled "Lawyers Professional Liability Insurance Policy Coverage Form," stated that Tamarack would pay for claims made against Rehm during the policy period, which claims arose prior to the policy period,

> provided that prior to the effective date of the first Lawyers Professional Liability Insurance Policy issued by

> [Tamarack] to [Rehm] and continuously renewed and maintained in effect to the inception of this policy period:
>
> (a) [Rehm] did not give notice to any prior insurer of any such act, error or omission; and
>
> (b) [Rehm] had no reasonable basis to believe that [he] had breached a professional duty or to foresee that a claim would be made against [him]; and
>
> (c) there is no prior policy or policies which provide insurance for such liability or claim . . . [.]

After Rehm notified Tamarack of Quinn's malpractice claim, Tamarack asked Rehm to write the company a brief narrative describing the Quinn case. On October 27, 1997, Rehm sent a letter to Tamarack detailing his representation of Quinn. In the letter, exhibit 20, Rehm explained the procedural history of the case and the steps he had taken in his representation of Quinn. Rehm also described a conversation he had had with Quinn as follows:

> Once the Motion for Summary Judgment had been filed, I had a discussion with Jeannine [Quinn] that I now regret. I frankly told her that I had not analyzed the case correctly and that I felt bad we had turned down the previous settlement offer, and declined to mediate. She and I had a long discussion about it and for a long time, I felt she was not going to make a claim because she was aware that mistakes are made and she knew the effects of a malpractice action on the doctors that she worked for.

In a letter dated November 20, 1997, exhibit 21, Rehm wrote Tamarack to clarify his remarks regarding the " 'unfortunate conversation.' " Rehm explained that he "did not feel that [he] had committed malpractice."

On December 16, 1997, Tamarack notified Rehm that it was denying coverage for Quinn's malpractice claim, based upon the provisions of subsection II.A.2 quoted above. On February 23, 1998, Rehm filed a petition for declaratory judgment with the district court for Lancaster County, seeking, inter alia, a declaratory judgment that the Tamarack professional liability insurance policy provided coverage to Rehm for Quinn's malpractice claim.

Rehm's petition came on for jury trial on October 26, 1999. The trial lasted 4 days, and the record contains approximately 300 pages of testimony from four witnesses and 38 numbered

exhibits. To the extent they are necessary, further facts and rulings from the trial are incorporated in our analysis below.

Tamarack moved for a directed verdict at the conclusion of the presentation of Rehm's case and renewed the motion for directed verdict at the conclusion of all of the evidence. The trial court denied both of these motions. On October 28, 1999, the case was submitted to the jury.

On October 29, 1999, the jury reached a verdict, finding in favor of Rehm. On a verdict form, the jury answered "yes" to each of the following questions:

> Question #1:
>
> Has Rehm shown, by the greater weight of the evidence, that prior to the effective date of the insurance policy issued by the defendant, he had no reasonable basis to believe that he had breached a professional duty to Jeannine Quinn?
>
> . . . .
>
> Question #2:
>
> Has Rehm shown, by the greater weight of the evidence, that prior to the effective date of the insurance policy issued by the defendant, he had no reasonable basis to foresee that a claim would be made against him?

On November 1, 1999, the trial court entered judgment on the jury's verdict in favor of Rehm and ordered that Tamarack provide coverage to Rehm for the malpractice claim asserted by Quinn.

On November 8, 1999, Tamarack filed its motion for new trial and for judgment notwithstanding the verdict. The combined motion came on for hearing on November 12, and in an order filed November 24, the trial court denied Tamarack's combined motion in its entirety.

Tamarack appeals.

III. ASSIGNMENTS OF ERROR

Tamarack assigns six errors which, restated, combine to form four. Tamarack claims that the district court erred (1) in overruling Tamarack's motion for directed verdict, (2) in overruling Tamarack's motion for judgment notwithstanding the verdict, (3) in overruling Tamarack's motion for new trial, and (4) in allowing Rehm's expert witness to testify at trial.

IV. STANDARDS OF REVIEW

[1-3] A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law. *King v. Crowell Memorial Home, ante* p. 177, 622 N.W.2d 588 (2001). 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. *Genetti v. Caterpillar, Inc., ante* p. 98, 621 N.W.2d 529 (2001). 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.*

[4,5] 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 discretion. *Id.*; *Jameson v. Liquid Controls Corp.*, 260 Neb. 489, 618 N.W.2d 637 (2000). A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred. *Id.*

[6,7] On a motion for judgment non obstante verdicto, or notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence. *Snyder v. Contemporary Obstetrics & Gyn.*, 258 Neb. 643, 605 N.W.2d 782 (2000). In order to sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Id.*

[8] To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of the litigant complaining about evidence admitted or excluded. *Nickell v. Russell*, 260 Neb. 1, 614 N.W.2d 349 (2000).

V. ANALYSIS

1. Overruling of Motion for Directed Verdict

At trial, the jury was asked to decide issues the resolution of which would determine if subsection II.A.2 of the Tamarack

policy provided coverage to Rehm against Quinn's claim. There is no dispute between the parties that subsections II.A.2(a) and (c) regarding coverage under prior policies do not excuse Tamarack from coverage. The issue before the jury was whether under subsection II.A.2(b), prior to the effective date of the policy, Rehm had a reasonable basis to believe that he had breached a professional duty or to foresee that a claim would be made against him.

On appeal, Tamarack argues the district court erred in failing to sustain Tamarack's motion for directed verdict made at the end of the evidence and that as a matter of law, the court should have concluded that the Tamarack policy, subsection II.A.2(b), did not provide coverage for Quinn's malpractice claim against Rehm. Resolving the conflicts in the evidence in Rehm's favor and giving Rehm the benefit of every inference which can reasonably be drawn from the evidence, see *Genetti v. Caterpillar, Inc., supra*, we conclude that reasonable minds could differ and that more than one conclusion could be drawn from the evidence. Accordingly, we determine that the district court did not err in overruling Tamarack's motion for a directed verdict.

(a) Did Rehm Have Reasonable Basis to Foresee Quinn Would Bring Malpractice Claim Against Him?

Under subsection II.A.2(b) of the Tamarack policy, Tamarack did not provide professional liability insurance coverage for malpractice claims which happened prior to the policy period if prior to the effective date of the policy, the insured had a reasonable basis to foresee that a claim would be made. Our review of the record shows that there was ample evidence from which a trier of fact could determine that Rehm did not have a reasonable basis to foresee, prior to the effective date of the Tamarack policy, that Quinn intended to bring a malpractice claim against him and that such evidence would sustain a finding in Rehm's favor. Thus, the district court did not err in denying Tamarack's motion for directed verdict.

Quinn testified that the "first time" she believed that Rehm had breached a professional duty to her was in September or October 1997, when she met with new counsel, which was well after the effective date of the Tamarack policy on November 23,

1996. Importantly, Quinn further stated that until she met with new counsel, she had never indicated to Rehm that she would file a malpractice claim against him. Similarly, Rehm testified that at the time Tamarack issued its professional liability insurance policy to him, he did not have a reason to foresee that Quinn would bring a malpractice claim against him.

Notwithstanding the testimonial and documentary evidence offered by Rehm, such as exhibit 20 in which he stated, "I felt she was not going to make a claim," Tamarack nevertheless claims that Rehm acknowledged during his trial testimony that prior to Tamarack's coverage, he foresaw that Quinn would make a claim against him and that a directed verdict should have been entered on this basis. Tamarack cites to the following trial testimony as constituting Rehm's purported "admission": "Q. [Rehm's counsel] And during that period of time [from when Rehm began to represent Quinn until he received new counsel's October 3, 1997, letter] you had no reason or basis to foresee that [Quinn] would make a claim against you, is that correct? A. [Rehm] No." Even were we to ignore the syntactical challenge inherent in this question and answer and treat Rehm's testimony as acknowledging the potential for a claim by Quinn, given the controverted evidence and our duty to give the nonmoving party the benefit to be drawn from the evidence, we cannot say the district court erred in denying Tamarack's motion for a directed verdict. Given this record, reasonable minds could differ regarding the conclusion to be drawn from the evidence regarding whether Rehm had a reasonable basis to foresee Quinn would bring a claim against him, and a directed verdict would not have been proper. See *Genetti v. Caterpillar, Inc.*, *ante* p. 98, 621 N.W.2d 529 (2001).

(b) Did Rehm Have Reasonable Basis to Believe He Had Breached Professional Duty?

Subsection II.A.2(b) provides that the Tamarack policy does not provide professional liability insurance coverage for any malpractice claims that arose prior to the effective date of the policy if the insured had a reasonable basis to believe, prior to the policy's effective date, that he or she had breached a professional duty. In its brief on appeal, Tamarack argues that a com-

ment Rehm made to Quinn and a statement in his October 27, 1997, letter to Tamarack, exhibit 20, demonstrate that Rehm had a reasonable basis to believe that he had breached a professional duty during his representation of Quinn. Tamarack argues that on the basis of this evidence, it was entitled to a directed verdict. We do not agree.

The statement relied upon by Tamarack is a comment Rehm admittedly made to Quinn that she could "get [him] on this," apparently referring to his representation of her in her case against LPS. The record indicates without contradiction that this statement was made after the effective date of the Tamarack policy. Indeed, Quinn testified that her conversation with Rehm in which he stated she could "get [him] on this" did not occur until after this court denied Quinn's petition for further review in June 1997, which was some 6 months after the Tamarack policy took effect. Thus, to the extent the statement constitutes an admission on Rehm's part that at some point he reasonably believed he had breached a professional duty, it was not made until after the effective date of the policy. Giving Rehm the benefit of every inference which can be drawn from this evidence, see *Genetti v. Caterpillar, Inc., supra*, it was not error for the district court to deny Tamarack's motion for directed verdict on this basis.

Tamarack also relies upon Rehm's October 27, 1997, letter, exhibit 20, which was admitted into evidence during the trial, in support of its claim that it was entitled to a directed verdict. In the letter, Rehm described a conversation he had had with Quinn after LPS had filed its motion for summary judgment on April 19, 1995. In the letter, Rehm stated that he had "told her [Quinn] that [he] had not analyzed the case correctly and that [he] felt bad [they] had turned down the previous settlement offer, and declined to mediate." Because this statement was made before the Tamarack policy took effect, Tamarack argues that this statement constitutes an admission by Rehm that he made a mistake in analyzing Quinn's case; that as a result of his mistaken analysis, his client had been harmed through her failure to accept a settlement offer; and that therefore, Rehm had a reasonable basis to believe he had breached a professional duty prior to the effective date of the policy. Were this the only evidence in the record from which a jury could determine what Rehm actually knew con-

cerning the propriety of his representation of Quinn, Tamarack's argument would be more persuasive. The record, however, contains contradictory evidence as to Rehm's knowledge, prior to the effective date of the policy, on the issue of his understanding of a possible breach of his professional duty to Quinn.

First, as noted above, Rehm's November 20, 1997, letter to Tamarack, exhibit 21, was also admitted into evidence. In this letter, Rehm sought to clarify the description of his conversation with Quinn which was contained in his earlier letter of October 27. In his letter of November 20, Rehm stated that when he had the conversation with Quinn regarding his failure to analyze the case correctly, he did not "feel that [he] had committed malpractice." Rather, he states in his November 20 letter that he was trying to convey to Quinn that if the summary judgment motion proved successful, they would both regret having turned down the earlier settlement offer.

Second, during the trial, Rehm testified that after LPS filed its summary judgment motion, he concluded that if the sidewalk rule governed, Quinn would not be successful in her suit against the school district based on the original petition. He further testified that following the filing of the summary judgment motion, he researched the sidewalk rule, and as a result of this research, he concluded that under the law of Nebraska, as well as other jurisdictions, there were exceptions to the sidewalk rule which were applicable to Quinn's case against LPS. Rehm testified that thereafter, he gathered evidence from LPS employees, a snow removal operator, and a "slip and fall expert" supporting these exceptions to the sidewalk rule, and that on August 25, 1995, he filed an amended petition based upon these exceptions. As a result of these actions, Rehm testified that as of the date of the district court's ruling granting LPS' motion for summary judgment on November 17, 1995, he did not feel that he had breached a professional duty to Quinn. Rather, he testified that he thought he had stated the claim correctly in Quinn's amended petition, after admittedly having stated it incorrectly in the original petition. Rehm further testified that after the district court ruled against Quinn on LPS' motion for summary judgment, he still believed Quinn had a viable claim which would be recognized upon appeal.

Rehm testified that had he been more aware of the sidewalk rule at the inception of the litigation, he would have commenced Quinn's lawsuit with the allegations contained in her amended petition. He testified that even if he had known at the start of the litigation that the city owned the sidewalk in question, he would not have named the city as a defendant because, in his opinion, he would not have been able to convince a jury that the city was responsible for Quinn's injuries.

[9] Based upon our review of the record, we conclude there is evidence about which reasonable minds could differ and that there is evidence which would sustain a finding in favor of Rehm as to what Rehm's knowledge was prior to the effective date of the policy concerning his breach of a professional duty. The record precludes entry of a directed verdict against Rehm. See *Genetti v. Caterpillar, Inc., ante* p. 98, 621 N.W.2d 529 (2001). Accordingly, we conclude that Tamarack's assignment of error claiming that the district court incorrectly denied its motion for directed verdict is without merit.

2. Motion for Judgment Notwithstanding Verdict and for New Trial

Tamarack assigns as error the district court's overruling of its motion for judgment notwithstanding the verdict and motion for new trial. In support of its argument that the district court erred, Tamarack essentially relies upon the same arguments it raised in support of its motion for a directed verdict.

[10] 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 discretion. *Genetti v. Caterpillar, Inc., supra*; *Jameson v. Liquid Controls Corp.*, 260 Neb. 489, 618 N.W.2d 637 (2000). A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred. *Id.* In order to sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Snyder v. Contemporary Obstetrics & Gyn.*, 258 Neb. 643, 605 N.W.2d 782 (2000). For the reasons stated above in connection with our discussion regarding the correctness of the district court's denial

of Tamarack's motion for directed verdict, the district court did not err in overruling Tamarack's posttrial motions. Accordingly, these assignments of error are without merit.

3. Admission of Expert Testimony

Finally, Tamarack assigns as error the district court's failure to grant Tamarack's motion in limine, which motion sought to preclude Rehm's expert witness from testifying. The substance of Tamarack's objection to the testimony of Rehm's expert was renewed at trial, and we understand Tamarack's appeal to be from the district court's overruling of its objection. See *Allphin v. Ward*, 253 Neb. 302, 570 N.W.2d 360 (1997) (stating that when motion in limine to exclude evidence is overruled, movant must object when particular evidence which was sought to be excluded by motion is offered during trial to preserve error for appeal). In order to constitute reversible error in a civil case, the admission of evidence must unfairly prejudice a substantial right of the litigant complaining about evidence admitted. *Nickell v. Russell*, 260 Neb. 1, 614 N.W.2d 349 (2000).

Rehm's expert witness, an attorney, testified as to whether Rehm had met the standard of care in his representation of Quinn in her slip-and-fall case. Tamarack offered its own expert, also an attorney, who offered testimony on the same topic. In the context of this case which involves the issue of coverage under a professional liability policy, the district court did not err in overruling Tamarack's objection. See *Boyle v. Welsh*, 256 Neb. 118, 589 N.W.2d 118 (1999) (concluding that expert testimony as to attorney's standard of conduct in particular circumstance was admissible). There is no merit to this assignment of error.

4. Attorney Fees

[11] Pursuant to Neb. Rev. Stat. § 44-359 (Reissue 1998), which provides generally that an insurance policy beneficiary who successfully sues his or her insurance company is entitled to a reasonable attorney fee at the trial level and on appeal, Rehm has moved for an award of attorney fees in this appeal. In accordance with § 44-359, Rehm is entitled to attorney fees on appeal. We determine that $2,000 is a fair and reasonable attorney fee on appeal and, accordingly, award Rehm that amount.

VI. CONCLUSION

For the reasons set forth herein, we affirm the district court's orders denying Tamarack's motion for directed verdict, motion for judgment notwithstanding the verdict, and motion for new trial and the district court's order overruling Tamarack's objection to the expert testimony offered by Rehm. Attorney fees are awarded to Rehm on appeal in the amount of $2,000.

AFFIRMED.

WRIGHT and STEPHAN, JJ., not participating.

IN RE ESTATE OF VELMA L. DICKIE, DECEASED. DONALD L. FLAMME, APPELLEE AND CROSS-APPELLANT, V. VERNON FLAMME, PERSONAL REPRESENTATIVE OF THE ESTATE OF VELMA L. DICKIE, DECEASED, APPELLANT AND CROSS-APPELLEE.

623 N.W.2d 666

Filed March 30, 2001. No. S-00-039.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question 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.
2. **Standing: Jurisdiction: Parties: Judgments: Appeal and Error.** Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court.
3. **Actions: Parties: Standing.** The purpose of an inquiry as to standing is to determine whether one has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.
4. **Standing: Jurisdiction: Justiciable Issues.** As an aspect of jurisdiction and justiciability, standing requires that a litigant have such a personal stake in the outcome of the controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf.
5. **Wills.** Actions in the county court for probate of a will are in rem, and every person interested in the subject matter is a party in the county court whether named or not.

Appeal from the County Court for Dodge County: DANIEL J. BECKWITH, Judge. Reversed and remanded for further proceedings.

Kevin R. McManaman and Michelle B. Miller, of Erickson & Sederstrom, P.C., for appellant.

Richard Register for appellee.

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

WRIGHT, J.

NATURE OF CASE

On July 1, 1999, Donald L. Flamme filed a claim against the estate of his mother, Velma L. Dickie. The personal representative of the estate, Vernon Flamme, filed a disallowance of the claim on December 13. The Dodge County Court found that the disallowance of the claim was out of time and, therefore, allowed the claim in the amount of $2,875. The county court further found that upon allowance of the claim, Donald had no standing to object to the continuation of Vernon's role as personal representative. Therefore, the county court overruled Donald's objection to the inventory of the estate and his application for removal of Vernon as personal representative.

SCOPE OF REVIEW

[1] Statutory interpretation presents a question 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. *Tilt-Up Concrete v. Star City/Federal, ante* p. 64, 621 N.W.2d 502 (2001).

[2] Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court. *Miller v. City of Omaha*, 260 Neb. 507, 618 N.W.2d 628 (2000).

FACTS

When Velma died on November 18, 1998, she was survived by her husband, Edward D. Dickie, and her two sons, Vernon and Donald. Velma's last will and testament named Vernon as the personal representative and the sole beneficiary of her estate.

Letters of personal representative were issued to Vernon on June 4, 1999, by the county court. Notice to creditors was pub-

lished in the Fremont Tribune newspaper for 3 consecutive weeks beginning June 10. The notice stated that creditors of the estate were required to file their claims with the county court on or before August 10 or be forever barred. A copy of this notice was sent to Donald on June 15.

On July 1, 1999, Donald filed a claim against the estate for an alleged 50-percent interest in a 1971 mobile home valued at $5,750. On September 17, Donald filed an application to remove Vernon as personal representative due to Vernon's alleged failure to complete an inventory. A short-form inventory was filed September 21, and Donald subsequently filed an objection to the inventory.

The matter was initially scheduled for hearing on November 29, 1999, but was continued to December 13 because Vernon was not in attendance at the November 29 hearing. On December 13, Vernon filed a notice of disallowance of Donald's claim.

On December 21, 1999, the county court entered a written order that set forth findings made at the December 13 hearing. The county court concluded that the disallowance of Donald's claim was out of time. Therefore, the county court allowed Donald's claim in the amount of $2,875. The county court also found that Vernon's failure to attend the hearings caused an unreasonable burden upon Donald. On this basis, the county court allowed a surcharge against Vernon in favor of Donald in the amount of $317.18 for travel expenses, food, and hotel expenses. The county court further concluded that upon allowance of Donald's claim, he had no standing to object to the continuation of Vernon's role as personal representative and, therefore, overruled Donald's objection to the inventory and his application for removal of Vernon as the personal representative.

Vernon appeals from the order allowing Donald's claim, and Donald cross-appeals the county court's determination regarding standing.

ASSIGNMENTS OF ERROR

Vernon assigns as error that the county court erred in finding that a personal representative cannot disallow a claim after it has been allowed due to the personal representative's failure to

timely file a disallowance of the claim and in allowing Donald's claim against Velma's estate.

On cross-appeal, Donald assigns as error that the county court erred when it found that once his claim was allowed by the court, he no longer had standing to object to the inventory prepared by Vernon or to request that Vernon be relieved of his duties as personal representative of the estate.

ANALYSIS

We must first determine whether a claim against an estate is irrevocably allowed if the personal representative does not timely give notice of disallowance of the claim after the claim has been filed. Statutory interpretation presents a question 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. *Tilt-Up Concrete v. Star City/Federal, ante* p. 64, 621 N.W.2d 502 (2001).

Neb. Rev. Stat. § 30-2488(a) (Reissue 1995) states:

> As to claims presented in the manner described in section 30-2486 within the time limit prescribed in section 30-2485, the personal representative may mail a notice to any claimant stating that the claim has been disallowed. If, after allowing or disallowing a claim, the personal representative changes his or her decision concerning the claim, he or she shall notify the claimant. The personal representative may not change a disallowance of a claim after the time for the claimant to file a petition for allowance or to commence a proceeding on the claim has run and the claim has been barred. Every claim which is disallowed in whole or in part by the personal representative is barred so far as not allowed unless the claimant files a petition for allowance in the court or commences a proceeding against the personal representative not later than sixty days after the mailing of the notice of disallowance or partial allowance if the notice warns the claimant of the impending bar. Failure of the personal representative to mail notice to a claimant of action on his or her claim for sixty days after the time for original presentation of the claim has expired has the effect of a notice of allowance.

The county court apparently concluded that Vernon did not timely file a notice of disallowance of the claim, and therefore, the claim was allowed by default.

We have not specifically addressed the issue Vernon raises in this case, but the Nebraska Court of Appeals did so in *In re Estate of Krichau*, 1 Neb. App. 398, 501 N.W.2d 722 (1992). Therein, a claim was filed against the estate for expenses incurred while the decedent lived with his daughter-in-law during the last 6 years of his life. The Buffalo County Court disallowed the claim, and the claimant appealed. The district court also ruled against the claimant. On appeal to the Court of Appeals, one of the claimant's assignments of error was that the county court erred in not finding that the claim should be allowed because the personal representative did not timely object as provided in § 30-2488.

In *In re Estate of Krichau*, the claim was filed June 22, 1987, and the personal representative did not allow or disallow the claim. By stipulation of the parties, the personal representative was subsequently removed. A new personal representative was appointed, who then gave notice of disallowance of the claim on September 5. The claimant alleged that the claim had been allowed by the failure of the personal representative to timely object to the claim. The estate argued that § 30-2488 allowed the personal representative to subsequently disallow the claim as long as the claimant was not injured by such disallowance.

The Court of Appeals concluded that § 30-2488 permitted the personal representative to disallow such a claim and that public policy was best served by this interpretation of the statute. The Court of Appeals stated:

> Section 30-2488 also provides that "[i]f, after allowing or disallowing a claim, the personal representative changes his or her decision concerning the claim, he or she shall notify the claimant." This provision can have no purpose other than to allow the personal representative to change his or her mind. We note that the statute does not place a time limit on the personal representative's right to change his or her mind. The only limitation that the statute places on the personal representative's right to change a claim is the rule that a claim cannot be allowed after it has been

> barred. There is no reason why the personal representative can change his or her mind when the personal representative formally denied or allowed the claim, but not when the personal representative allowed the claim by inaction. The claimant of a newly disallowed claim would still have 60 days to file a petition for allowance in the court or commence a proceeding against the personal representative. § 30-2488(a). If the Legislature desired to prevent the personal representative from disallowing an allowed claim, it would have expressed its intention in the same manner as it did with respect to barred claims.
>
> If the statute is interpreted to cause the personal representative to irrevocably allow the claim by not giving notice of disallowance within 60 days of its filing, personal representatives will be forced to deny all claims except those claims that are unquestionably good. If the personal representative can change his or her mind and disallow a claim that was once allowed, the worst that could happen is that the claimant would be in a state of uncertainty. If certainty is an important element to a claimant, that claimant can always petition the court to allow the claim. In this regard, the claimant would be in no greater state of uncertainty than any other litigant doing business with a dilatory party and would suffer no greater disadvantage than a claimant who has received notice of allowance when the personal representative still has the power to disallow the claim.
>
> We believe that § 30-2488 permits a personal representative to disallow a claim that has been allowed by the failure to object. We also believe that public policy is best served by this interpretation of the statute and not by a restrictive interpretation of the statute.

In re Estate of Krichau, 1 Neb. App. 398, 404-05, 501 N.W.2d 722, 726 (1992).

Section 30-2488 has not been amended since the Court of Appeals interpreted it in *In re Estate of Krichau*, and we agree with the Court of Appeals' interpretation of § 30-2488 therein. Accordingly, the county court erred in concluding that Donald's claim should be allowed based on Vernon's failure to timely disallow the claim.

Donald's attempts to distinguish *In re Estate of Krichau* from the case at bar are without merit. Donald first asserts that once a claimant can no longer file a petition for allowance or once the time to begin a proceeding on the claim passes, then the personal representative cannot change his or her mind on the claim because the claimant will not be able to bring the contested issue before the court for decision. This argument misapplies the relevant statutes. Under Neb. Rev. Stat. § 30-2486 (Reissue 1995), there are two ways in which claims may be brought against a decedent's estate. Under § 30-2486(1), the claimant files a written statement of the claim in the form prescribed by rule with the clerk of the court. Under § 30-2486(2), the claimant commences a proceeding against the personal representative in any court which has subject matter jurisdiction. This requires that commencement of the proceeding occur within the time limit for presenting the claim. Section 30-2486(3) provides in relevant part: "If a claim is presented under subsection (1), no proceeding thereon may be commenced more than sixty days after the personal representative has mailed a notice of disallowance . . . ." According to the plain meaning of § 30-2486(3), a claimant has 60 days to commence a proceeding after the notice of disallowance. Therefore, Donald's argument has no merit.

Donald also argues that he exercised his option to bring the claim against Vernon on the merits and that the county court allowed the claim on the merits. This argument is directly contradicted by the language of the journal entry which states that the disallowance was out of time and that the claim should be allowed on that basis. It is apparent that the county court did not adjudicate the claim on its merits, but found that since Vernon's notice of disallowance was untimely filed, Donald should be awarded what he requested in his claim.

On cross-appeal, Donald asserts that the county court erred when it found that he lacked standing to object to the inventory prepared by Vernon and to request that Vernon be removed as personal representative. The county court's decision regarding Donald's standing was based upon its determination that his claim should be allowed. The county court reasoned that Donald no longer had any interest in the proceeding and therefore

lacked standing to object to the inventory and to seek removal of Vernon as personal representative.

[3,4] Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the jurisdiction of a court; determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court. *Miller v. City of Omaha*, 260 Neb. 507, 618 N.W.2d 628 (2000). The purpose of an inquiry as to standing is to determine whether one has a legally protectable interest or right in the controversy that would benefit by the relief to be granted. *Id.* As an aspect of jurisdiction and justiciability, standing requires that a litigant have such a personal stake in the outcome of the controversy as to warrant invocation of a court's jurisdiction and justify the exercise of the court's remedial powers on the litigant's behalf. *Id.*

Neb. Rev. Stat. § 30-2454 (Reissue 1995) provides:

> (a) A person interested in the estate may petition for removal of a personal representative for cause at any time. . . .
>
> (b) Cause for removal exists when removal would be in the best interests of the estate, or if it is shown that a personal representative or the person seeking his appointment intentionally misrepresented material facts in the proceedings leading to his appointment, or that the personal representative has disregarded an order of the court, has become incapable of discharging the duties of his office, or has mismanaged the estate or failed to perform any duty pertaining to the office.

Neb. Rev. Stat. § 30-2209(21) (Cum. Supp. 2000) provides: "Interested person includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person which may be affected by the proceeding."

[5] In *In re Estate of Emery*, 258 Neb. 789, 606 N.W.2d 750 (2000), we concluded that a creditor had standing to bring a suit based upon § 30-2209(21). Actions in the county court for probate of a will are in rem, and every person interested in the subject matter is a party in the county court whether named or not.

In re Estate of Emery, supra. Such person may appear for the purpose of protecting his or her interest in the county court. *Id.* Because Donald is an interested person as defined by § 30-2209(21), we conclude that the county court erred in determining that he did not have standing to object to the inventory or to seek disqualification of Vernon as the personal representative.

CONCLUSION

For the reasons set forth herein, we reverse the judgment of the county court and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. DAVID C. STEELE, APPELLANT.

624 N.W.2d 1

Filed March 30, 2001. No. S-00-477.

1. **Judgments: Speedy Trial: Appeal and Error.** Ordinarily, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Judgments: Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
3. **Speedy Trial: Indictments and Informations.** Neb. Rev. Stat. § 29-1207 (Reissue 1995) provides that every person indicted or informed against for any offense shall be brought to trial within 6 months.
4. **Extradition and Detainer.** The Agreement on Detainers, Neb. Rev. Stat. § 27-759 (Reissue 1995), provides the procedure whereby persons who are imprisoned in one state or by the United States, and who are also charged with crimes in another state or by the United States, can be tried expeditiously for the pending charges while they are serving their current sentences in order to avoid prolonged interference with rehabilitation programs.
5. ___. The Agreement on Detainers, Neb. Rev. Stat. § 27-759 (Reissue 1995), controls a defendant's speedy trial rights when he or she is already incarcerated in another state or in a federal facility before an information is filed against the defendant in Nebraska.
6. ___. The provisions of the Agreement on Detainers, Neb. Rev. Stat. § 27-759 (Reissue 1995), apply only when a detainer has been lodged against a prisoner who has entered a term of imprisonment in a party state.

7. **Federal Acts: Extradition and Detainer.** The Agreement on Detainers is a congressionally sanctioned interstate compact, which is subject to federal construction.
8. **Speedy Trial: Indictments and Informations.** Once the operation of Nebraska's speedy trial statutes has been triggered by the filing of an indictment or information, the statutory right to a speedy trial of a defendant under the control of prosecuting authorities who knowingly extradite him or her to another state or to federal authorities is governed by Neb. Rev. Stat. § 29-1207 (Reissue 1995), not the Agreement on Detainers.
9. **Speedy Trial: Proof.** To avoid a defendant's absolute discharge from an offense charged, as dictated by Neb. Rev. Stat. § 29-1208 (Reissue 1995), the State must prove by a preponderance of the evidence the existence of a period of time which is authorized by Neb. Rev. Stat. § 29-1207(4) (Reissue 1995) to be excluded in computing the time for commencement of the defendant's trial.
10. **Speedy Trial.** In Nebraska, whether a defendant's unavailability is an excludable time period under Neb. Rev. Stat. § 29-1207(4)(d) (Reissue 1995) depends upon whether it is attributable to the State or to the defendant.
11. **Criminal Law: Extradition and Detainer: Waiver.** A voluntary waiver of extradition under Neb. Rev. Stat. § 29-754 (Reissue 1995) does not prevent the State from refusing to surrender a person against whom a criminal prosecution has been initiated pursuant to Neb. Rev. Stat. § 29-747 (Reissue 1995).
12. **Speedy Trial.** The primary burden of bringing an accused person to trial within the time provided by law is upon the State.
13. **Extradition and Detainer: Time.** Where the State has discretion to hold a defendant until trial and the prosecuting attorney has knowledge of extradition proceedings, the defendant's unavailability should be attributed to the State.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Reversed.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

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

CONNOLLY, J.

David C. Steele appeals the district court's order overruling his motion to discharge on statutory and constitutional speedy trial grounds. Steele was charged with felony criminal mischief and released on bond. Prior to trial, scheduled in Lancaster County District Court, the Lancaster County Attorney filed a fugitive complaint against Steele. The complaint alleged that

Steele was a fugitive from justice in Colorado. Steele was taken into custody and waived extradition to Colorado under the Uniform Criminal Extradition Act, Neb. Rev. Stat. §§ 29-729 to 29-758 (Reissue 1995) (Extradition Act). Steele was not returned to Nebraska until after the trial deadline imposed by Neb. Rev. Stat. § 29-1207 (Reissue 1995), a Nebraska speedy trial statute.

This appeal presents interrelated issues: (1) Whether § 29-1207 or the Agreement on Detainers (Agreement), found in Nebraska at Neb. Rev. Stat. § 29-759 (Reissue 1995), controls a defendant's statutory right to a speedy trial when he or she is extradited after an information has been filed and trial has been set and (2) whether the time period during which a defendant is voluntarily surrendered to another jurisdiction is chargeable to the State or to the defendant under § 29-1207(4)(d). We conclude that when a defendant under the State's control is knowingly extradited by the prosecuting attorney to another jurisdiction after an information or indictment has been filed against him or her, the defendant's statutory right to a speedy trial is governed by § 29-1207 and the trial deadline is not tolled under § 29-1207(4)(d). Accordingly, we reverse.

I. BACKGROUND

Steele was charged by information in Lancaster County District Court on April 16, 1999, with felony criminal mischief. He pled not guilty at his arraignment, trial was set for June 21, and he was released on bond. On April 16, Steele filed a motion seeking discovery, which was granted on May 13.

On May 20, 1999, the Lancaster County Attorney filed a fugitive complaint against Steele, alleging that he was a fugitive from Fremont County, Colorado. Colorado had issued a warrant against Steele after he had failed to appear for charges of reckless driving and driving with a revoked license, but had not lodged a detainer against him in Nebraska. Steele was taken into custody, and on May 24, he waived extradition and was returned to Colorado pursuant to the Extradition Act. The prosecuting attorney did not lodge a detainer against Steele at that time.

Steele's case came up for docket call on July 13, 1999, for the jury term scheduled to commence July 26. Defense counsel

informed the court that Steele was incarcerated in Colorado until December 24, 1999, and would need transportation back to Nebraska for trial. The State asked the court to issue a bench warrant against Steele so that he could be extradited back to Nebraska, and the motion was granted. However, by the July 26 trial date, the State had not started the extradition process because the prosecuting attorney claimed he did not know the location in Colorado where Steele was being held. The case was continued to July 28. On July 28, the case was taken off the trial list because the State could not obtain Steele's presence. On August 5, a bench warrant was issued for Steele.

On August 31, 1999, the case again came up for docket call, but Steele's presence had not been obtained, although the prosecuting attorney stated that he believed that steps had been taken to locate him. Trial was set for September 13. On September 9, the prosecuting authorities lodged a detainer against Steele in Colorado. The record does not reflect what happened on September 13, but a trial was not held. On September 30, another docket call was held. The State informed the court that it had lodged a detainer in Colorado, asking for Steele's return after he had completed his sentence. On October 18, the court removed the case from the trial list over Steele's attorney's objection. At each docket call, defense counsel informed the court that the case was ready for trial but that Steele had not been extradited.

On November 2, 1999, Steele waived extradition, agreeing to return to Nebraska. He was picked up by the Lancaster County Sheriff's Department on or about November 29. On December 2, Steele filed a motion to discharge based on speedy trial grounds.

The district court found that Steele had voluntarily waived extradition and had failed to take any action to make himself available to appear in Nebraska, other than to have his attorney appear in court and claim that the case was ready for trial. The court therefore found that Steele was unavailable from the time of his voluntary extradition from Nebraska to his voluntary extradition from Colorado, and the court excluded this period from the 6-month trial deadline under § 29-1207. The district court obviously considered § 29-1207 to control Steele's statu-

tory speedy trial claim. The State argues on appeal, however, that the speedy trial provisions of the Agreement are controlling.

II. ASSIGNMENTS OF ERROR

Steele assigns as error, restated, the district court's overruling of his motion to discharge (1) for statutory speedy trial violations and (2) constitutional speedy trial violations.

III. STANDARD OF REVIEW

[1] Ordinarily, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Baird*, 259 Neb. 245, 609 N.W.2d 349 (2000); *State v. Tucker*, 259 Neb. 225, 609 N.W.2d 306 (2000).

[2] However, to the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below. *State v. Tucker, supra.*

IV. ANALYSIS

1. Applicable Statutes

Steele contends his statutory trial deadline is governed by Nebraska's speedy trial statutes, Neb. Rev. Stat. §§ 29-1205 to 29-1209 (Reissue 1995). The State contends that the speedy trial provisions of the Agreement are controlling. If the State is correct, then Steele's claim that his statutory right to a speedy trial has been violated is without merit.

[3] Section 29-1207 provides that every person indicted or informed against for any offense shall be brought to trial within 6 months. *State v. Boslau*, 258 Neb. 39, 601 N.W.2d 769 (1999); *State v. White*, 257 Neb. 943, 601 N.W.2d 731 (1999).

[4] The Agreement, on the other hand,

> provides the procedure whereby persons who are imprisoned in one state or by the United States, and who are also charged with crimes in another state or by the United States, can be tried expeditiously for the pending charges while they are serving their current sentences, in order to avoid prolonged interference with rehabilitation programs.

State v. Williams, 253 Neb. 619, 624, 573 N.W.2d 106, 110 (1997), citing § 29-759, article I. See, also, *United States v.*

Mauro, 436 U.S. 340, 98 S. Ct. 1834, 56 L. Ed. 2d 329 (1978) (delineating disadvantages prisoners sustain as result of having detainers lodged against them).

[5] There is no question that the Agreement controls a defendant's speedy trial rights when he or she is already incarcerated in another state or in a federal facility before an information is filed against the defendant in Nebraska. See, e.g., *State v. Reynolds*, 218 Neb. 753, 359 N.W.2d 93 (1984) (analyzing defendant's statutory right to speedy trial under only Agreement where defendant was incarcerated by federal authorities in California before he could be arrested in Nebraska). Which statutory scheme controls when the general speedy trial statutes have been triggered and the defendant is then extradited to another state, however, is an issue of first impression in Nebraska.

The State argues that the statutory scheme of the Agreement, § 29-759, is remarkably similar to the procedural requirements for obtaining a final disposition of outstanding charges under Nebraska's disposition of untried charges statutes, which govern the resolution of pending charges against in-state inmates. See Neb. Rev. Stat. §§ 29-3801 to 29-3809 (Reissue 1995). The State argues that there is no reason to distinguish between in-state and out-of-state inmates when the procedural requirements for obtaining a speedy trial are identical. Thus, the State argues that by analogizing to *State v. Tucker*, 259 Neb. 225, 609 N.W.2d 306 (2000), this court should find that Steele's speedy trial rights are governed by the Agreement.

In *Tucker*, the defendant was arrested and convicted on charges in Jefferson County, Nebraska, while he was released on bond on charges pending in Lancaster County, Nebraska. The Lancaster County Attorney obtained his presence for trial through a writ of habeas corpus ad prosequendum, but not before the speedy trial deadline under § 29-1207 had expired. We held that because the defendant was in the custody of the Nebraska Department of Correctional Services at the time he filed his motion, his statutory speedy trial claim was governed by §§ 29-3801 to 29-3809. *State v. Tucker, supra.*

When dealing with in-state prisoners, the trial deadline under § 29-3805 can be triggered only by the prosecutor's receipt of

the required certificate from the Director of Correctional Services. The director is obligated to issue that certificate upon request by the prisoner under § 29-3803, or upon request by the prosecutor under § 29-3804 if the prosecutor has lodged a detainer against the prisoner. The prosecutor had not lodged a detainer in *Tucker*, but we noted that the statutes do not obligate the prosecutor to do so. Further, the defendant himself had failed to ask for a final disposition even though he had actual knowledge of the charges in Lancaster County and could have asked for final disposition without the filing of a detainer against him. We therefore held that the trial deadline was never triggered under § 29-3805 and that the defendant's statutory speedy trial rights had not been violated. *State v. Tucker, supra.*

[6] But this case is different from *Tucker* in two respects. First, "'[t]he provisions of the Agreement apply only when a detainer has been lodged against a prisoner who has entered a term of imprisonment in a party State.'" See *State v. Reynolds*, 218 Neb. at 756, 359 N.W.2d at 98. Accord *United States v. Mauro*, 436 U.S. 340, 98 S. Ct. 1834, 56 L. Ed. 2d 329 (1978). The defendant in *Tucker* was free to request a speedy trial disposition without the filing of a detainer against him. Here, Steele could not have triggered the speedy trial provisions of the Agreement before September 9, 1999, because the State did not lodge a detainer against him until that date.

Second, the defendant in *Tucker* was arrested in Jefferson County while released on bond. In this case, while Steele was released on bond, the county attorney's office filed a fugitive complaint against him on May 20, 1999, 1 month before his trial was scheduled to take place on June 21. He was arrested shortly thereafter, and the county attorney's office relinquished its control over him and delivered him to authorities from Colorado under the Extradition Act. We determine that *Tucker* is not dispositive.

[7] The Agreement is a congressionally sanctioned interstate compact, which is subject to federal construction. See *State v. Williams*, 253 Neb. 619, 573 N.W.2d 106 (1997), citing *Cuyler v. Adams*, 449 U.S. 433, 101 S. Ct. 703, 66 L. Ed. 2d 641 (1981). On the federal level, the U.S. Supreme Court noted in *United States v. Mauro, supra*, that the federal Speedy Trial Act of

1974, 18 U.S.C. § 3161 et seq. (1994), is not incompatible with the Agreement: "In situations in which two different sets of time limitations are prescribed, the more stringent limitation may simply be applied." 436 U.S. at 357 n.24. See, also, *United States v. O'Bryant*, 775 F.2d 1528 (11th Cir. 1985).

Other states that have considered the issue have come to the same conclusion in regard to the Agreement and their state speedy trial provisions. Colorado courts make a distinction between filing an information against a defendant who is already imprisoned in another state, see *Simakis v. Dist. Ct.*, 194 Colo. 436, 577 P.2d 3 (1978) (determining that defendant's statutory claim is analyzed under Agreement), and a defendant that is under the state's control when the general speedy trial statute is triggered and then extradited. In the latter situation, the general speedy trial statutes control. See, e.g., *People v. Yellen*, 739 P.2d 1384 (Colo. 1987) (analyzing defendant's speedy trial claim under state's general speedy trial statutes, while excluding time defendant was out of state because he had voluntarily requested disposition of his out-of-state charges under Agreement without notifying the prosecuting attorney of his imminent departure); *People v. Moye*, 635 P.2d 194 (Colo. 1981) (same result as *Yellen* where defendant was involuntarily extradited from different county and prosecuting attorney was unaware of proceedings and had no opportunity to object to extradition); *People v. Wimer*, 43 Colo. App. 237, 604 P.2d 1183 (1979) (analyzing statutory claim under general speedy trial statutes where trial deadline had been triggered and defendants were then voluntarily surrendered by state pursuant to fugitive warrants).

The Washington Supreme Court, similarly, has held there is not a conflict between the time limits of a state's speedy trial statute and the Agreement. See *State v. Peterson*, 90 Wash. 2d 423, 585 P.2d 66 (1978). Although Washington has since amended its speedy trial statute to exclude periods during which a defendant is detained in another jurisdiction's prison or jail, see Wash. Crim. R. 3.3(g)(6), in *Peterson*, the Supreme Court specifically rejected the contention that the Agreement's trial deadline was controlling when the general speedy trial statute had already been triggered. See, also, *Patterson v. State*, 318 Ark. 358, 885 S.W.2d 667 (1994) (analyzing defendant's statu-

tory right to speedy trial under both Agreement and general speedy trial statutes).

As a matter of policy, holding that the speedy trial provisions of the Agreement controlled in this case would allow the State to ignore the speedy trial deadline under § 29-1207 whenever a concurrent extradition was requested. There is no inherent incompatibility between § 29-1207 and the speedy trial provisions under the Agreement. The Agreement provides the means by which prosecuting authorities can obtain a defendant's presence to stand trial, but it does not relieve those authorities from their obligation to use all reasonable diligence to try a criminal defendant under their control within the time limitations of § 29-1207.

[8] Thus, we conclude that once the operation of Nebraska's speedy trial statutes has been triggered by the filing of an indictment or information, the statutory right to a speedy trial of a defendant under the control of prosecuting authorities who knowingly extradite him or her to another state or to federal authorities is governed by § 29-1207, not the Agreement.

2. Merits of Statutory Speedy Trial Claim

The information against Steele was filed on April 16, 1999. Excluding the day the information was filed, the last day on which Steele could have been tried within the statutory 6-month period was October 16, unless any period between the filing of the information and commencement of trial must be excluded. See, *State v. Ward*, 257 Neb. 377, 597 N.W.2d 614 (1999); *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997).

[9] To avoid a defendant's absolute discharge from an offense charged, as dictated by § 29-1208, the State must prove by a preponderance of the evidence the existence of a period of time which is authorized by § 29-1207(4) to be excluded in computing the time for commencement of the defendant's trial. *State v. Baird*, 259 Neb. 245, 609 N.W.2d 349 (2000); *State v. Turner, supra*.

Section 29-1207(4) provides, in relevant part:

> The following periods shall be excluded in computing the time for trial:
>
> (a) The period of delay resulting from other proceedings concerning the defendant, including . . . the time from

> filing until final disposition of pretrial motions of the defendant . . . .
>
> . . . .
>
> (d) The period of delay resulting from the absence or unavailability of the defendant.

(a) Pretrial Motions

On April 26, 1999, Steele filed a pretrial motion seeking discovery, which was granted on May 13. Therefore, the district court properly added 18 days to the 6-month period for this delay, bringing the deadline to November 2. See *State v. Ward, supra*. Steele was not returned to Nebraska until November 29. His motion for discharge was filed on December 2, which again tolled the trial deadline. See *id.* Therefore, unless some other excludable period applies under § 29-1207(4) to cover the 30 days from November 2 to December 2, Steele is entitled to discharge under § 29-1208.

(b) Unavailability

[10] The district court found that Steele was unavailable from the time of his voluntary waiver of extradition to Colorado on May 24, 1999, to his voluntary waiver of extradition back to Nebraska on November 2, and excluded this period from the speedy trial deadline. In Nebraska, whether a defendant's unavailability is an excludable time period under § 29-1207(4)(d) depends upon whether it is attributable to the State or to the defendant. See, e.g., *State v. Letscher*, 234 Neb. 858, 861, 452 N.W.2d 767, 769 (1990) ("when *a defendant* has commenced a period of delay due to his or her absence or unavailability, the period of time from the defendant's later availability to the next reasonably available trial date is excludable under § 29-1207" (emphasis supplied)); *State v. Kriegler*, 225 Neb. 486, 406 N.W.2d 137 (1987) (delay occasioned by defendant's failure to appear while jury panel was in session was excludable under § 29-1207(4)(d)). Thus, the question is whether Steele's extradition and resulting unavailability is attributable to the State or to Steele.

The county attorney's office filed the fugitive complaint against Steele on May 20, 1999, 1 month before his trial was

scheduled to take place on June 21. Steele waived extradition proceedings on May 24 and voluntarily returned to Colorado as provided for under § 29-754.

Under § 29-730 of the Extradition Act,

> it is the duty of the Governor of this state to have arrested and delivered up to the Executive Authority of any other state of the United States any person charged in that state with treason, felony, or other crime, who has fled from justice and is found in this state.

But the Extradition Act also provides that whenever a person in this state is under a pending criminal prosecution at the time the demanding state's requisition is made, then "the Governor, in his discretion, either may surrender him . . . or hold him until he has been tried and discharged or convicted and punished in this state." § 29-747.

[11] Steele's voluntary waiver of extradition is not dispositive. Under Nebraska's waiver of extradition statute, § 29-754, the State's rights under the Extradition Act are specifically reserved:

> If and when such consent has been duly executed it shall forthwith be forwarded to the office of the Governor of this state and filed therein. . . . *Provided, however*, that nothing in this section shall be deemed to limit the rights of the accused person to return voluntarily and without formality to the demanding state, *nor shall this waiver procedure be deemed* to be an exclusive procedure or *to limit the powers, rights or duties* of the officers of the demanding state or *of this state.*

(Emphasis in original.) (Emphasis supplied.) Simply put, a voluntary waiver of extradition does not prevent the State from refusing to surrender a person against whom a criminal prosecution has been initiated pursuant to § 29-747. Furthermore, because the State failed to lodge a detainer against Steele immediately, the extradition had the effect of preventing him from requesting a speedy disposition of his pending charges in Nebraska. Thus, Steele could not have obtained a swifter disposition by his own action.

[12,13] The primary burden of bringing an accused person to trial within the time provided by law is upon the State. *State v.*

Blackson, 256 Neb. 104, 588 N.W.2d 827 (1999). Where the State has discretion to hold a defendant until trial and the prosecuting attorney has knowledge of extradition proceedings, the defendant's unavailability should be attributed to the State. See *People v. Wimer*, 43 Colo. App. 237, 604 P.2d 1183 (1979) (concluding that speedy trial deadline is not extended when state voluntarily extradites defendant within its control). Thus, the district court erred in excluding this period under § 29-1207(4)(d), and Steele was not brought to trial within 6 months from the filing of the information under § 29-1207(2).

V. CONCLUSION

We conclude that Steele is entitled to discharge under § 29-1208 because the State has failed to meet its burden of showing that he was brought to trial within the statutory deadline imposed by § 29-1207.

REVERSED.

JO ANN NOONAN, APPELLANT, V. MICHAEL J. NOONAN, APPELLEE.

624 N.W.2d 314

Filed April 6, 2001. No. S-99-1013.

1. **Modification of Decree: Child Support: Appeal and Error.** Modification of a dissolution decree is entrusted to the discretion of the trial court, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion.
2. **Judges: Words and Phrases.** 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 a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
3. **Judgments: Evidence: 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.
4. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change of circumstances which occurred subsequent to the entry of the original decree or a previous modification which was not contemplated when the prior order was entered.
5. **Child Support: Rules of the Supreme Court: Presumptions.** The Nebraska Child Support Guidelines are applied as a rebuttable presumption, and all orders for child

support shall be established in accordance with the provisions of the guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the application of the guidelines should be applied.

6. **Modification of Decree: Child Support: Appeal and Error.** Modifying a part of the original child support order absent a request by either party or a reasonable explanation for the change constitutes an abuse of discretion.
7. **Child Support: Words and Phrases.** When a court calculates the amount of child support to be paid, the court must consider the total monthly income, defined as the "income of both parties derived from all sources."
8. **Child Support: Presumptions.** All income from employment must be included in the initial child support calculation, which then becomes a rebuttable presumption of appropriate support.
9. **Child Support.** It is appropriate to consider overtime wages in child support calculations if the overtime is a regular part of the employment and the employee can actually expect to earn regularly a certain amount of income for working overtime.
10. **Child Support: Rules of the Supreme Court: Presumptions: Proof.** If a moving party shows that a nonmoving party earns or can reasonably expect to earn a certain amount of income on a regular basis, a rebuttable presumption of including such income in calculating child support arises under the Nebraska Child Support Guidelines. After the moving party has met its burden of proof, the nonmoving party must produce sufficient evidence to rebut the presumption that the application of the guidelines will result in a fair and equitable child support order before deviation from the guidelines is appropriate.
11. **Child Support: Presumptions: Proof.** If a moving party shows that a nonmoving party actually sells stock and receives capital gains income on a regular basis, there arises a rebuttable presumption of including such income in the calculation of child support. If the nonmoving party rebuts the presumption by showing that the sale of the stock and the resulting capital gains income is speculative in nature and that the nonmoving party has little or no control over the timing of the future sales of the stock, the income should be excluded from the child support calculation.
12. **Child Support: Rules of the Supreme Court.** The increased cost to the parent for health insurance for the children of the parent shall be allowed as a deduction from gross income under the Nebraska Child Support Guidelines.
13. **Child Support: Proof.** In calculating child support, the parent requesting an adjustment for health insurance premiums must submit proof of the cost of the premium. The party claiming the deduction must show how much of the health insurance premium is attributable to the children.
14. **Modification of Decree: Child Support: Time.** The rule, absent equities to the contrary, should generally be that the modification of a child support order should be applied retroactively to the first day of the month following the filing date of the application for modification.
15. **Child Support: Rules of the Supreme Court.** The main principle behind the Nebraska Child Support Guidelines is to recognize the equal duty of both parents to contribute to the support of their children in proportion to their respective net incomes.
16. **Divorce: Modification of Decree: Child Support.** The paramount concern and question in determining child support, whether in the initial marital dissolution action or in proceedings for modification of a decree, is the best interests of the child.

17. **Modification of Decree: Child Support.** In a modification of child support proceeding, the child and custodial parent should not be penalized, if it can be avoided, by the delay inherent in our legal system.
18. **Modification of Decree: Attorney Fees: Appeal and Error.** In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.
19. **Divorce: Attorney Fees.** Customarily in dissolution cases, attorney fees and costs are awarded only to prevailing parties or assessed against those who file frivolous suits.
20. **Appeal and Error.** When evidence is in conflict, an appellate court will consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts over another.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed as modified.

Wayne E. Janssen for appellant.

Paul M. Conley for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

GERRARD, J.

I. INTRODUCTION

Jo Ann Noonan (mother) filed a petition seeking modification of a child support order entered in the dissolution of her marriage to Michael J. Noonan (father). After a hearing, the district court found no material change in circumstances and denied the mother's request for an increase in child support. The mother appeals, contending that the district court erred in not finding a 10-percent variance in the father's child support obligation by assigning the tax exemptions for the two children to her and not the father, not including the father's overtime wages and capital gains in his gross income, including the father's student loan payments as a deduction, and improperly assigning and calculating health insurance costs as a deduction from income. The mother also argues that the modification should be retroactive to the date of filing and that she should be awarded attorney fees. Based on our de novo review, we determine that there was more than a 10-percent variation in the child support obligation of the father, and we modify the child support order retroactive to the

first day of the month following the filing date of the application for modification.

II. BACKGROUND

The father and mother were married in 1985 and had two children. After their marriage was dissolved on August 31, 1995, certain issues were appealed to the Nebraska Court of Appeals which entered a memorandum opinion and judgment on appeal on April 1, 1997. *Noonan v. Noonan*, 5 Neb. App. xv (case No. A-95-1153, Apr. 1, 1997). The mother was awarded custody of the two children, and the father was ordered to pay child support in the amount of $740 per month and to provide health insurance for the children and was given the right to claim the children as tax exemptions. In calculating child support, the father's mandatory overtime was included as income and his student loan payments were not allowed as deductions.

The mother filed this action for modification of child support in Lancaster County on December 30, 1997. She claimed a material change in circumstances had occurred since the date of dissolution in that the father's income had increased and the application of the child support guidelines would result in a variation of more than 10 percent in the father's child support obligation. The mother also alleged that a material change in circumstances had occurred with respect to health insurance and that the responsibility for health insurance should be given to her. The mother filed a motion for temporary allowances requesting a temporary increase in child support, which the district court denied.

On September 17, 1998, the mother's attorney filed a motion to set the matter for trial, and a modification hearing was held on February 9, 1999. At the modification hearing, evidence was adduced relating to the father's income and deductions. First, the father testified as to how much is deducted from his monthly paycheck for health care expenses. The father, however, did not show how much of the health care cost is attributable to his two children.

Next, the father testified that at the time of the modification hearing, he had worked approximately 6½ years for his current employer. The father testified that his hourly rate of pay at the

time of the hearing was $19.86. He stated that he usually receives pay raises each year and that his last raise was a 2-percent increase. Additionally, the father testified that he is not required to work overtime, as he was required to do at the time the original divorce decree was entered. While the overtime hours are no longer mandatory, the father's testimony revealed that he continues to work overtime at a rate of 5 hours per pay period (every 2 weeks).

Each pay period, a percentage of the father's wages are paid in the form of company stock. The father testified that he sells the stock he receives from his employer each year. The yearly stock sales have resulted in the father's receiving capital gains income for the 2 years prior to the modification hearing. In 1996 and 1997, the father received capital gains of $979 and $888 respectively from the sale of stock he had received from his employer.

The father also has student loans that he acquired during his marriage to the mother. The father continues to make payments on the student loans in the amount of $87.32 per month. There is no evidence in the record regarding what the loans were used for during the Noonans' marriage, no evidence as to what benefit the father received from the loans, nor is there evidence as to how much of the loan is principal or interest.

The mother testified that at the time of the modification hearing, she had been working for the State of Nebraska for approximately 12 years. There was also evidence adduced at trial indicating that the mother makes approximately $9.48 per hour as a secretary.

Since the dissolution, there have been issues regarding the communication between the father and the mother with respect to health insurance for the children. The mother testified that she had difficulties filing claims because the father's employer changed insurance providers and that he failed to inform her of the changes. The father, on the other hand, testified that he gave the mother copies of the new insurance cards as soon as he discovered his employer had changed insurance providers. Because the insurance companies with whom the mother filed claims were not always the most current insurance company through the father's employer, the health care provider would turn the

matter over to a collection agency and the mother would receive collection notices from the agencies. She testified that since these occurrences, she has been unable to obtain credit cards.

The father testified that he knows nothing about when or where his children go for health care services or what claims are filed with his insurance until he receives a statement from his insurance company. He also testified that he did not receive copies of his children's past-due medical bills until the collection agencies called him. The father also claims that he is now in the habit of calling medical care providers to be sure that he is up to date with payments.

There is no evidence showing that health insurance coverage stopped at any time or that the children suffered a reduction in health care services (although, at one point, one of the children had been dropped from the father's health insurance coverage for a short period of time due to a mistake by the father's employer. The claims that had been refused were eventually paid).

On May 4, 1999, the district court entered its order finding that there was not a 10-percent change in the father's child support obligation through the application of the Nebraska Child Support Guidelines (Guidelines). The district court's calculation resulted in the father's child support obligation increasing to $805.42, just short of $814, which would be the 10-percent variation required to raise a rebuttable presumption of a material change in circumstances under the Guidelines. Thus, the district court found no material change in circumstances and denied the request for an increase in child support.

In its calculations, the district court did not include the father's overtime wages as income, reasoning that his overtime was considerably less than in past years and that his employer did not require overtime. Also, the court included a deduction for student loan payments from the father's income, reasoning that the Court of Appeals recognizes the payment of student loans as a legitimate deduction from income under the Guidelines. The worksheet attached to the district court's order, which is incorporated by reference into the order, shows that the children's income tax exemptions were assigned to the mother in the calculation and not to the father as in the original decree. The shift of exemptions was not requested by either party.

The mother's request that she be given responsibility for the children's health insurance, instead of the father, was denied by the district court. The court stated that both parties have legitimate reasons to carry the insurance and that both had given reasons why the other party would not be reliable in carrying the insurance. The district court also denied the mother's request for attorney fees.

The mother filed a motion for new trial, and the district court overruled her motion in all relevant respects. This timely appeal followed.

III. ASSIGNMENTS OF ERROR

The mother assigns, restated and renumbered, that the district court erred in (1) failing to transfer the obligation of health insurance to her; (2) calculating child support by assigning the tax exemptions for the two children to her and not the father, not including the father's overtime wages and capital gains from the sale of stock in his gross income, including the father's student loan payments as a deduction from income, and failing to require the father to show that his health insurance deduction was fully attributable to the health insurance cost for their two children; (3) failing to award temporary child support; (4) failing to modify the child support retroactive to the date of filing for modification; and (5) failing to award her attorney fees.

IV. STANDARD OF REVIEW

[1,2] Modification of a dissolution decree is entrusted to the discretion of the trial court, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *Hartman v. Hartman, ante* p. 359, 622 N.W.2d 871 (2001); *Riggs v. Riggs, ante* p. 344, 622 N.W.2d 861 (2001). 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 a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Riggs v. Riggs, supra.*

[3] 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. *Harris v. Harris, ante* p. 75, 621 N.W.2d 491 (2001).

V. ANALYSIS

1. Modification of Child Support

[4] A party seeking to modify a child support order must show a material change of circumstances which occurred subsequent to the entry of the original decree or a previous modification which was not contemplated when the prior order was entered. *Gammel v. Gammel*, 259 Neb. 738, 612 N.W.2d 207 (2000). Paragraph Q of the Guidelines provides:

> Application of the child support guidelines which would result in a variation by 10 percent or more, upward or downward, of the current child support obligation, due to financial circumstances which have lasted 3 months and can reasonably be expected to last for an additional 6 months, establishes a rebuttable presumption of a material change of circumstances.

[5] The Guidelines are applied as a rebuttable presumption, and all orders for child support shall be established in accordance with the provisions of the Guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the application of the Guidelines should be applied. *Sears v. Larson*, 259 Neb. 760, 612 N.W.2d 474 (2000).

The mother correctly argues that finding an error by the trial court in her favor would almost certainly result in a 10-percent change in the father's child support obligation, thereby raising a rebuttable presumption of a material change in circumstances. The father's current child support obligation is $740. A 10-percent increase in appellee's child support obligation would be $814 per month or more. The trial court's application of the Guidelines resulted in an increase to the father's obligation to $805.42 per month—just short of the 10-percent change. We now turn to the district court's calculation of child support.

(a) Tax Exemptions

In the original divorce decree, which the district court took judicial notice of at the modification hearing, the father was

given the tax exemptions for the two children of the marriage. Neither party requested that the tax exemptions be reallocated in this modification action. While the district court did not specifically mention the exemptions in its written order, the court without explanation indicated on the Guidelines worksheet, and in its calculations, that the mother was given three exemptions and the father one exemption. Absent evidence and a finding to the contrary, the father should have been given three exemptions in the calculation and the mother one exemption as neither party requested the change.

[6] Modifying a part of the original child support order absent a request by either party or a reasonable explanation for the change constitutes an abuse of discretion.

(b) Overtime and Capital Gains Income

[7,8] When a court calculates the amount of child support to be paid, the court must consider the "Total Monthly Income," defined as the "income of both parties derived from all sources." Guidelines, paragraph D. See, also, Neb. Rev. Stat. § 42-364.16 (Reissue 1998). Thus, all income from employment must be included in the initial calculation, which then becomes a rebuttable presumption of appropriate support. *Dueling v. Dueling*, 257 Neb. 862, 601 N.W.2d 516 (1999).

[9] In our review of sources of income appropriate for consideration in calculating child support, we have previously determined that regularly earned overtime wages should be included. *Stuczynski v. Stuczynski*, 238 Neb. 368, 471 N.W.2d 122 (1991). In *Stuczynski*, we stated that it is appropriate to consider overtime wages in child support calculations "if the overtime is a regular part of the employment and the employee can actually expect to earn regularly a certain amount of income for working overtime." 238 Neb. at 374, 471 N.W.2d at 126. We also noted that the level of income should not be based on income that is "speculative in nature and over which the employee has little or no control." *Id.*

[10] It is logical to extend the principles stated in *Stuczynski* to encompass forms of income other than overtime wages. Consequently, if the evidence shows that a party actually earns or can reasonably expect to earn a certain amount of income on

a regular basis, it is appropriate to consider such income in calculating child support. Paragraph D of the Guidelines, which requires all sources of income to be included in calculating child support, requires such a rule. Therefore, if the moving party shows that the nonmoving party earns or can reasonably expect to earn a certain amount of income on a regular basis, a rebuttable presumption of including such income arises under the Guidelines.

After the moving party has met its burden of proof, the nonmoving party must produce sufficient evidence to rebut the presumption that the application of the Guidelines will result in a fair and equitable child support order before deviation from the Guidelines is appropriate. § 42-364.16; *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000); *Dueling v. Dueling*, *supra*. Thus, if the nonmoving party can show that the included income is speculative in nature and over which the person has little or no control, *Stuczynski v. Stuczynski*, *supra*, the presumption of including the income is rebutted and it shall be excluded from the calculation.

(i) Overtime Wages

In *Stuczynski*, the husband's overtime wages at ConAgra had been included in his income as calculated by the district court. We found no abuse of discretion in the inclusion of the husband's ConAgra overtime wages because the husband could reasonably expect to earn a certain amount of overtime, his overtime was not speculative in nature, and he had some control over the income.

Conversely, in the case at hand, the district court refused to include overtime wages in calculating the father's income. We conclude, however, that the rule from *Stuczynski* extends to the case before us: If the father earns or can reasonably expect to earn a certain amount of income on a regular basis, such income should be included in the child support calculation unless the presumption is rebutted by showing that the income is speculative in nature and that it is income over which the father has little or no control.

The record shows that the father in this case does not work as many overtime hours as he did when the original decree was issued and that his overtime is no longer mandatory as it was

then. The father, however, consistently works approximately 5 hours of overtime per pay period (every 2 weeks). There was no evidence that the father expects his overtime to decrease, nor was there any evidence that the father would work fewer hours in the future. The evidence shows that the father regularly works 5 hours of overtime per pay period, and we infer from the evidence of such consistent income that the father can reasonably expect to continue working 5 hours of overtime per pay period. Thus, the mother has met her burden of showing that the overtime is a regular part of the father's income and that he can expect to regularly work 5 hours of overtime per pay period.

The father presented no evidence to rebut the presumption of including the overtime wages. On the contrary, the fact that the father consistently has 5 hours of overtime per pay period shows that the income is not speculative, and the fact that he chooses to work the overtime reveals that he has control over the income.

Therefore, the district court erred in excluding the overtime wages from the father's child support calculation. We determine that the equivalent of 5 hours of overtime per pay period is to be included in calculating the father's income.

(ii) Capital Gains Income

[11] As with overtime, if the mother shows that a portion of the father's wages is paid in the form of stock which is regularly sold and results in capital gains income at the end of the year, it is appropriate to consider such income under paragraph D of the Guidelines in calculating child support. Again, however, if the father rebuts the presumption by showing that the sale of the stock and the resulting capital gains income is speculative in nature and that he has little or no control over the timing of the future sales of the stock, the income should be excluded.

In the instant case, the father received stock as part of his compensation and his employer reduced his cash wages by the value of the stock. His biweekly pay stub shows that he receives 6 percent of his wages in the form of stock. The record shows that during the 2 years prior to the modification hearing, the father regularly sold the stock within months after he received it and that he consistently received capital gains income from those sales. He reported capital gains income of $979 and $888

in the 2 years prior to this action from the sale of the stock he received from his employer. Absent evidence to the contrary, the record supports the conclusion that capital gains income has been and will be a regular part of the father's income. Therefore, it is to be included in his income calculation unless the father can rebut the presumption by showing that the sale of the stock and resulting capital gains income is speculative in nature and that he has little or no control over the disposition of the stock.

There is no evidence in the record offered by the father showing why the capital gains income should not be included in the child support calculation. To the contrary, the evidence before us reveals that the father (1) receives stock as part of his compensation, (2) sells the stock each year, and (3) has consistently received capital gains income from the sales of the stock. Thus, the father has not rebutted the presumption of including the capital gains income in the child support calculation.

Therefore, the district court erred in not including the capital gains income in the child support calculation. Based on our de novo review of the record, we determine that the equivalent of $933.50 of yearly capital gains income, which is his average capital gains income from the previous 2 years, is to be included in calculating the father's income. Further, we determine that such income is to be divided by 12 and included in the calculation of the father's monthly income prior to the calculation of federal taxes. Short-term capital gains, which are gains on the sale of stock held for less than 1 year, are taxable at the same rates as ordinary income. See, I.R.C. § 1222(1) (1994); 33A Am. Jur. 2d *Federal Taxation* ¶ 11125 (2000).

(c) Student Loan Payments

Paragraph E of the Guidelines provides a specific list of deductions from income that may be subtracted in calculating child support. Student loan payments are not specifically provided for in that list of deductions. Under the Guidelines, a deviation is permissible whenever application of the Guidelines in an individual case would be unjust or inappropriate. Guidelines, paragraph C(5). Deviations from the Guidelines also must take into account the best interests of the child. *Brooks v. Brooks, ante* p. 289, 622 N.W.2d 670 (2001).

In *Sears v. Larson*, 259 Neb. 760, 612 N.W.2d 474 (2000), we determined that a trial court may, in appropriate cases, deviate from the Guidelines to allow a deduction from income based on a parent's student loan payment. In order to do so, however, we held that it is the moving party's burden to prove that an application of the Guidelines without a deviation based on his or her student loan obligation would produce an unjust result. *Id.* In *Sears*, we found that the moving party had failed to meet such burden. We noted that there was nothing in the record regarding the amount of the loans, the terms of the loans, the amount attributable to principal and interest, and the amount of the loans that were used for education, child support, or other expenditures. *Id.* Therefore, we concluded that because the moving party had not proved that the district court should have deviated from the Guidelines by considering the loans, the district court did not abuse its discretion in refusing to consider the loan obligations in computing child support.

In the instant case, the district court did permit a deviation from the Guidelines by including the father's student loan payments as a deduction from income. The only evidence at the modification hearing relating to student loans was the amount of the monthly payment and the fact that the debt was incurred during the Noonans' marriage. Aside from the fact that the father's student loan payments were not allowed as deductions in the original proceedings, we note that there is nothing in the record to indicate the total amount of the father's loans, the terms of the loans, the amounts attributable to principal and interest, or what amounts were used for education, child support, or other expenses. There is also no evidence that reveals whether the loan terms allow the father to reduce the size of the monthly payment.

It was the father's burden to prove that an application of the Guidelines without a deviation based on his student loan obligation would produce an unjust result. *Id.* We find that the father failed to meet this burden and that therefore, the district court abused its discretion by including the father's student loan obligation as a deduction in calculating child support. However, our conclusion in *Sears v. Larson, supra*, remains intact—i.e., paragraph C(5) of the Guidelines allows a trial court *in an appropriate case* to deviate from the Guidelines to allow a deduction

from income based on a parent's student loan payment. Deviation was not appropriate in the case at bar because the father failed to meet his burden of proof.

(d) Health Insurance Cost

[12,13] Paragraph E(3) of the Guidelines states that "[t]he increased cost to the parent for health insurance for the child(ren) of the parent shall be allowed as a deduction from gross income. The parent requesting an adjustment for health insurance premiums must submit proof of the cost of the premium." See, also, *Rauch v. Rauch*, 256 Neb. 257, 590 N.W.2d 170 (1999). In *Rauch*, we held that the parent claiming a deduction for health insurance must show that he or she has incurred an increased cost to maintain the coverage for the children over what it would cost to insure himself or herself. The party claiming the deduction must show how much of the health insurance premium is attributable to the children. *Id.*

In the instant case, the father has the burden of showing the amount his insurance increased due to the coverage of his two children in order for him to claim health insurance as a deduction from income in calculating child support. While there is evidence of his total health insurance cost, the record is devoid of evidence indicating how much of the father's insurance premiums are attributable to the children. In fact, at the modification hearing, the father could not remember how much his insurance premium was at all. We conclude that the district court erred in granting the father a deduction for health insurance without determining how much of the health insurance premium was attributable to the children.

(e) Child Support Calculation

Having concluded that the district court erred in (1) shifting the tax exemptions for the two children to the mother, (2) not including the father's overtime payments and regularly earned capital gains in income, and (3) deducting the father's student loan payment and health insurance costs from income, we must now calculate the parties' child support obligation in our de novo review of the record. Because Social Security taxes and state income taxes are not deducted from capital gains income,

the father's state tax and FICA calculations are based on his monthly income excluding capital gains income, or $3,549.93. Thus, in utilizing the relevant provisions from the state and federal tax codes in effect on the date of the trial, we find, in our de novo review, that worksheet 1 is properly computed as follows:

		Mother	Father
		Combined	
1. Total monthly income from all sources (except payments received for children of prior marriages and all means-tested public assistance benefits)		1,643.20	3,627.72
a. Nontaxable income (voluntary contribution to 401K)			267.20
2. Deductions			
a. Taxes	Federal	159.61	386.30
	State	35.44	130.35
b. FICA		125.70	271.57
c. Health insurance			
d. Mandatory retirement		71.15	
e. Child support previously ordered for other children			
f. Total deductions		391.90	788.22
3. Monthly net income		1,251.30	3,106.70
4. Combined monthly net income		4,358.00	
5. Combined annual net income		52,296.00	
6. Percent contribution of each parent		28.7%	71.3%
7. Monthly support from table 1		1,436.44	
8. Each parent's share		412.44	1,024.00

We conclude that there has been a material change in circumstances in that the application of the Guidelines results in a variation of more than 10 percent in the father's child support obligation, see Guidelines, paragraph Q; therefore, the father's child support obligation is to increase to $1,024 per month for the parties' two minor children and, utilizing worksheet 4, to $698.70 when one child remains in the household.

2. Temporary Child Support

The mother argues that the district court erred in failing to award a temporary increase in child support during the pend-

ency of this action. We disagree. The district court's determination to deny temporary support based on the affidavit supplied by the mother was not an abuse of discretion.

3. Retroactive Modification

The mother also claims that the father's increased child support obligation should be effective as of the date that she filed for the modification. The initial determination regarding the retroactive application of the modification order is normally entrusted to the discretion of the trial court, see *Sears v. Larson*, 259 Neb. 760, 612 N.W.2d 474 (2000); however, the district court did not modify the original decree in the instant case. Therefore, the determination regarding retroactivity is left to this court based on our de novo review of the record.

[14-17] We recently stated that the rule, absent equities to the contrary, should generally be that the modification of a child support order should be applied retroactively to the first day of the month following the filing date of the application for modification. *Riggs v. Riggs, ante* p. 344, 622 N.W.2d 861 (2001). This court reiterated that the main principle behind the Guidelines is to recognize the equal duty of both parents to contribute to the support of their child in proportion to their respective net incomes. *Id.* See, also, Guidelines, paragraph A. The paramount concern and question in determining child support, whether in the initial marital dissolution action or in the proceedings for modification of decree, is the best interests of the child. *Riggs v. Riggs, supra.* We also observed that the child and custodial parent should not be penalized, if it can be avoided, by the delay inherent in our legal system. *Id.*

In the instant case, the mother filed her petition seeking a modification of the decree and an increase of child support on December 30, 1997. During discovery in this action, the mother had interrogatories sent to the father on March 27, 1998. The mother testified that on May 27, she asked her attorney to send a letter to the father's attorney requesting answers to the interrogatories. On June 22, the mother directed her attorney to file a motion to compel answers to the interrogatories, and a hearing was set for July 10. The interrogatories were answered on July 6, 1998, 4 days prior to the hearing on the motion to compel and more than 3

months after the interrogatories were sent. The mother testified that she thought the answers to interrogatories regarding mandatory retirement were incorrect, so she sent follow-up requests for admissions to clear up issues regarding whether the father's retirement contributions were mandatory or voluntary.

The requests for admissions were sent on July 18, 1998, and were objected to by the father's attorney. The requests were eventually answered on September 11, and the father admitted that his employer does not have mandatory retirement, despite statements to the contrary in the interrogatories.

On September 16, 1998, the mother's attorney filed a motion to set the matter for trial, and a modification hearing was eventually held on February 9, 1999. On May 4, the district court entered its order denying the mother's request for an increase in child support. The mother filed a timely motion for new trial, which was denied, and she then promptly filed an appeal to this court.

We determine that the equities involved in this case require that the modified support obligation become effective as of January 1, 1998, the first day of the month following the date of the filing of the mother's petition for modification. The record reveals no delay caused by the mother, and the children in this case should not be penalized by the delay inherent in the legal process, nor should the noncustodial parent gratuitously benefit from the delay. See *Riggs v. Riggs, supra*. Given the father's dilatory actions in this matter and the fact that he is earning sufficient income to pay the increased child support, we find that the increase in his child support obligation should be retroactive to January 1, 1998.

4. Attorney Fees

[18] The mother's next assignment of error is that the district court abused its discretion in not awarding attorney fees in the instant action. In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Riggs v. Riggs, ante* p. 344, 622 N.W.2d 861 (2001).

[19] Obviously, the mother did not prevail in the lower court, and the court no doubt took that into consideration when deny-

ing her attorney fees at the district court level. Customarily in dissolution cases, attorney fees and costs are awarded only to prevailing parties or assessed against those who file frivolous suits. *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000). In our de novo review, we do give weight to the fact that the mother prevailed in obtaining an increase in child support. Additionally, Neb. Rev. Stat. § 25-824(4) (Reissue 1998) provides that attorney fees are available 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."

Based on the father's abuse of the discovery process outlined above and the fact that the mother eventually prevailed in obtaining an increase in child support, we conclude in our de novo review that the mother should have been awarded fees for her attorney's services at the trial court level. While the record reveals evidence of substantial legal services on behalf of the mother at the trial court level, we consider the retroactive nature of the increased child support when awarding attorney fees in the instant matter. Giving consideration to the above-stated equities, we order the father to pay the sum of $1,200 for the mother's attorney fees in the district court.

5. Health Insurance Obligation

[20] Finally, the district court refused to transfer the health insurance obligation to the mother because each party had introduced evidence why the other would be unreliable in providing health insurance and why each wanted to be responsible for the insurance obligation. When evidence is in conflict, we will consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts over another. *Elsome v. Elsome*, 257 Neb. 889, 601 N.W.2d 537 (1999). We find in our de novo review of the record that the district court did not abuse its discretion in refusing to reassign the health insurance obligation.

VI. CONCLUSION

We, therefore, conclude that the district court abused its discretion in (1) shifting the tax exemptions of the two children, (2)

not including the father's overtime pay and regularly earned capital gains and income, (3) deducting the father's student loan payments and health insurance cost from income, and (4) ultimately denying the mother's request for an increase in child support and denying her request for an attorney fee at the trial level. We find that the district court did not abuse its discretion in failing to award a temporary increase in child support during the pendency of this action and in refusing to reassign the parties' health insurance obligation. Therefore, we modify the father's child support obligation, effective January 1, 1998, to $1,024 per month for the parties' two minor children and $698.70 per month when one child remains in the household. The father is ordered to pay the sum of $1,200 for the mother's attorney fees in the district court. The judgment of the district court is affirmed as modified.

AFFIRMED AS MODIFIED.

MILLER-LERMAN, J., not participating.

DIANA LEE SIMONS, APPELLEE, V.
RONALD DAVID SIMONS, APPELLANT.
624 N.W.2d 36

Filed April 6, 2001. No. S-99-1442.

1. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court.
2. **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.
3. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
4. **Accord and Satisfaction.** To constitute an accord and satisfaction, there must be (1) a bona fide dispute between the parties, (2) substitute performance tendered in full satisfaction of the claim, and (3) acceptance of the tendered performance.
5. **Estoppel.** The doctrine of equitable estoppel will not be invoked against a governmental entity except under compelling circumstances where right and justice so demand; in such cases, the doctrine is to be applied with caution and only for the purpose of preventing manifest injustice.

6. **Judgments.** If a judgment looks to the future in an attempt to judge the unknown, it is a conditional judgment.
7. **Judgments: Final Orders.** A conditional judgment is one that does not perform in praesenti and leaves to speculation and conjecture what its final effect may be.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

Ralph E. Peppard for appellant.

Mary Pat K. Coe for State of Nebraska.

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

HENDRY, C.J.

INTRODUCTION

On June 10, 1997, Ronald David Simons filed a declaratory judgment action asking the court to declare the Income Withholding for Child Support Act (the Act), currently codified at Neb. Rev. Stat. § 43-1701 et seq. (Reissue 1998 & Cum. Supp. 2000), unconstitutional and to quash a May 1997 amended notice to withhold child support from his earnings. The court denied Ronald any relief, and Ronald appeals.

FACTUAL BACKGROUND

On July 1, 1986, Diana Lee Simons' petition for a divorce from Ronald was granted by the district court for Douglas County. The parties had three minor children, who were 8, 7, and 6 years old at the time of the divorce. Ronald, who had been employed as a meatpacker and cook, was ordered to pay child support.

At the time of the divorce decree, Ronald was incarcerated, having been found guilty of first degree sexual assault upon one of the children. The decree states:

> C. Beginning with the first day of the first month following respondent's release from prison, respondent shall pay to the Clerk of the District Court of Douglas County, Nebraska, for the support of the minor children of the parties, the sum of $100.00 per month, per child, or a total of $300.00 per month.

Ronald did not pay any child support after being released from prison on August 1, 1988.

Prior to 1988, Diana began receiving Aid to Families with Dependent Children payments from the State. Pursuant to Neb. Rev. Stat. § 43-512.07 (Reissue 1993), Diana's receipt of these payments operated as an assignment of Diana's right to enforce Ronald's child support obligation ordered by the district court in the July 1, 1986, decree to the Nebraska Department of Health and Human Services (formerly the Nebraska Department of Social Services). A notice of assignment was filed with the Douglas County District Court on March 8, 1994, effective August 1, 1988.

A notice of intent to withhold income pursuant to § 43-1718.01 (Reissue 1993) of the Act was mailed to Ronald on January 10, 1995. In May 1997, Child Support Services of Nebraska (CSSN), the private contractor hired by the State to collect child support, sent Ronald's employer an amended notice to withhold income pursuant to § 43-1720 (Cum. Supp. 1994).

The oldest of Diana and Ronald's children became emancipated in 1996. As a result, the amended notice ordered Ronald's employer to withhold $200 per month rather than $300 per month for ongoing support and an additional $50 per month toward Ronald's arrearage. Ronald's total arrearage, as calculated by the clerk of the district court, totaled $29,074.50. This calculation utilized August 1, 1988, as the date the support obligation commenced, which date corresponded to the date Ronald was released from prison.

On June 10, 1997, Ronald filed a declaratory judgment action asking the court to declare the Act, and the actions of CSSN under the Act, unconstitutional, and to quash the May 1997 amended notice to withhold. Ronald also argued that the order of child support in the 1986 divorce decree was conditional and that therefore the support order was void. In addition, Ronald asserted that because there had been an "accord and satisfaction" between Diana and Ronald regarding the child support payments, Ronald no longer had any obligation to pay support.

While the declaratory judgment action was pending, Ronald filed a motion to stay child support payments in the divorce proceeding, requesting the district court to stay the $250 ordered to be withheld by his employer pursuant to the May 1997 amended notice sent by CSSN. The district court, after finding that the

$50 "added to the $200 . . . was not approved by the Court," ordered CSSN not to include this arrearage payment in its notice to Ronald's employer. The $200 in ongoing support was not affected.

In January 1998, Ronald and the State filed cross-motions for summary judgment in the declaratory judgment action. Both motions were denied. Trial on the declaratory judgment action was scheduled for April 29, 1999. Sometime prior to the scheduled hearing, the second child of Diana and Ronald was emancipated. As a result, the district court in the divorce proceeding again modified the decree. The modified decree ordered Ronald to pay $100 per month for the support of the remaining child and $100 per month for the arrearage, for a total of $200 per month.

On April 29, 1999, the declaratory judgment action was heard. Diana had notice of the hearing but did not appear. At the hearing, Ronald testified that after he was released from jail, he met with Diana and that the following conversation ensued:

> Q. What did she say to you?
>
> A. We had some small talk, and she says that, if they come after me for child support, it's not her fault, 'cause she don't want anything from me.
>
> . . . .
>
> Q. Did she also talk about you coming around to see her or the kids?
>
> A. She just said she didn't want to see me no more.
>
> . . . .
>
> Q. Has she ever contacted you about paying child support since—or ever?
>
> A. No
>
> Q. Did you understand your conversation to be an exchange of you giving up your visitation rights and she would give up receiving child support?
>
> A. I got that impression.

On October 21, 1999, the district court decided the declaratory judgment action against Ronald, determining that the Act was not unconstitutional. It further denied Ronald's request to quash the May 1997 notice of withholding. Ronald filed a motion for new trial, which was overruled on December 1, 1999. Ronald filed his appeal on December 16.

We moved this case to our docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals. Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

Ronald asserts, rephrased, that the district court erred in failing to find that (1) the Act violates the separation of powers doctrine in Neb. Const. art. II, § 1, and the "open courts" provision found in Neb. Const. art. I, § 13, in that the Act improperly grants CSSN authority to determine the monthly amount to be withheld from Ronald's earnings for arrearage without resort to the courts; (2) Diana released Ronald from his obligation to pay any child support in accord and satisfaction for his agreement to have no contact with the children; (3) the support order contained in the divorce decree is void as a conditional order; and (4) the State was equitably estopped from collecting any child support from Ronald. He asserts that the court also erred in failing to (5) grant a new trial, (6) award Ronald attorney fees, and (7) sustain Ronald's motion for summary judgment.

STANDARD OF REVIEW

[1] In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court. *Dunn v. Daub*, 259 Neb. 559, 611 N.W.2d 97 (2000).

ANALYSIS

CONSTITUTIONALITY

In May 1997, pursuant to the Act, CSSN sent an income withholding notice to Ronald's employer, directing the employer to withhold $50 per month toward Ronald's arrearage of $29,074.50, as well as $200 per month in ongoing support. According to Ronald, the Act unconstitutionally authorized CSSN, at its discretion and without court authorization, to impose the additional payment for arrearage. Ronald argues that by imposing the additional $50 payment, CSSN violated both art. II, § 1, and art. I, § 13, of the Nebraska Constitution.

The record, however, shows that on June 20, 1997, the district court quashed that portion of CSSN's notice ordering Ronald's

employer to withhold an additional $50 per month for arrearage. There is nothing in the record to indicate that the State appealed that order. In addition, the record further indicates the district court, in the divorce proceeding, subsequently approved a modification of Ronald's ongoing child support obligation. After the second child was emancipated, the court set Ronald's obligation at $100 per month for current support and $100 per month to be applied to the arrearage.

[2,3] "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." *Hron v. Donlan*, 259 Neb. 259, 262, 609 N.W.2d 379, 383 (2000). "A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. As a general rule, a moot case is subject to summary dismissal." *Id.* at 263, 609 N.W.2d at 383.

The $50 increase which Ronald claims was unconstitutional was quashed by the district court. There is no indication from the record that the State is presently attempting to withhold anything beyond the subsequent court-ordered amount of $200. For these reasons, the issue initially presented by Ronald regarding the alleged unconstitutionality of CSSN's actions under the Act has ceased to exist and is therefore moot. See *id.* In addition, Ronald has not demonstrated any reason which would justify the application of an exception to the mootness doctrine. See *Hauser v. Hauser*, 259 Neb. 653, 611 N.W.2d 840 (2000). Ronald's first assignment of error is moot and thus without merit.

Accord and Satisfaction

Ronald next argues that he has no child support obligation for the State to enforce because he and Diana reached an "accord and satisfaction." Ronald contends that the conversation he had with Diana after his release from prison was an accord and satisfaction releasing him from his support obligations. This conversation simply does not meet the elements of an accord and satisfaction.

[4] To constitute an accord and satisfaction, there must be (1) a bona fide dispute between the parties, (2) substitute performance tendered in full satisfaction of the claim, and (3) accept-

ance of the tendered performance. *Mischke v. Mischke*, 253 Neb. 439, 571 N.W.2d 248 (1997). Under these facts, Diana and Ronald could not reach accord and satisfaction. Diana's right to enforce Ronald's child support obligation had previously been assigned to the State pursuant to § 43-512.07, effective August 1, 1988. Given the circumstances of this case, there was simply no bona fide dispute between Diana and Ronald. This assignment of error is without merit.

EQUITABLE ESTOPPEL

Ronald further asserts that the State is equitably estopped from collecting any child support or arrearage from Ronald, 9 years after Diana purportedly "released" him from his child support obligation. To satisfy the elements of equitable estoppel, Ronald must show, on the part of the State,

> (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 persons; and (3) knowledge, actual or constructive, of the real facts . . . .

State ex rel. Neb. Health Care Assn. v. Dept. of Health, 255 Neb. 784, 795-96, 587 N.W.2d 100, 108 (1998).

[5] The doctrine of equitable estoppel "will not be invoked against a governmental entity except under compelling circumstances where right and justice so demand; in such cases, the doctrine is to be applied with caution and only for the purpose of preventing manifest injustice." *Id.* at 796, 587 N.W.2d at 108.

There is no manifest injustice in requiring Ronald to fulfill his legal obligation to support his children. There is no evidence in the record that the State has falsely represented or concealed any facts from Ronald. This error is without merit.

CONDITIONAL ORDER

Finally, Ronald argues that because the divorce decree stated that his support obligation began on the day he was released from prison, the support order was conditional and thus unenforceable.

[6,7] If a judgment looks to the future in an attempt to judge the unknown, it is a conditional judgment. *Village of Orleans v. Dietz*, 248 Neb. 806, 539 N.W.2d 440 (1995), citing *Romshek v. Osantowski*, 237 Neb. 426, 466 N.W.2d 482 (1991). A conditional judgment is one that does not "perform in praesenti" and leaves to speculation and conjecture what its final effect may be. *Dietz, supra*, citing *Schaad v. Simms*, 240 Neb. 758, 484 N.W.2d 474 (1992).

The court's support order here did not leave its final effect to speculation and conjecture. Ronald's child support obligation was set at $100 per month per child, commencing upon his release from prison. Although Ronald's actual release date was not stated in the order, it was clear that Ronald would be released from prison, and on August 1, 1988, he was released. Ronald's release from prison is not an unknowable or uncertain future event. This assignment of error is also without merit.

REMAINING ASSIGNMENTS OF ERROR

Ronald also asserts the court erred in failing to grant a new trial, in failing to award Ronald attorney fees, and in failing to sustain Ronald's motion for summary judgment. Based on our disposition of the above-mentioned issues, we conclude these assignments of error are similarly without merit.

CONCLUSION

The judgment of the district court is affirmed.

AFFIRMED.

VICKY KLUNDT, AS PARENT AND NATURAL GUARDIAN OF JENNIFER KARR, FORMERLY A MINOR, AND VICKY KLUNDT, INDIVIDUALLY, APPELLANT, AND JENNIFER KARR, APPELLEE, V. STEVEN D. KARR, APPELLEE.

624 N.W.2d 30

Filed April 6, 2001. No. S-00-014.

1. **Directed Verdict: Appeal and Error.** In reviewing the action of a trial court, an appellate court must treat a motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is

directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.

2. **Judgments: Directed Verdict: Appeal and Error.** On appeal from an order of a trial court dismissing an action at the close of the plaintiff's evidence, an appellate court must accept the plaintiff's evidence as true, together with reasonable conclusions deducible from that evidence.
3. **Negligence: Words and Phrases.** Gross negligence, within the meaning of the Nebraska guest statute, means gross and excessive negligence or negligence in a very high degree, the absence of slight care in the performance of duty, an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others.
4. **Directed Verdict.** A directed verdict is proper at the close of all the evidence only where reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., for appellant.

J. Arthur Curtiss, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee Steven D. Karr.

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

MCCORMACK, J.

NATURE OF CASE

Appellant, Vicky Klundt, individually and as parent and natural guardian of her daughter, appellee Jennifer Karr, brought suit against appellee Steven D. Karr, Vicky's ex-husband and the father of Jennifer. Vicky and Jennifer alleged that Jennifer suffered severe and permanent injuries when she fell from the back of a pickup truck being operated by Steven. Vicky and Jennifer claimed that Steven was grossly negligent in allowing Jennifer to ride on the tailgate of the pickup and should be liable for Jennifer's injuries. The case proceeded to a jury trial. At the close of Vicky and Jennifer's evidence, Steven made an oral motion for a directed verdict alleging four grounds. However, the trial court decided this motion on the ground that the negligence of Steven was not gross. The trial court granted the

motion for directed verdict. Vicky appeals, and this court removed this case from the Nebraska Court of Appeals under our power to regulate the caseloads of this court and the Court of Appeals.

BACKGROUND

On May 16, 1992, Steven allowed Jennifer, then 13 years of age, and her friend Tara Folsom, approximately the same age, to ride in the back of his pickup while driving around Pawnee Lake which was only 1½ to 2 miles away from Steven's house. Steven usually did not let anyone ride in the back of the pickup and was told by Vicky the night before not to let the girls ride in the back of the pickup. Steven could see the girls in the back of the pickup through the pickup's mirrors and looked back at them frequently. Steven was traveling approximately 25 m.p.h. in a 50-m.p.h. speed zone around the lake. The road surface was asphalt. Steven testified that he was driving around the lake when he heard the tailgate come down. Then, in a matter of seconds, Jennifer fell or jumped out of the back of the pickup.

Tara testified that Jennifer put the tailgate down and that the two of them scooted out onto the tailgate and rode that way for 3 or 4 minutes. Tara also testified that as they were riding they saw some boys along the side of the road and that Jennifer asked, "Should I jump?" and "Do you want me to jump?" Tara told her "no." Tara then testified that shortly after asking these questions, Jennifer "jumped or whatever." Tara did not actually see Jennifer go off the pickup. Jennifer sustained a brain injury, lost consciousness, and remained unresponsive in a "week-long coma." Jennifer does not remember the accident. Jennifer has received treatment and therapy from psychologists, speech and language therapists, physical therapists, occupational therapists, and social workers and has participated in a rehabilitation program.

At the conclusion of Vicky and Jennifer's evidence, the trial court sustained Steven's motion for directed verdict, finding insufficient evidence to establish Steven's gross negligence.

ASSIGNMENTS OF ERROR

Vicky assigns that the trial court erred (1) in finding the evidence insufficient, as a matter of law, to establish gross negli-

gence on the part of Steven and (2) in granting Steven's motion for directed verdict.

STANDARD OF REVIEW

[1] In reviewing the action of a trial court, an appellate court must treat a motion for directed verdict as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *Lackman v. Rousselle*, 257 Neb. 87, 596 N.W.2d 15 (1999); *Corcoran v. Lovercheck*, 256 Neb. 936, 594 N.W.2d 615 (1999); *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999).

[2] On appeal from an order of a trial court dismissing an action at the close of the plaintiff's evidence, an appellate court must accept the plaintiff's evidence as true, together with reasonable conclusions deducible from that evidence. *Snyder v. Contemporary Obstetrics & Gyn.*, 258 Neb. 643, 605 N.W.2d 782 (2000); *Alexander v. Warehouse*, 253 Neb. 153, 568 N.W.2d 892 (1997).

ANALYSIS

On appeal, Vicky argues that construing the evidence in the light most favorable to the plaintiff, the jury could find or infer from the evidence that (1) Steven, knowing of the dangers of riding in the back of a pickup, permitted Jennifer and Tara to ride unattended in the back; (2) while driving, Steven was aware that Jennifer had lowered the tailgate and that both girls were sitting on it with their feet hanging down off of it; and (3) Steven continued to operate the vehicle, knowing the two girls were on the tailgate for "4 to 5 minutes, at a speed of 25 to 30 m.p.h. over gravel county roads, until Jennifer fell from the tailgate." Brief for appellant at 10. However, there is evidence in the record which states the time at 3 or 4 minutes. Exhibits 15 to 31 show the accident happened on an asphalt road. Vicky contends that this evidence is sufficient to create a jury question regarding whether Steven's conduct was grossly negligent under Nebraska's guest statute, Neb. Rev. Stat. § 25-21,237 (Reissue

1995). We note that at the time of the incident, May 16, 1992, Neb. Rev. Stat. § 39-6,191 (Reissue 1998) was then in effect. However, 1993 Neb. Laws, L.B. 370, operative January 1, 1994, amended that statute without substantive change.

Steven contends that the guest statute requires gross negligence in the operation of a motor vehicle. Steven concludes that (1) he was not grossly negligent in his "operation" of his vehicle and that there was not sufficient evidence to establish his actions constituted gross negligence and (2) any negligence, gross or otherwise, on the part of Steven was not the proximate cause of the accident or Jennifer's damages because this accident could not be considered "probable" under the definition of proximate cause.

Section 25-21,237 states in pertinent part:

> The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person related to such owner or operator as spouse or within the second degree of consanguinity or affinity who is riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by (1) the driver of such motor vehicle being under the influence of intoxicating liquor, or (2) the gross negligence of the owner or operator in the operation of such motor vehicle.

[3] Gross negligence, within the meaning of the Nebraska guest statute, means gross and excessive negligence or negligence in a very high degree, the absence of slight care in the performance of duty, an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the safety of others. *Wagner v. Mines*, 203 Neb. 143, 277 N.W.2d 672 (1979). See, also, *Carlson v. Waddle*, 223 Neb. 671, 392 N.W.2d 777 (1986).

[4] A directed verdict is proper at the close of all the evidence only where reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law. *King v. Crowell Memorial Home, ante* p. 177, 622 N.W.2d 588 (2001); *Genetti v. Caterpillar, Inc., ante* p. 98, 621 N.W.2d 529 (2001); *Cole v. Loock*, 259 Neb. 292, 609 N.W.2d 354 (2000). In the present case, Steven made a motion for directed verdict at the close of

Vicky and Jennifer's case. Therefore, the question is, as a matter of law, could a reasonable juror find that Steven's acts constitute more than simple negligence? We need to determine whether the evidence in the record supporting the claimed acts of negligence of Steven is of a sufficient magnitude to constitute gross negligence under § 25-21,237, so as to submit the question to the jury. See *Liston v. Bradshaw*, 202 Neb. 272, 275 N.W.2d 59 (1979).

In *Liston*, we stated:

> "It must be borne in mind, always, that no decision on gross negligence can constitute an absolute precedent in any other case. Each case necessarily differs somewhat in its particular facts and circumstances, and in the composite which results from them. A dissection of the individual facts may, therefore, be misleading, because, in the attempted segregation, part of their real significance may become lost. While it may be regrettable that no perfect yardstick for measuring gross negligence has ever been devised, the numerous decisions, which the guest statutes have produced, seem rather clearly to demonstrate that this is as close as it is possible to come to a judicial solution. If the tapeline of past decisions seems at times to be somewhat inaccurately applied, and the processes of logic to be a bit variable in their result, this may be largely because the observer is looking at the facts in isolation and not in context. Here, both the bench and the profession must be on guard. *Courts cannot hesitate in directing a verdict where the conviction is clear that negligence in a very high degree is not present. But, if there is adequate proof of negligence, a verdict should only be directed where the court can clearly say that it fails to approach the level of negligence in a very high degree under the circumstances. In all other cases, it must be left to the jury to determine whether it amounts to gross negligence or to mere ordinary negligence.*"

(Emphasis in original.) 202 Neb. at 278-79, 275 N.W.2d at 63, quoting *Thompson v. Edler*, 138 Neb. 179, 292 N.W. 236 (1940).

Our standard of review requires that every controverted fact and the benefit of every inference which can reasonably be

deduced from the evidence be resolved in Vicky's favor. The pertinent facts under this review are as follows: Steven believed it to be unsafe to let people ride in the back of a pickup and therefore, prior to May 16, 1992, never allowed anyone to ride in the back of his pickup. Steven allowed his daughter Jennifer and her friend Tara to ride in the back of his pickup on May 16. Steven became aware that Jennifer had lowered the tailgate and that the two girls were sitting on it with their feet hanging down for a period of 3 or 4 minutes while Steven was traveling at a speed of 25 m.p.h. Jennifer and Tara saw some boys on the side of the road, Jennifer asked Tara if she should jump out, and Tara said "no." Tara did not see whether Jennifer jumped or fell out of the pickup. Jennifer sustained a brain injury when she landed on the asphalt road.

Most of the cases brought under § 25-21,237 and its forerunner § 39-6,191 focus on one or more of the following factors: intoxication, speed, failure to maintain lookout, and failure to control. Vicky has relied on several cases in which the facts, alleged to be grossly negligent, appear to be distinguishable from the present case.

In *Larson v. Storm*, 137 Neb. 420, 289 N.W. 792 (1940), the plaintiff, age 20, complained to the defendant, age 23, that he was driving too fast. They were crossing a bridge at 50 to 55 m.p.h. when the defendant failed to make a slight turn, lost control of the car, went into a ditch, and hit a cement pipe. The car bounced up, and the door flew open, throwing the plaintiff out onto the frozen ground. This court held that from these facts, a jury could consider whether gross negligence existed.

In *Jennings v. Lowrey*, 168 Neb. 831, 97 N.W.2d 345 (1959), the defendant was driving in excess of 60 to 70 m.p.h., at about 2:30 a.m., when they reached a curve in the road. The defendant's car left the pavement, skidded 10 feet, and hit a stop sign. The plaintiff was thrown from the car while the car rolled over. This court ruled that reasonable minds could differ as to whether or not the defendant's actions constituted gross negligence.

In *Demont v. Mattson*, 188 Neb. 277, 196 N.W.2d 190 (1972), an 18-year-old driver and four passengers, aged 13 through 15, were traveling down a hill on a winding, narrow, and unlighted road at 50 m.p.h. and failed to make a curve, went into a ravine,

and hit an embankment. This court ruled that the trial court was correct in submitting to the jury the question whether the defendant was guilty of gross negligence.

Jones v. Foutch, 203 Neb. 246, 278 N.W.2d 572 (1979), involved the defendant, age 16, who was an unlicensed motorcyclist who had driven this particular motorcycle only two or three times, and the plaintiff, his 15-year-old passenger. The defendant accelerated to 20 m.p.h. over the speed limit, in heavy traffic, driving between lanes and between cars. The plaintiff told the defendant to slow down because she knew a curve was coming, but the defendant failed to slow down and missed the turn, striking a guardrail. This court found that the evidence supported a finding of gross negligence and that the trial court was correct in submitting the case to the jury.

In addition, Vicky cited cases in which this court ruled that the claims of gross negligence did not present a jury question. These cases also appear to contain facts that are distinguishable from the present case.

In *Montgomery v. Ross*, 156 Neb. 875, 58 N.W.2d 340 (1953), the defendant, while driving his car, left the traveled portion of the highway and passed onto and across the shoulder and into a ditch. The defendant drove the car for another 100 feet and then hit an embankment. This court held that the defendant's negligence did not rise to the degree of gross negligence within the meaning of the statute. This court affirmed the trial court's sustaining the defendant's motion to dismiss.

Luther v. Pawling, 195 Neb. 679, 240 N.W.2d 42 (1976), was a wrongful death action. In *Luther*, while driving 60 m.p.h. on a gravel road, the driver reached under the seat for "a missing cupcake." The car hit a cement bridge and ended up in a ditch. This court affirmed the trial court's sustaining the defendant's motion for summary judgment.

Finally, in *Wagner v. Mines*, 203 Neb. 143, 277 N.W.2d 672 (1979), three people were in a two-seat British Triumph sports car. The defendant's daughter was driving, the plaintiff occupied the passenger seat, and another passenger occupied a space to the rear of the two seats. Emergency vehicles were up ahead on the road because of a plane crash. The car immediately ahead of the Triumph either slowed down or made an abrupt stop, and the

defendant's daughter ran into the rear of that vehicle. The plaintiff was thrown through the windshield. This court held that "failure to maintain a proper lookout alone does not ordinarily constitute gross negligence. When the evidence viewed most favorably for plaintiff fails to disclose gross negligence, the trial court is obligated to sustain a motion to direct a verdict for the defendant." *Id.* at 149, 277 N.W.2d at 676.

In a gross negligence case, if there is adequate proof of negligence, a verdict should be directed only where the court can clearly say that it fails to approach the level of negligence to a very high degree under the circumstances. See *Liston v. Bradshaw*, 202 Neb. 272, 275 N.W.2d 59 (1979). Steven was going half the speed limit at 25 m.p.h. when the accident occurred. Steven and the two girls were leaving the lake at the time of the accident. Steven testified that his house was about 1½ or 2 miles away from the lake. Even with an inference for Vicky, Steven was a relatively short distance away from home. Although Steven may have made some bad decisions which constitute negligence, we conclude that his actions do not rise to the level of gross negligence. Reasonable minds would not differ and could only draw one conclusion, that Steven's actions were not grossly negligent. Courts cannot hesitate in gross negligence cases to direct a verdict where the conviction is clear that negligence in a very high degree is not present. See *id.*

CONCLUSION

Finding that Steven's actions do not constitute gross negligence, we affirm the trial court's order sustaining Steven's motion for directed verdict.

AFFIRMED.

GERRARD, J., dissents.

J.B. CONTRACTING SERVICES, INC., A NEBRASKA CORPORATION, APPELLEE, AND NEBRASKA BEEF, LTD., A NEBRASKA LIMITED PARTNERSHIP, AS ASSIGNEE OF J.B. CONTRACTING SERVICES, INC., APPELLANT, V. UNIVERSAL SURETY COMPANY, A NEBRASKA CORPORATION, APPELLEE.

624 N.W.2d 13

Filed April 6, 2001. No. S-00-041.

1. **Demurrer: Pleadings: Appeal and Error.** In an appellate court's review of a ruling on a demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader.
2. **Demurrer: Pleadings.** In determining whether a cause of action has been stated, the 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 must be overruled.
3. **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.
4. **Courts: Appeal and Error.** An appellate court will not consider an issue on appeal that was not passed upon by the trial court.
5. **Actions: Judicial Notice: Demurrer.** When cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in the former proceedings involving one of the parties now before it, the court has a right to examine its own records and take judicial notice of its own proceedings and judgments in the former action. Matters so judicially noticed are properly considered when determining the question presented by a demurrer.
6. **Records: Appeal and Error.** It is incumbent on the party appealing to present a record which supports the errors assigned, and absent such a record, the decision of the lower court will be affirmed.
7. **Judgments: Records: Appeal and Error.** Meaningful appellate review requires a record that elucidates the factors contributing to the lower court judge's decision.
8. **Demurrer: Pleadings.** When a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendment will correct the defect.
9. **Demurrer: Pleadings: Appeal and Error.** Before error can be predicated upon the refusal of a trial court to permit an amendment to a petition after a demurrer is sustained, the record must show that under the circumstances, the ruling of the court was an abuse of discretion.
10. **Judges: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.

Appeal from the District Court for Douglas County: MICHAEL MCGILL, Judge. Affirmed.

William M. Lamson, Jr., and Robert A. Mooney, of Lamson, Dugan & Murray, L.L.P., and, on brief, Cletus W. Blakeman and David A. Domina, of Domina Law, P.C., for appellant.

David A. Hecker, of Kutak Rock, L.L.P., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MILLER-LERMAN, JJ.

STEPHAN, J.

Nebraska Beef, Ltd., as the assignee of J.B. Contracting Services, Inc. (J.B. Contracting), asserted claims in this action against Universal Surety Company (Universal) based upon a performance bond pursuant to which ABC Electric, Inc., as principal, and Universal, as surety, undertook certain obligations to J.B. Contracting in connection with a construction project on property owned by Nebraska Beef. The district court for Douglas County sustained Universal's demurrer, denied leave to amend, and dismissed the action. Nebraska Beef perfected this timely appeal which we moved to our docket on our own motion pursuant to our authority to regulate the dockets of the appellate courts. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995). We affirm the judgment of the district court.

BACKGROUND

FACTUAL ALLEGATIONS

We summarize the facts alleged by Nebraska Beef in its petition as follows: On or about April 28, 1995, Nebraska Beef, a Nebraska limited partnership, engaged J.B. Contracting to provide construction management and general contractor services in connection with the remodeling and expansion of facilities located at 4501 South 36th Street in Omaha, Nebraska, which were owned by Nebraska Beef. On or about that same date, J.B. Contracting entered into a "Standard Sub-Contract Agreement" with ABC Electric, an Iowa corporation. Under this subcontract, ABC Electric was to provide labor and material for the project. Pursuant to the subcontract, ABC Electric was required to obtain, effect, maintain, and furnish a performance bond to J.B. Contracting. On May 16, Universal, a Nebraska corporation, executed and delivered to J.B. Contracting a "Subcontract

Performance Bond Form A" that designated ABC Electric as principal, Universal as surety, and J.B. Contracting as obligee.

Nebraska Beef alleged that while J.B. Contracting complied at all times with its obligations under the subcontract, ABC Electric failed to perform its obligations in a timely and workmanlike manner. Thereafter, J.B. Contracting timely notified ABC Electric and Universal of ABC Electric's failure to perform its obligations. On November 15, 1995, both J.B. Contracting and Nebraska Beef sent a letter to ABC Electric and Universal specifically identifying ABC Electric's failure to perform. This letter was received by ABC Electric and Universal on November 16. Nebraska Beef alleged that Universal then began to make arrangements to perform ABC Electric's obligations under the subcontract, but failed to properly and timely remedy the deficiencies.

According to the petition, on March 11, 1997, J.B. Contracting filed an action in Douglas County District Court alleging that Nebraska Beef had failed to pay it for services rendered pursuant to the agreement. Nebraska Beef responded that J.B. Contracting was responsible to it for damages it sustained due to ABC Electric's failure to perform under the subcontract. On November 14, J.B. Contracting and Nebraska Beef entered into an agreement settling their dispute. The settlement included an agreement by Nebraska Beef to pay $45,000 to J.B. Contracting in exchange for an assignment by J.B. Contracting of its right to pursue any claim that J.B. Contracting had against ABC Electric or Universal.

In the portion of its petition designated as "First Cause of Action," Nebraska Beef alleged that Universal breached a covenant of good faith and fair dealing to J.B. Contracting which was implied in the performance bond. Specifically, Nebraska Beef alleged that Universal breached the covenant by (1) failing to inform J.B. Contracting that ABC Electric had defaulted on other construction projects; (2) failing to acknowledge communications regarding claims from both J.B. Contracting and Nebraska Beef; (3) failing to adequately investigate ABC Electric's default and the scope of work completed under the subcontract; (4) failing to adopt and implement reasonable standards to investigate the claim of J.B. Contracting and Nebraska Beef on the performance bond; (5) failing to pay

claims without conducting reasonable investigation; (6) failing to comply with standards in the industry for investigating the claim; (7) failing to, in good faith, effectuate prompt, fair, and equitable settlements of claims for which liability had become reasonably clear; (8) allowing ABC Electric to represent Universal in investigating, negotiating, and litigating the claim; (9) compelling ABC Electric to proceed with litigation; (10) failing to reasonably and adequately explain its failure to remedy ABC Electric's defaults under the performance bond; and (11) filing a lawsuit against Nebraska Beef on a subrogation claim of a construction lien which arose due to the nonpayment by ABC Electric of one of its subcontractors for labor and materials. Nebraska Beef alleged that as a direct and proximate result of Universal's breach, it sustained damages in that it was required to pay another contractor to complete ABC Electric's deficient work and that such completion delayed the operation of the facility, thus causing it to lose profits.

In that portion of its petition designated "Second Cause of Action," Nebraska Beef alleged that Universal violated the Unfair Insurance Claims Settlement Practices Act (UICSPA), codified at Neb. Rev. Stat. §§ 44-1536 to 44-1544 (Reissue 1993 & Cum. Supp. 1994), by (1) failing to acknowledge the claims of Nebraska Beef and J.B. Contracting with reasonable promptness, (2) refusing to pay J.B. Contracting's claim without first making reasonable investigation, (3) failing to adopt and implement reasonable standards to investigate the claim, and (4) making payment on the claim of J.B. Contracting without identifying the coverage under which each payment was being made. Nebraska Beef alleged that as a direct and proximate result of these violations, it and J.B. Contracting suffered the aforementioned damages.

Procedural Background

Universal filed a demurrer in which it asserted that the petition failed to state a cause of action. Specifically, Universal asserted that the petition was deficient because (1) it failed to allege any recoverable damage sustained by J.B. Contracting; (2) "Nebraska does not recognize claims by third-parties for bad faith against an insurer or surety"; and (3) the UICSPA does not afford a private right of action and that even if it did, "Universal

is not an 'insurer' as defined in § 44-1538(1)(c) of such act." A hearing on the demurrer was scheduled for October 22, 1999. However, because no bill of exceptions was filed in this appeal, we have no verbatim record of that proceeding.

On December 8, 1999, the district court entered its order sustaining the demurrer and dismissing the petition with prejudice. Relying upon *Dalition v. Langemeier*, 246 Neb. 993, 524 N.W.2d 336 (1994), and *State Security Savings Co. v. Pelster*, 207 Neb. 158, 296 N.W.2d 702 (1980), the court took judicial notice of an order that it had entered on June 29, 1999, in "the related case of J.B. Contracting Services, Inc. v. Universal Surety Company, Doc. 966, No. 988." The district court characterized that case as "certainly interwoven and interdependent" with the instant case in that both cases

> arise out of the same subject matter (i.e. the performance bond), and both involve the same parties, save Nebraska Beef. Since Nebraska Beef's claims, however, are based solely on J.B. Contracting's right to take legal action against Universal, and the former proceeding decided the issue of whether J.B. Contracting could in fact state a claim against Universal, the cases are very closely interwoven and interdependent.

The district court further stated:

> The Order in Doc. 966 No. 988 granted summary judgment for Universal on the grounds that J.B. Contracting failed to prove the existence of any damages, therefore J.B. Contracting could not bring a breach of contract action against Universal and the Amended Petition was then dismissed with prejudice.
>
> A careful examination of the Petition then reveals that all of Nebraska Beef's claims are based on the claims of J.B. Contracting regarding the performance bond and/or subcontract. Nebraska Beef was not a party to either contract and does not request relief on the basis of any third-party rights. Rather, Nebraska Beef's alleged sole right to a claim lies in the assignment of rights from J.B. Contracting to Nebraska Beef in the agreement between those two parties dated November 14, 1997. See Exhibit F, Plaintiff's Petition.

> However, in the previous case the Court found that J.B. Contracting did not suffer any damages and therefore could not sue Universal for a breach of contract. Since all of Nebraska Beef's claims are based on the assignment from J.B. Contracting, and J.B. Contracting has nothing to assign, then Nebraska Beef has nothing to claim.

The district court provided an alternative ground for sustaining the demurrer with respect to the UICSPA claim by determining that contracts of suretyship are not covered under the UICSPA. The district court reasoned that the purpose of the UICSPA was to "'set forth standards for the disposition of claims arising under *policies* issued to residents of this state,'" see § 44-1537, and that § 44-1538(e), defining "policy," states specifically that "'policy or certificate shall *not* include contracts of . . . suretyship.'" Consequently, the district court held that the UICSPA was inapplicable.

Finally, noting that "[t]he defect in the pleadings goes to the right to sue Universal," the district court denied leave to amend, reasoning:

> This Court in the earlier case at Doc. 966 No. 988 held that J.B. Contracting could not sue Universal because it suffered no damages. Even if J.B. Contracting were to suffer damages at some future time, the prior holding dismissed the [sic] J.B. Contracting's case with prejudice, so it cannot bring the same claim again. Since the only way Nebraska Beef has asserted a claim has been through J.B. Contracting, Nebraska Beef is not able to sue Universal on the same claims either.

ASSIGNMENT OF ERROR

Nebraska Beef asserts that "[t]he district court erred in sustaining the demurrer of Universal Surety and in dismissing, with prejudice, Nebraska Beef's Petition without granting Nebraska Beef leave to amend its petition."

STANDARD OF REVIEW

[1,2] In an appellate court's review of a ruling on a demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact

which may be drawn therefrom, but not the conclusions of the pleader. *Noffsinger v. Nebraska State Bar Assn.*, *ante* p. 184, 622 N.W.2d 620 (2001); *Danler v. Rosen Auto Leasing*, 259 Neb. 130, 609 N.W.2d 27 (2000). In determining whether a cause of action has been stated, the 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 must be overruled. *Freeman v. Hoffman-La Roche, Inc.*, 260 Neb. 552, 618 N.W.2d 827 (2000); *Brown v. Social Settlement Assn.*, 259 Neb. 390, 610 N.W.2d 9 (2000).

ANALYSIS

[3] Assuming without deciding that Nebraska Beef's broadly worded assignment of error is sufficient to encompass the district court's disposition of its alleged claim pursuant to the UICSPA, the reasoning by which the district court determined that contracts of suretyship do not fall within the scope of the UICSPA is not discussed in either the opening brief or the reply brief filed on behalf of Nebraska Beef. 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. *Carroll v. Chase County*, 259 Neb. 780, 612 N.W.2d 231 (2000); *Miller v. E.M.C. Ins. Cos.*, 259 Neb. 433, 610 N.W.2d 398 (2000). Accordingly, we do not consider this issue.

[4] Nebraska Beef argues that because the district court did not address the unresolved issue of whether Nebraska law would recognize the right of one who is not a party to a surety bond to maintain an action for bad faith against the surety, any appellate opinion on this issue "would be premature and advisory at this time." Reply brief for appellant at 14. We agree. An appellate court will not consider an issue on appeal that was not passed upon by the trial court. *In re Estate of Jakopovic*, *ante* p. 248, 622 N.W.2d 651 (2001); *Prucha v. Kahlandt*, 260 Neb. 366, 618 N.W.2d 399 (2000); *Torres v. Aulick Leasing*, 258 Neb. 859, 606 N.W.2d 98 (2000). Therefore, we do not address this issue.

[5] The only other argument advanced by Nebraska Beef in support of its claim that the district court erred in sustaining the demurrer is its contention that the district court should not have

taken judicial notice of its prior order in another case. As correctly noted by the district court, we have held that when cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in the former proceedings involving one of the parties now before it, the court has a right to examine its own records and take judicial notice of its own proceedings and judgments in the former action. Matters so judicially noticed are properly considered when determining the question presented by a demurrer. *In re Adoption of Trystyn D.*, 259 Neb. 539, 611 N.W.2d 112 (2000); *Dalition v. Langemeier*, 246 Neb. 993, 524 N.W.2d 336 (1994); *Association of Commonwealth Claimants v. Moylan*, 246 Neb. 88, 517 N.W.2d 94 (1994). While it does not challenge this principle, Nebraska Beef argues that the district court erred in taking judicial notice of its order in the prior action because the two proceedings are not interwoven and interdependent.

Judicial notice of adjudicative facts is governed by Neb. Evid. R. 201, Neb. Rev. Stat. § 27-201 (Reissue 1995). This rule authorizes a judge or court to "take judicial notice, whether requested or not," and provides that "[j]udicial notice may be taken at any stage of the proceeding." § 27-201(3) and (6). In addition, the rule provides that "[a] party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken." § 27-201(5). The record does not reflect that Nebraska Beef utilized this rule to challenge the propriety of taking judicial notice in the district court prior to perfecting this appeal. Assuming without deciding that the issue is nevertheless preserved for appeal, the record does not permit us to address it.

[6,7] It is incumbent on the party appealing to present a record which supports the errors assigned, and absent such a record, the decision of the lower court will be affirmed. *In re Application of SID No. 384*, 259 Neb. 351, 609 N.W.2d 679 (2000); *Durkan v. Vaughan*, 259 Neb. 288, 609 N.W.2d 358 (2000); *Shearer v. Leuenberger*, 256 Neb. 566, 591 N.W.2d 762 (1999). Meaningful appellate review requires a record that elucidates the factors contributing to the lower court judge's decision. *Van Ackeren v. Nebraska Bd. of Parole*, 251 Neb. 477, 558 N.W.2d 48 (1997). In

In re Adoption of Trystyn D., supra, an appeal from the dismissal of a motion to set aside an adoption upon the sustaining of a demurrer, we noted that the county court could take judicial notice of the facts determined in the adoption proceeding which were included in the appellate record. Similarly, in *Association of Commonwealth Claimants v. Moylan, supra*, we noted that in ruling upon a demurrer, the district court took judicial notice of its prior related proceeding and that since the record from that proceeding had been included in the appellate record, it could properly be considered by this court.

Here, the record discloses nothing of the proceeding of which the district court took judicial notice, other than the court's brief description of that proceeding in its order as set forth above, and its characterization of the two proceedings as being "certainly interwoven and interdependent." Neither the order granting summary judgment nor any of the pleadings in the judicially noticed proceeding appear in the appellate record before us in this case. This could have been accomplished by inclusion of the pertinent documents from the other proceeding in the transcript filed herein. See, *State v. Dandridge*, 255 Neb. 364, 585 N.W.2d 433 (1998); Neb. Ct. R. of Prac. 4 (rev. 2000). In the absence of a record containing the order and pleadings from the judicially noticed proceeding, we are unable to address Nebraska Beef's contention that the prior proceeding and the present one are not interrelated and independent and that judicial notice was therefore improper.

[8-10] Finally, we address the argument that the district court erred in not granting Nebraska Beef leave to amend its petition after sustaining Universal's demurrer. When a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendment will correct the defect. *Noffsinger v. Nebraska State Bar Assn., ante* p. 184, 622 N.W.2d 620 (2001); *Gordon v. Community First State Bank*, 255 Neb. 637, 587 N.W.2d 343 (1998). Before error can be predicated upon the refusal of a trial court to permit an amendment to a petition after a demurrer is sustained, the record must show that under the circumstances, the ruling of the court was an abuse of discretion. *Drake v. Drake*, 260 Neb. 530, 618 N.W.2d 650 (2000). An abuse of dis-

cretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Weiss v. Weiss*, 260 Neb. 1015, 620 N.W.2d 744 (2001).

In the present case, the district court denied leave to amend based upon its reasoning that the defect in the petition went to the right of Nebraska Beef, as the assignee of J.B. Contracting, to maintain an action against Universal arising from the facts alleged in the petition. Because we do not disturb the district court's determination as a matter of law that J.B. Contracting had no valid claim to assign, we must also conclude that this defect cannot be cured by amendment.

In arguing that it should have been granted leave to amend, Nebraska Beef relies upon *Nebraska Beef v. Universal Surety Co.*, 9 Neb. App. 40, 607 N.W.2d 227 (2000) (*Nebraska Beef I*). In that case, Nebraska Beef asserted claims against Universal based upon the same alleged underlying facts and performance bond involved in the present case, seeking damages on theories of breach of contract and negligence. Universal's demurrer was sustained without leave to amend, and the action was dismissed by the district court. In resolving the appeal from this order taken by Nebraska Beef, the Nebraska Court of Appeals held that the district court did not err in determining that the petition failed to state facts sufficient to constitute a cause of action based upon theories of breach of contract and negligence. However, the Court of Appeals also held that Nebraska Beef should have been given leave to amend its petition to allege a subrogation theory of recovery, i.e., that it had paid subcontractors to complete the obligations of ABC Electric who should have been paid by Universal pursuant to its performance bond, and that it was entitled to recover these payments from Universal. Nebraska Beef argues that "[c]onsidering that the subrogation issues of *Nebraska Beef I* may have direct application in this present case, the requested amendment in this action may correct the district court's perceived defect in the original pleading." Brief for appellant at 13. While Nebraska Beef does not identify the nature of the "requested amendment," we understand its argument to be that it should have been granted leave to amend its petition in this action to allege a subrogation claim.

Nebraska Beef I and the present case involve the same parties and the same underlying factual circumstances, i.e., the alleged default by ABC Electric, the named principal in the performance bond. Other than the theories of recovery asserted, the primary difference we discern between the two cases is that in *Nebraska Beef I*, Nebraska Beef asserted claims on its own behalf whereas in this case, it asserted claims as the alleged assignee of J.B. Contracting. There is nothing in the record or the briefs to suggest that Nebraska Beef could assert a subrogation claim as the assignee of J.B. Contracting. Therefore, granting leave to amend in this action to assert the same subrogation claim that it was given leave to assert in *Nebraska Beef I* would only encourage piecemeal litigation and serve no useful purpose. Accordingly, we conclude that the district court did not abuse its discretion in not granting leave to amend.

CONCLUSION

Based upon the record presented for our review and for the reasons stated herein, we find no error by the district court and, therefore, affirm its judgment of dismissal.

AFFIRMED.

McCORMACK, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
EUSEBIO L. BECERRA, APPELLANT.
624 N.W.2d 21

Filed April 6, 2001. No. S-00-711.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective counsel at trial or on direct appeal, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.
3. **Postconviction: Constitutional Law: Proof.** In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his

or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.

4. **Postconviction: Appeal and Error.** An appellate court will not consider as an assignment of error a question not presented to the district court for disposition through a defendant's motion for postconviction relief.
5. **Jury Instructions: Lesser-Included Offenses: Evidence.** A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.
6. ___: ___: ___. It is not prejudicial error to not instruct upon a lesser-included offense when the evidence entirely fails to show an offense of a lesser degree than that charged in the information.
7. ___: ___: ___. Where the prosecution has offered uncontroverted evidence on an element necessary for a conviction of the greater crime but not necessary for the lesser offense, a duty rests on the defendant to offer at least some evidence to dispute this issue if he or she wishes to have the benefit of a lesser-offense instruction.
8. **Criminal Law: Aiding and Abetting: Intent: Liability.** When a crime requires the existence of a particular intent, an alleged aider or abettor can be held criminally liable as a principal if it is shown that the aider or abettor knew that the perpetrator of the act possessed the required intent or that the aider or abettor himself or herself possessed the required intent.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Eusebio L. Becerra, pro se.

Don Stenberg, Attorney General, and Susan J. Gustafson for appellee.

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

STEPHAN, J.

After conducting an evidentiary hearing, the district court for Sarpy County entered an order denying Eusebio L. Becerra's motion for postconviction relief. This is an appeal from that order. Finding no error, we affirm the judgment of the district court.

BACKGROUND

Following a 1996 jury trial, Becerra was convicted of kidnapping and use of a firearm in the commission of a felony. He was sentenced to life imprisonment on the kidnapping charge

and to a consecutive term of imprisonment of 2 to 5 years on the use of a firearm charge. We affirmed the convictions and sentences on direct appeal in *State v. Becerra*, 253 Neb. 653, 573 N.W.2d 397 (1998). The facts upon which the convictions are based are set forth in detail in that opinion, and we briefly summarize them here.

Acting in concert with a person he identified as Daniel Gonzalez, Becerra abducted Melvin Washington, Jr., on January 5, 1996, as Washington was leaving his place of employment in Omaha. Washington testified at trial as a witness called by the State, and Becerra testified in his own defense. The two men gave differing accounts of the abduction.

Washington testified that as he left his place of employment at approximately 6:30 p.m. on January 5, 1996, he observed a red two-door Blazer occupied by three men including Becerra, to whom he owed money for drugs. According to Washington, Becerra exited the vehicle holding a 9-mm handgun and inquired about the money as he loaded the weapon. After a conversation between Becerra and Gonzalez in which the two men discussed what they were going to do with Washington, Becerra and Washington entered a vehicle owned by Washington's sister while Gonzalez reentered the Blazer with the third, unidentified individual. According to Washington, Becerra held the gun on him and ordered him to follow the Blazer. While driving around the city in this fashion, Becerra repeatedly told Washington that he had "messed up." Eventually, the two vehicles stopped and all four men entered an Oldsmobile. According to Washington, he was ordered into the rear seat of the Oldsmobile with Gonzalez, who was holding an assault rifle aimed at Washington's feet. They then drove around Omaha for an additional period of time. Washington testified that he believed the men were looking for a place to execute him because after exiting the vehicle and checking a warehouse, Becerra told Gonzalez that there were too many cars in the area and that it was not a good spot.

Washington testified that the men then drove him to Lake Manawa in Iowa and that Becerra told him to remove his clothing. Washington complied, taking off everything except his T-shirt, boxer shorts, and socks. He was then ordered out of the

vehicle, where the temperature outside was below freezing. Washington testified that Becerra and Gonzalez were each holding weapons. Becerra continued telling him that he had "messed up" and instructed Washington to come toward them so that Becerra could place his weapon in Washington's mouth. Washington did not comply but turned to walk away, and as he did, Gonzalez and Becerra followed and began kicking and beating him. Washington testified that Becerra hit him in the face with the handgun and that Gonzalez hit him in the back with the rifle. Washington retaliated by striking both Becerra and Gonzalez and was able to escape by running across the frozen lake and hiding in a snowbank until Gonzalez and Becerra left the area. Washington then made his way to a nearby home where he sought and obtained assistance.

In his trial testimony, Becerra denied that he had ever sold drugs but admitted that he arranged a sale of drugs by Gonzalez to Washington for which Washington failed to make payment. Becerra testified that Gonzalez was upset at this and threatened Becerra and his family with harm if the debt was not paid. Becerra testified that on January 5, 1996, Gonzalez picked him up at his home and told him that he needed the money and that Becerra participated in the abduction because he had no other choice. Becerra denied possessing a weapon or harming Washington in any way. He admitted that Gonzalez threatened Washington during the abduction, but claimed that his role was limited to translating between Spanish and English to enable Gonzalez to communicate with Washington.

In his direct appeal, Becerra contended that the evidence was insufficient to sustain his conviction and that he was denied effective assistance by his trial counsel, who was not the same attorney who represented him on appeal. We noted that the evidence clearly supported the conclusion that Becerra had abducted and restrained Washington on January 5, 1996. As to the element of intent, under the standard by which we review the sufficiency of evidence to support a criminal conviction, we held that "[t]here can be no serious dispute that the evidence regarding Washington's abduction and continued restraint, when taking the view most favorable to the State, sufficiently establishes Becerra's intent to terrorize Washington." *State v. Becerra*, 253

Neb. 653, 660, 573 N.W.2d 397, 403 (1998). We also held that Becerra failed to establish ineffective assistance of counsel based upon allegations that his trial counsel failed to object to certain exhibits and leading questions.

We then addressed Becerra's contention on direct appeal that his trial counsel was ineffective because he did not request a lesser-included offense instruction on first degree false imprisonment. Noting that it is the "*intent to terrorize* which distinguishes kidnapping from false imprisonment in the first degree," we held that first degree false imprisonment is a lesser-included offense of kidnapping and overruled the holding to the contrary in *State v. Newman*, 5 Neb. App. 291, 559 N.W.2d 764 (1997). (Emphasis in original.) *Becerra*, 253 Neb. at 665, 573 N.W.2d at 405. However, we concluded that the record was insufficient to determine the second prong of the test utilized to determine whether a lesser-included instruction could have been given, i.e., whether "the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense." *Id.* at 664, 573 N.W.2d at 405.

On January 28, 1999, Becerra, acting pro se, filed a verified motion for postconviction relief alleging that he was deprived of his constitutional right to effective assistance of counsel at trial and on direct appeal. Becerra alleged that his constitutional right to effective assistance of counsel was violated: (1) by his trial counsel's failure to discuss with him a plea bargain offer allegedly made by the prosecution; (2) by his trial counsel's failure to perform adequate discovery, resulting in trial counsel's failure to object to alleged misrepresentations by a law enforcement officer who testified at trial regarding a statement made by Becerra; (3) by his trial counsel's failure to understand the charges against Becerra, thus prejudicing his defense; and (4) by his appellate counsel's failure to properly raise, on direct appeal, the issue of his trial counsel's inability to understand the charges. Becerra also moved for appointment of counsel. On or about February 2, an attorney was appointed to represent Becerra in this proceeding. However, on July 30, an attorney retained by Becerra entered an appearance on his behalf, and his appointed counsel was granted leave to withdraw on August 10. Becerra's retained counsel represented him

throughout the remainder of the postconviction proceedings before the district court.

On April 24, 2000, the district court held an evidentiary hearing on Becerra's postconviction motion. The former deputy Sarpy County Attorney who prosecuted Becerra was called to testify on Becerra's behalf. The prosecutor stated that he did not offer a plea agreement to Becerra and did not recall any discussions with Becerra's trial counsel on this subject. He explained that if he had been approached, he would have entered into plea negotiations.

Becerra also testified at the evidentiary hearing. He stated that he first became aware that a conviction for kidnapping would result in a mandatory life sentence when he was sentenced for his conviction. On cross-examination, Becerra stated he did not remember the judge's informing him of the charges and penalties he was facing. He stated that he was initially represented by the Sarpy County public defender's office, but subsequently retained the attorney who represented him at trial. According to Becerra, his trial counsel informed him that he was facing 7 to 14 years of imprisonment for the kidnapping charge and 3 to 5 years of imprisonment for the use of a deadly weapon to commit a felony charge. Becerra also indicated that his trial counsel never advised him of the possibility of pleading to a lesser charge. He noted that he would have pled guilty to a lesser charge if he had known he was facing life in prison. He also contended that his trial counsel did not discover a police report which contained a statement by Becerra regarding the events of the evening in question. On cross-examination, Becerra stated that he was not sure if the report was in his retained trial counsel's file. However, he did acknowledge that he spoke to his retained trial counsel about the statement he had made to police.

Becerra's trial counsel testified at the evidentiary hearing. He stated that he asked Becerra before trial if he wished to enter into plea negotiations and that Becerra told him emphatically that he did not. He also testified that he discussed with Becerra the statements Becerra had made to the police. Additionally, the attorney testified regarding two proposed jury instructions which he submitted on Becerra's behalf. The first was a choice of lesser harm instruction, and the second was an instruction stating the attorney's theory of the case which was that "Eusebio

Becerra's participation in the events of January 5, 1996 was only to protect Melvin Washington, Becerra, and Becerra's family from a greater harm that Becerra believed might have resulted, had Becerra not done what he did." Before submitting these instructions, the attorney consulted with two other attorneys whom he considered to be experienced in the criminal defense practice. He recalled speaking to Becerra in general terms regarding these instructions and stated that these theories were based on the totality of the circumstances and were developed using his best judgment. On cross-examination, the attorney testified that he informed Becerra that a mandatory life sentence would be imposed if Becerra was convicted of kidnapping.

The Sarpy County public defender also appeared as a witness at the evidentiary hearing. He testified that he represented Becerra at the preliminary hearing and arraignment and that during this representation, no plea agreement was offered by the prosecutor. Although he did not recall specifically explaining to Becerra the penalties he would face if convicted of the charges, the public defender explained that he certainly would have followed his normal practice of doing so during his first interview with a defendant. He also testified that it was customary for the district judge at the arraignment to inform the defendant of the charges involved and the possible penalties.

At the conclusion of the hearing, the district judge asked that Becerra's arraignment proceeding be transcribed and offered for the record. That proceeding was later transcribed and received into evidence on April 26, 2000. The transcript of the arraignment reflects that Becerra was advised that the maximum penalty for a conviction of kidnapping was life in prison.

On June 22, 2000, the district court filed an order denying Becerra's motion. The order addressed each of Becerra's specific allegations of denial of effective assistance of counsel which were set forth in the motion. As to Becerra's allegation that trial counsel failed to advise him of an offer for a plea agreement, the district court found that based on the evidence adduced at the hearing, no offer of a plea agreement was ever made. The district court noted the testimony of Becerra's trial counsel that Becerra emphatically told him he did not want to enter into any plea negotiations.

Addressing the allegation that Becerra's trial counsel had been ineffective in conducting discovery, the district court found that the evidence did not support the conclusion that Becerra's trial counsel did not have the police report in question. Furthermore, the district court found no evidence demonstrating that the law enforcement officer's testimony at trial was false or incorrect. Thus, the district court reasoned that while the testimony may have been impeached, it also may have provided the officer an opportunity to explain or amplify his answer. Given these findings, the district court found that ineffective assistance of counsel was not proved.

Regarding Becerra's allegation that trial counsel did not understand the charges against him and therefore conducted an ineffective defense, the district court found that even if it accepted the allegation as true, Becerra suffered no prejudice. The district court reasoned that "[a]lthough defense theories or tactics may be shown, by hindsight, to be incorrect or without merit, unless it is shown such theories or tactics (assuming they do not meet the appropriate standard for effective representation) caused prejudice, they furnish no grounds for postconviction relief." Based upon the district court's disposition of this issue, it rejected Becerra's allegation that his counsel on direct appeal had been ineffective in not raising it.

Becerra perfected this pro se appeal.

ASSIGNMENTS OF ERROR

Becerra asserts four assignments of error, which we quote verbatim:

> 1. The District Court erred in finding Appellant's trial counsel was not ineffective for failing to understand the charges against the Appellant.
>
> 2. The District Court erred in finding Appellant's direct appeal counsel was not ineffective for failing to properly raise Error #1 on direct appeal.
>
> 3. Appellant's postconviction counsel was ineffective for not arguing the ineffective assistance of trial counsel for failing to request a lesser-included offense instruction, thus violating the Appellant's right to the Due Process of Law.

4. The record shows it was plain error not to give the lesser-included offense jury instruction for first degree false imprisonment [at] the Appellant's trial.

STANDARD OF REVIEW

[1,2] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Silvers*, 260 Neb. 831, 620 N.W.2d 73 (2000); *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000). In order to establish a right to postconviction relief based on a claim of ineffective counsel at trial or on direct appeal, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. *State v. Silvers, supra*; *State v. Soukharith, supra.*

ANALYSIS

In his brief, Becerra characterizes his four assignments of error as "interrelated and dependent upon one another." Brief for appellant at 8. He argues that he was prejudiced by his trial counsel's failure to request a lesser-included offense instruction; that counsel on direct appeal, while raising this issue, was ineffective in failing to present a record to support it; and that his postconviction counsel was ineffective in failing to raise the issue that both trial and appellate counsel were ineffective in this regard. Thus, Becerra's entire argument in this appeal relates to a claim that he was prejudiced by the fact that a lesser-included offense instruction was not requested or given at his trial.

This claim, however, was not asserted in Becerra's pro se motion for postconviction relief. The only reference in that motion to a lesser-included offense is the allegation that Becerra's trial counsel discussed this subject with the prosecutor, received an offer to allow him to plead guilty to a lesser offense, and failed to communicate the offer to him. Based upon the testimony of the prosecutor, the public defender, and Becerra's trial counsel that no plea agreement was ever proposed or discussed, the district court properly rejected this claim

for postconviction relief without addressing whether a lesser-included offense instruction on first degree false imprisonment should have been requested or given at trial.

[3,4] We have held that in a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable. *State v. Narcisse*, 260 Neb. 55, 615 N.W.2d 110 (2000); *State v. El-Tabech*, 259 Neb. 509, 610 N.W.2d 737 (2000). An appellate court will not consider as an assignment of error a question not presented to the district court for disposition through a defendant's motion for postconviction relief. *State v. Casper*, 219 Neb. 641, 365 N.W.2d 451 (1985). Accordingly, we do not reach Becerra's first, second, and fourth assignments of error.

Apparently recognizing this deficiency in his motion for postconviction relief, Becerra contends in his third assignment of error that "postconviction counsel was ineffective for not arguing the ineffective assistance of trial counsel for failing to request a lesser-included offense instruction." We have held that Nebraska does not recognize a constitutional claim based upon ineffectiveness of postconviction counsel. *State v. Gray*, 259 Neb. 897, 612 N.W.2d 507 (2000). Becerra contends, however, that a right to the effective assistance of postconviction counsel arises from Neb. Rev. Stat. § 29-3004 (Reissue 1995), which provides:

> The district court may appoint not to exceed two attorneys to represent the prisoners in all proceedings under sections 29-3001 to 29-3004. The district court, upon hearing the application, shall fix reasonable expenses and fees, and the county board shall allow payment to the attorney or attorneys in the full amount determined by the court. The attorney or attorneys shall be competent and shall provide effective counsel.

Becerra relies upon the last sentence of this statute, which was added by amendment in 1993. See 1993 Neb. Laws, L.B. 652. He argues that this provision creates a statutory right which is guaranteed under the Due Process Clauses of the federal and the state Constitutions.

We have previously held that appointment of counsel in postconviction proceedings pursuant to § 29-3004 is not a matter of right, but, rather, is discretionary with the trial court such that the failure to appoint counsel is not error in the absence of an abuse of discretion. *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000); *State v. Livingston*, 244 Neb. 757, 509 N.W.2d 205 (1993). Whether § 29-3004 has any application to this case is unclear. On its face, it pertains to postconviction counsel who are appointed by the court pursuant to what we have held to be discretionary statutory authority. As noted, Becerra filed his motion for postconviction relief pro se. He was then represented by appointed counsel for a period of approximately 6 months, during which time no proceedings in the case are reflected in the record. Appointed counsel was then given leave to withdraw, and Becerra was represented by retained counsel from July 30, 1999, through the evidentiary hearing on April 24, 2000. We cannot determine from the record or briefs whether Becerra's claim of ineffective assistance of postconviction counsel is directed at his appointed counsel, his retained counsel, or both. The record does not reflect whether Becerra requested either attorney to raise the lesser-included offense issue in this postconviction proceeding, nor does the record reflect why the issue which Becerra now argues in his pro se appellate briefs was not asserted by him in his pro se motion for postconviction relief.

[5-7] We need not address these questions in order to resolve this appeal because we conclude from the record that Becerra was not deprived of effective assistance of counsel at trial by virtue of the fact that his attorney did not request a lesser-included offense instruction on first degree false imprisonment. A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense. *State v. Wright*, 261 Neb. 277, 622 N.W.2d 676 (2001); *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000). It is not prejudicial error to not instruct upon a lesser-included

offense when the evidence entirely fails to show an offense of a lesser degree than that charged in the information. *State v. Cebuhar*, 252 Neb. 796, 567 N.W.2d 129 (1997). Where the prosecution has offered uncontroverted evidence on an element necessary for a conviction of the greater crime but not necessary for the lesser offense, a duty rests on the defendant to offer at least some evidence to dispute this issue if he or she wishes to have the benefit of a lesser-offense instruction. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000); *State v. Parks*, 253 Neb. 939, 573 N.W.2d 453 (1998). Here, it is undisputed that Becerra actively participated with Gonzalez in the abduction and restraint of Washington. Becerra argues, however, that the finder of fact could have determined that he lacked the requisite intent to support a conviction for kidnapping.

[8] Nebraska's aider and abettor statute, Neb. Rev. Stat. § 28-206 (Reissue 1995), provides that "[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." In Becerra's trial, the jury was so instructed without objection. When a crime requires the existence of a particular intent, an alleged aider or abettor can be held criminally liable as a principal if it is shown that the aider or abettor knew that the perpetrator of the act possessed the required intent or that the aider or abettor himself or herself possessed the required intent. *State v. Sims*, 258 Neb. 357, 603 N.W.2d 431 (1999); *State v. Arnold*, 253 Neb. 789, 572 N.W.2d 74 (1998); *State v. Mantich*, 249 Neb. 311, 543 N.W.2d 181 (1996). As noted in our opinion resolving Becerra's direct appeal, intent may be inferred from the words and acts of the accused and from the facts and circumstances surrounding the conduct. *State v. Becerra*, 253 Neb. 653, 573 N.W.2d 397 (1998).

"A person commits kidnapping if he abducts another or, having abducted another, continues to restrain him with intent to . . . [t]errorize him or a third person." Neb. Rev. Stat. § 28-313(1)(c) (Reissue 1995). "A person commits false imprisonment in the first degree if he knowingly restrains or abducts another person . . . under terrorizing circumstances or under circumstances which expose the person to the risk of serious bodily injury." Neb. Rev. Stat. § 28-314(1)(a) (Reissue 1995). We stated in

Becerra's direct appeal that "[i]t is the *intent to terrorize* which distinguishes kidnapping from false imprisonment in the first degree." (Emphasis in original.) *Becerra*, 253 Neb. at 665, 573 N.W.2d at 405. Becerra now argues that he "was present at the abduction, but his defense was, and evidence was presented to show, that he did not intend to harm or terrorize the victim. *That was Mr. Gonzalez's intent, not the Appellant's.*" (Emphasis supplied.) Brief for appellant at 10.

This statement and Becerra's trial testimony establish without question that he knew of Gonzalez' intent at the time of the abduction. Becerra admitted that he knew that Gonzalez was angry because Washington had not paid for the drugs, and he testified that he hoped that they would not encounter Washington on the evening of the abduction "[b]ecause I didn't want nothing to happen to him." During the abduction and detention, Becerra knew that Gonzalez was threatening Washington with harm because he was translating Gonzalez' words from Spanish to English so that Washington could understand them. Because Becerra admitted that he actively assisted Gonzalez in the abduction with knowledge of his intent, there was no rational basis upon which the jury could have acquitted him of kidnapping but convicted him of first degree false imprisonment. The trial court did not err in not giving a lesser-included offense instruction. The fact that Becerra's trial counsel did not request one, but instead requested instructions reflecting Becerra's claim that he acted under the duress of threats from Gonzalez, was a matter of legitimate trial strategy which was consistent with Becerra's own testimony and was not prejudicial to his defense.

CONCLUSION

For the reasons discussed, we conclude that the district court did not err in denying Becerra's motion for postconviction relief and therefore affirm its judgment.

AFFIRMED.

GERALD R. KIRWAN, JR., AND LEONA KIRWAN, HUSBAND AND WIFE, APPELLANTS AND CROSS-APPELLEES, V. CHICAGO TITLE INSURANCE COMPANY, APPELLEE AND CROSS-APPELLANT.

624 N.W.2d 644

Filed April 20, 2001. No. S-99-498.

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. **Summary Judgment: Final Orders: Appeal and Error.** Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as it deems just.
4. **Jurisdiction.** Unlike substantive issues, procedural matters are governed by the law of the forum.
5. **Title: Insurance: Claims.** When the record conclusively establishes that an insured knew of an adverse claim against the insured property before the title insurance policy took effect but failed to notify the title insurance company until after the effective date of the policy, under the terms of the policy, the claim is excluded from coverage.
6. **Attorney Fees: Appeal and Error.** If a party is not successful on appeal in obtaining an amount of recovery, the party is not entitled to attorney fees on appeal under Neb. Rev. Stat. § 44-359 (Reissue 1998).

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and SIEVERS and MOORE, Judges, on appeal thereto from the District Court for Holt County, WILLIAM B. CASSEL, Judge. Judgment of Court of Appeals affirmed in part and in part reversed, and cause remanded with directions.

David A. Domina and Nora M. Kane, of Domina Law, P.C., for appellants.

Matthew F. Wright, Derrick J. Hahn, Lynn R. Fritz, and, on brief, Richard J. Butler, of Butler, Galter, O'Brien, Boehm & Fritz Law Firm, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

This case is before the Nebraska Supreme Court on the grant of the petition for further review filed by appellants, Gerald R. Kirwan, Jr., and Leona Kirwan. The opinion of the Nebraska Court of Appeals is found at *Kirwan v. Chicago Title Ins. Co.*, 9 Neb. App. 372, 612 N.W.2d 515 (2000).

At issue in this appeal are the obligations of appellee, Chicago Title Insurance Company (Chicago Title), to pay for attorney fees incurred in successfully defending title to certain insured property in South Dakota (the subject property) by two of its insureds: (1) the Kirwans, the purchasers of the subject property, and (2) First Trust National Association (First Trust), the Kirwans' lender. We conclude that under the purchasers' title insurance policy, Chicago Title was not obligated to pay the cost of defending the Kirwans in the claim against the subject property, and we affirm the Court of Appeals' decision to that effect. We further conclude that under the lender's title insurance policy, Chicago Title was obligated to pay the cost of defending First Trust, a named defendant, in the claim against the subject property, and we therefore reverse that portion of the Court of Appeals' decision which concluded that the Kirwans were obligated to reimburse Chicago Title for the fees Chicago Title had paid to First Trust's attorney and remand the cause with directions to enter an order affirming the district court's denial of Chicago Title's motion for summary judgment on this counterclaim.

STATEMENT OF FACTS

A more complete recital of the underlying facts in this case may be found in the Court of Appeals' opinion, *Kirwan v. Chicago Title Ins. Co., supra.* The facts and procedural history of particular relevance on further review are summarized herein. There is no dispute regarding the material facts.

In March 1991, Robert and Eva Matthews sold and conveyed the subject property to the Kirwan Ranch, a South Dakota partnership, and David, Harry, and Betty Vanderwerf (collectively

referred to as "the Vanderwerfs") as tenants in common. At their request, Harry and Betty's names did not appear on the deed. In 1995, the partnership asked David to execute a quitclaim deed with respect to the subject property, accompanied by the representations that the deed would not be recorded and that the property would be used as collateral for a loan. The partnership told David that when it received the loan proceeds, it would buy out the Vanderwerfs' interest. David signed the quitclaim deed. The partnership recorded it the same day.

Thereafter, in December 1995, without the Vanderwerfs' approval, the partnership entered into a contract to sell the property to the Kirwans. In the course of this sale, the Kirwans obtained from Chicago Title a title insurance commitment for the subject property effective April 1, 1996. The sale closed, and on April 26, the Kirwans obtained a mortgage from First Western Bank, N.A., which mortgage was later assigned to First Trust. Effective May 16, Chicago Title issued to the Kirwans an owner's title insurance policy on the subject property, and it issued a lender's title insurance policy to First Trust effective the same date.

The purchaser's title insurance commitment and the purchaser's title insurance policy each contain exclusionary provisions. However, the texts of the exclusionary provisions differ. The April 1, 1996, title insurance commitment provides:

> If the proposed Insured has or acquires actual knowledge of any defect, lien, encumbrance, adverse claim or other matter affecting the estate or interest or mortgage thereon covered by this Commitment other than those shown in Schedule B hereof [which schedule does not include the Vanderwerfs' claim], and shall fail to disclose such knowledge to [Chicago Title] in writing, [Chicago Title] shall be relieved from liability for any loss or damage resulting from any act of reliance hereon to the extent [Chicago Title] is prejudiced by failure to so disclose such knowledge.

The relevant "Exclusions from Coverage" provisions of the Kirwans' May 16 title insurance policy with Chicago Title provide:

> The following matters are expressly excluded from the coverage of this policy and [Chicago Title] will not pay

> loss or damage, costs, attorneys' fees or expenses which arise by reason of:
>
> . . . .
>
> 3. Defects, liens, encumbrances, adverse claims or other matters:
>
> . . . .
>
> (b) not known to [Chicago Title], not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to [Chicago Title] by the insured claimant prior to the date the insured claimant became an insured under this policy[.]

On April 5, 1996, the Vanderwerfs' lawyer wrote a letter to the Kirwans setting forth the Vanderwerfs' claim to the subject property. The Kirwans received the letter on April 7 or 8, but did not notify either Chicago Title or First Trust of the Vanderwerfs' claim at that time. On May 16, the Vanderwerfs brought suit in South Dakota state court against Kirwan Ranch, the Kirwans, and First Trust to set aside the transfer of the property and void the Kirwans' and First Trust's claims to the subject property (the South Dakota litigation).

On or about June 21, 1996, the Kirwans' attorney notified Chicago Title about the lawsuit against the subject property, thus advising Chicago Title of the claim for the first time. Chicago Title initially provided a defense for both the Kirwans and First Trust. As a result of information developed in discovery in the South Dakota litigation, Chicago Title later denied coverage to Gerald Kirwan on April 10, 1997, and to Leona Kirwan on September 3 for indemnity and defense, citing subsection 3(b) of the title insurance policy's exclusionary provisions. Chicago Title concluded that under subsection 3(b) of the title insurance policy, it had a duty neither to indemnify nor to defend the Kirwans against the Vanderwerfs' claim because the Kirwans had learned of the claim prior to the date the Kirwans became insureds and had failed to inform Chicago Title prior to the date the Kirwans became insureds under the title insurance policy.

Following Chicago Title's denial of coverage, the Kirwans hired legal counsel and successfully defended the Vanderwerfs' suit. The South Dakota trial court held that the Kirwans had received an absolute conveyance of the subject property and

were bona fide purchasers for value and without notice of fraud. It entered summary judgment in favor of the Kirwans and First Trust. The South Dakota Supreme Court affirmed the trial court's grant of summary judgment in favor of the Kirwans and First Trust. *Vanderwerf v. Kirwan*, 586 N.W.2d 858 (S.D. 1998).

On November 24, 1997, the Kirwans filed the instant action against Chicago Title in Holt County District Court (the Nebraska litigation). In their second amended petition filed May 8, 1998 (amended petition), the Kirwans alleged that the title insurance policy issued by Chicago Title provided that Chicago Title would "pay all reasonable costs of defense, including attorneys' fees, incurred in connection with any attack upon title . . . to or concerning the real estate." The amended petition further alleged that contrary to this provision in the title insurance policy, Chicago Title failed to provide and pay for legal services for the Kirwans and that as a result, the Kirwans personally incurred legal expenses successfully defending against the Vanderwerfs' claim. The Kirwans sought to recover the amount of legal fees they had incurred in the South Dakota litigation, as well as the attorney fees they incurred in the Nebraska litigation.

On June 1, 1998, Chicago Title filed its answer to the Kirwans' amended petition. Citing to subsection 3(b) of the title insurance policy's exclusion from coverage provision, Chicago Title denied that it had any duty to provide or pay for the Kirwans' legal expenses. Chicago Title also filed counterclaims, seeking, inter alia, repayment of the amounts Chicago Title had expended on attorney fees paid on behalf of both the Kirwans and First Trust in the South Dakota litigation.

On February 1, 1999, the Kirwans filed a motion for partial summary judgment in the Nebraska litigation. In their motion, the Kirwans sought entry of an order directing Chicago Title to reimburse them for attorney fees incurred in successfully defending title in the South Dakota litigation. On March 9, Chicago Title filed a cross-motion for summary judgment, generally seeking entry of judgment against the Kirwans on the claims raised in their amended petition and in Chicago Title's favor on its counterclaims. In its motion for summary judgment, Chicago Title specifically sought an order directing the Kirwans to reimburse Chicago Title for attorney fees Chicago Title had

expended in defending the Kirwans in the South Dakota litigation prior to Chicago Title's withdrawal of its defense. It also sought an order directing the Kirwans to reimburse Chicago Title for attorney fees Chicago Title had expended defending First Trust in the South Dakota litigation.

The parties' motions for summary judgment came on for hearing on March 18, 1999. Fifty-three exhibits, many with voluminous attachments, were admitted into evidence. The district court treated the Kirwans' motion as a cross-motion for summary judgment seeking entry of judgment on their amended petition and against Chicago Title on its counterclaims. The district court treated Chicago Title's motion for summary judgment as a cross-motion for summary judgment seeking entry of judgment against the Kirwans on their amended petition and in its favor on its counterclaims.

The district court ruled on the cross-motions for summary judgment on April 15, 1999. In its opinion, the district court found that as to the claims raised by the Kirwans in their amended petition, the Kirwans had learned of the Vanderwerfs' claim before the title insurance policy was issued and did not disclose the adverse claim to Chicago Title prior to its issuance of the title insurance policy. The district court concluded that the Vanderwerfs' claim was excluded under subsection 3(b) of the exclusionary provisions of the title insurance policy, and Chicago Title had no duty to defend the Kirwans or to pay for their legal fees in the South Dakota litigation. Accordingly, the district court denied the Kirwans' motion for summary judgment and granted Chicago Title's cross-motion for summary judgment on the claims raised by the Kirwans in their amended petition and dismissed the Kirwans' amended petition with prejudice.

As to Chicago Title's motion for summary judgment on its counterclaims, the district court concluded that the Kirwans were obligated to reimburse Chicago Title for the attorney fees Chicago Title had paid to defend the Kirwans in the South Dakota litigation prior to the withdrawal of its defense. The district court therefore granted a portion of Chicago Title's motion for summary judgment, ordered the Kirwans to reimburse Chicago Title for the legal fees Chicago Title had paid on the Kirwans' behalf in the South Dakota litigation and entered judg-

ment in Chicago Title's favor on this counterclaim. With respect to Chicago Title's counterclaim which sought to compel the Kirwans to reimburse Chicago Title for those sums Chicago Title had expended providing legal counsel to First Trust in the South Dakota litigation, the district court found that the lender's policy provided First Trust with a right to require a defense and that Chicago Title was responsible for those defense costs incurred on First Trust's behalf in the South Dakota litigation. The district court denied the portion of Chicago Title's motion for summary judgment which had sought reimbursement from the Kirwans for the attorney fees which Chicago Title had paid in the defense of First Trust in the South Dakota litigation and dismissed this counterclaim with prejudice.

To summarize, as a result of these rulings, the district court entered summary judgment in favor of Chicago Title and against the Kirwans on the claim raised by the Kirwans in their amended petition and dismissed the Kirwans' amended petition with prejudice. The district court entered summary judgment in favor of Chicago Title and against the Kirwans on Chicago Title's counterclaim that sought reimbursement of defense costs paid on behalf of the Kirwans in the South Dakota litigation. The district court entered summary judgment in favor of the Kirwans and against Chicago Title on the counterclaim raised by Chicago Title in which it sought reimbursement of attorney fees it had paid to defend First Trust in the South Dakota litigation and dismissed that counterclaim with prejudice.

The Kirwans appealed the district court's denial of their motion for summary judgment and dismissal of their amended petition to the Court of Appeals, and Chicago Title cross-appealed the district court's order on summary judgment refusing to order the Kirwans to pay Chicago Title the amount of legal fees it had incurred in defending First Trust in the South Dakota litigation. We note for the sake of completeness that the Kirwans did not appeal to the Court of Appeals the district court's decision granting summary judgment in Chicago Title's favor and ordering the Kirwans to reimburse Chicago Title for those attorney fees Chicago Title had paid on the Kirwans' behalf in the South Dakota litigation prior to Chicago Title's withdrawal of the defense. Accordingly, the Court of Appeals

did not comment on this portion of the district court's order, nor does this court comment on further review, and that portion of the district court's order remains in effect. See, generally, *Susan H. v. Keith L.*, 259 Neb. 322, 609 N.W.2d 659 (2000) (issue not assigned as error will not be considered on appeal).

In its published opinion deciding the Kirwans' appeal, the Court of Appeals affirmed the district court's order denying the Kirwans' motion for summary judgment and granting Chicago Title's motion for summary judgment on the claims raised in the Kirwans' amended petition. With respect to the cross-appeal filed by Chicago Title, the Court of Appeals concluded that Chicago Title had paid First Trust's attorney fees as a "volunteer" and, therefore, reversed that portion of the district court's summary judgment order which had denied Chicago Title's request for an order directing the Kirwans to reimburse it for those sums Chicago Title had expended for First Trust's legal fees in the South Dakota litigation. In connection with its reversal, the Court of Appeals remanded the cause for entry of judgment in favor of Chicago Title and against the Kirwans in the amount of $10,795.43, which amount equaled those sums Chicago Title paid for First Trust's attorney fees in the South Dakota litigation. See *Kirwan v. Chicago Title Ins. Co.*, 9 Neb. App. 372, 612 N.W.2d 515 (2000). We granted the Kirwans' petition for further review, and for the reasons stated below, we affirm in part and in part reverse the decision of the Court of Appeals.

ASSIGNMENTS OF ERROR

In their petition for further review, the Kirwans claim, restated, that the Court of Appeals erred (1) in affirming the district court's order which had granted the cross-motion of Chicago Title and had denied their motion for summary judgment in which the Kirwans had sought reimbursement from Chicago Title for the attorney fees they had incurred in connection with their successful defense of the title claim in the South Dakota litigation and (2) in reversing the portion of the district court's order which had denied Chicago Title's motion for summary judgment seeking reimbursement from the Kirwans for the amount of attorney fees Chicago Title had paid on First Trust's behalf in the South Dakota litigation and in remanding the cause

to the district court with instructions to enter judgment in favor of Chicago Title and against the Kirwans for $10,795.43, an amount equal to those sums Chicago Title paid to First Trust's attorneys for legal fees incurred in the defense of First Trust in the South Dakota litigation.

STANDARDS OF REVIEW

[1,2] 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. *Allstate Ins. Co. v. LaRandeau, ante* p. 242, 622 N.W.2d 646 (2001). 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. *Bates v. Design of the Times, Inc., ante* p. 332, 622 N.W.2d 684 (2001).

[3] Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as it deems just. *State Farm Mut. Auto Ins. Co. v. Cheeper's Rent-A-Car*, 259 Neb. 1003, 614 N.W.2d 302 (2000).

ANALYSIS

Choice of Law.

The Court of Appeals determined that South Dakota law governs the substantive issues in this case. See *Powell v. American Charter Fed. Sav. & Loan Assn.*, 245 Neb. 551, 514 N.W.2d 326 (1994). Neither party challenges that determination on further review. We conclude that the Court of Appeals was correct in this determination.

[4] Unlike substantive issues, procedural matters are governed by the law of the forum. *Whitten v. Whitten*, 250 Neb. 210,

548 N.W.2d 338 (1996). As the Court of Appeals correctly stated, "The standard of review to apply in a trial court's summary judgment and whether a party is entitled to summary judgment is a matter of procedure controlled by the law of the forum." *Kirwan v. Chicago Title Ins. Co.*, 9 Neb. App. 372, 379, 612 N.W.2d 515, 522 (2000) (citing *Shilling v. Moore*, 249 Neb. 704, 545 N.W.2d 442 (1996)).

Accordingly, in reviewing this case, we look to South Dakota's substantive law. However, we review the district court's orders regarding the cross-motions for summary judgment and the Court of Appeals' review thereof in accordance with Nebraska's procedural law.

South Dakota's Substantive Law.

Under South Dakota law, the insurer's duty to defend is severable and independent of its duty to pay and the duty to defend is a broader obligation, encompassing situations in which the duty to pay may not arise. *Tri-State Co. of Minnesota v. Bollinger*, 476 N.W.2d 697 (S.D. 1991); *Hawkeye-Security Ins. Co. v. Clifford*, 366 N.W.2d 489 (S.D. 1985). The insurer bears the burden of proving it had no duty to defend the insured. *SDCP v. Wausau Underwriters Ins. Co.*, 616 N.W.2d 397 (S.D. 2000); *State Farm Mut. Auto. Ins. Co. v. Wertz*, 540 N.W.2d 636 (S.D. 1995). In order to meet this burden, the insurer must show that the claim "clearly falls outside of policy coverage." *Hawkeye-Security Ins. Co.*, 366 N.W.2d at 492.

Under South Dakota law, the existence of the rights and obligations of parties to an insurance contract is determined by the language of the contract, which is to be construed according to the plain and ordinary meaning of the contract terms. *Biegler v. American Family Mut. Ins. Co.*, 621 N.W.2d 592 (S.D. 2001); *Elrod v. General Cas. Co. of Wisconsin*, 566 N.W.2d 482 (S.D. 1997); *Pete Lien & Sons v. First American Title*, 478 N.W.2d 824 (S.D. 1991). When the insurance policy provisions are "fairly susceptible of different interpretations, the interpretation most favorable to the insured should be adopted." *Friesz ex rel. Friesz v. Farm & City Ins.*, 619 N.W.2d 677, 697 (S.D. 2000). This rule of liberal construction, however, applies only when the contract language is ambiguous and susceptible of more than one inter-

pretation. The Supreme Court of South Dakota has stated that the "rule does not mean . . . that a court may seek out a strained or unusual meaning for the benefit of the insured. . . . '[A]n ambiguity is not of itself created simply because the parties differ as to the interpretation of the contract.'" *Id.* at 680 (quoting *Johnson v. Johnson*, 291 N.W.2d 776 (S.D. 1980)). South Dakota law recognizes that "[i]nsurers may assume some risks and exempt themselves from liability for others." *Kennel Club v. Indemnity Company*, 77 S.D. 503, 507, 94 N.W.2d 90, 92 (1959).

Appeal: Court of Appeals' Decision That Chicago Title Did Not Have Duty to Defend Kirwans.

In its amended petition filed in the district court and in its assignments of error on appeal to the Court of Appeals, the Kirwans claimed that Chicago Title had a duty to defend them in the South Dakota litigation and sought reimbursement for their attorney fees incurred in the successful defense of the title claim. Both the district court and the appellate court rejected this claim. On further review, we find no error by the Court of Appeals in rejecting the Kirwans' argument on appeal and in affirming the decision of the district court in this regard.

[5] The record in this appeal conclusively establishes that the Kirwans knew of the Vanderwerfs' claim before the title insurance policy was issued, but failed to notify Chicago Title until sometime after May 16, 1996, the date they became insureds under the policy. Pursuant to the language of the title insurance policy's exclusionary provisions, subsection 3(b), the Vanderwerfs' claim is excluded from coverage under the policy. As such, Chicago Title was not obligated to pay any damages, attorney fees, or expenses that arose by reason of such a claim.

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. *Allstate Ins. Co. v. LaRandeau, ante* p. 242, 622 N.W.2d 646 (2001). On the record presented in this appeal, the district court correctly rejected the Kirwans' claim in their amended petition for reimbursement of attorney fees incurred in the South

Dakota litigation and correctly entered summary judgment in favor of Chicago Title and against the Kirwans on this claim. On appeal, the Court of Appeals affirmed the district court's decision. On further review, we affirm the decision of the Court of Appeals as to this issue.

Cross-Appeal: Court of Appeals' Decision That Chicago Title Did Not Have Duty to Defend First Trust.

The Kirwans assign as error on further review the decision of the Court of Appeals reversing the district court's order which had denied Chicago Title's motion for summary judgment on its counterclaim in which Chicago Title had sought an order directing the Kirwans to reimburse it for attorney fees Chicago Title had incurred in defending First Trust in the South Dakota litigation. In its decision, the Court of Appeals required the Kirwans upon remand to reimburse Chicago Title for attorney fees Chicago Title had paid on behalf of First Trust. We agree with the Kirwans that the Court of Appeals erred in its decision reversing the decision of the district court on this issue.

In the district court, Chicago Title counterclaimed against the Kirwans for $10,795.43 for attorney fees that Chicago Title had paid in the defense of First Trust in the South Dakota litigation. The district court denied Chicago Title's motion for summary judgment on its counterclaim seeking reimbursement for those attorney fees. Chicago Title appealed to the Court of Appeals.

Relying on the mortgage between the Kirwans and First Trust, the Court of Appeals reversed the district court's order. The Court of Appeals determined that under the Kirwans' mortgage with First Trust, the Kirwans were obligated to defend an action against their title to the subject property at their own cost. Referring to the language of the mortgage, the Court of Appeals noted that First Trust, on the purchaser's behalf, " 'may . . . take any action that [First Trust] deems appropriate' " and the expenses of such action shall be paid by the purchaser. *Kirwan v. Chicago Title Ins. Co.*, 9 Neb. App. 372, 387, 612 N.W.2d 515, 527 (2000). The Court of Appeals concluded that when Chicago Title paid First Trust's attorney fees in the South Dakota litigation, it was doing so as a "volunteer" and held that under an equitable theory of subrogation, Chicago Title

" 'step[ped] into the shoes' of First Trust in terms of the right to recover the defense costs from the Kirwans." *Id.* at 388, 612 N.W.2d at 528.

We disagree with the Court of Appeals' conclusion in general and specifically on its reliance on the mortgage rather than the lender's title insurance policy in the resolution of this issue. Under the terms of the lender's title insurance policy issued by Chicago Title to First Trust, Chicago Title was obligated

> at its own cost . . . [to] provide for the defense of an insured in litigation in which any third party asserts a claim adverse to the title or interest as insured . . . as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy.

For the sake of completeness, we note that the lender's title insurance policy contains an exclusionary provision identical to subsection 3(b) contained in the Kirwans' title insurance policy and quoted above, but because there is no claim that First Trust had any prior knowledge of the Vanderwerfs' claim, the exclusionary provision is not at issue.

Under the "plain and ordinary meaning" of the lender's title insurance policy that Chicago Title issued to First Trust, Chicago Title was obligated to pay the cost of defending First Trust, a named defendant in the South Dakota litigation, in a claim adverse to the title of the subject property. See *Elrod v. General Cas. Co. of Wisconsin*, 566 N.W.2d 482 (S.D. 1997). Contrary to the inference from the opinion of the Court of Appeals in which it states that First Trust "can participate" in the South Dakota litigation, *Kirwan v. Chicago Title Ins. Co.*, 9 Neb. App. at 388, 612 N.W.2d at 527, as a named defendant in the South Dakota litigation, First Trust's appearance was not by choice. Because Chicago Title was contractually obligated to pay the defense costs of First Trust, Chicago Title was not a "volunteer." Accordingly, Chicago Title has no right to reimbursement for the attorney fees that it was contractually required to pay. The Court of Appeals erred in reversing the district court's order in this regard. Accordingly, upon further review, we reverse the Court of Appeals' decision and remand the cause to the Court of Appeals with directions to enter an order affirming the district court's denial of Chicago Title's motion for sum-

mary judgment on its counterclaim for reimbursement for those attorney fees Chicago Title paid on behalf of First Trust.

Kirwans' Motion for Attorney Fees on Appeal.

The Kirwans have moved for attorney fees both in connection with their appeal to the Court of Appeals and in connection with their petition for further review. Neb. Rev. Stat. § 44-359 (Reissue 1998) provides as follows:

> In all cases when the beneficiary or other person entitled thereto brings an action upon any type of insurance policy . . . against any company, person, or association doing business in this state, the court, upon rendering judgment against such company, person, or association, shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his or her recovery, to be taxed as part of the costs. If such cause is appealed, the appellate court shall likewise allow a reasonable sum as an attorney's fee for the appellate proceedings . . . .

This is a procedural statute, and accordingly, Nebraska law applies. See *Hawkeye Casualty Co. v. Stoker*, 154 Neb. 466, 48 N.W.2d 623 (1951).

[6] Under the foregoing statute, attorney fees are "likewise allow[ed]" on appeal. We read "likewise" to refer to the terms by which attorney fees are allowed by the trial court. The trial court shall allow attorney fees to the beneficiary or other person entitled to bring an action on an insurance policy "upon rendering judgment against such" insurance-related defendant "in addition to the amount of his or her recovery." Thus, attorney fees are to be awarded "in addition to the amount of [the] recovery." Because the Kirwans were not successful on appeal in obtaining an "amount of . . . recovery," they are not entitled to attorney fees on appeal under § 44-359. See, generally, *American Family Ins. Group v. Hemenway*, 254 Neb. 134, 575 N.W.2d 143 (1998). The Kirwans' motion for attorney fees is denied.

CONCLUSION

We conclude that the undisputed evidence before the district court on the cross-motions for summary judgment conclusively established that the Vanderwerfs' claim against the Kirwans'

property in South Dakota was excluded from coverage under the May 16, 1996, title insurance policy issued by Chicago Title to the Kirwans. Accordingly, Chicago Title was under no obligation to reimburse the Kirwans for attorney fees incurred in defense of the Vanderwerfs' claim in the South Dakota litigation. We affirm that portion of the Court of Appeals' decision which affirmed the district court's order denying the Kirwans' motion for summary judgment on its amended petition and granting Chicago Title's motion for summary judgment on the claims raised in the Kirwans' amended petition and dismissing the amended petition with prejudice.

We further conclude that under the terms of the lender's title insurance policy issued by Chicago Title to First Trust, Chicago Title was obligated to defend First Trust, a named defendant in the South Dakota litigation. Accordingly, we reverse that portion of the Court of Appeals' decision which reversed the district court's denial of Chicago Title's motion for summary judgment on its counterclaim in which it had sought reimbursement from the Kirwans for those attorney fees Chicago Title had paid on First Trust's behalf, and we remand the cause to the Court of Appeals with directions to enter an order affirming the district court's denial of Chicago Title's motion for summary judgment on this counterclaim.

As discussed above, we deny the Kirwans' motion for attorney fees under § 44-359.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

GERRARD, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
DAVID LEE QUINTANA, APPELLANT.
633 N.W.2d 890

Filed April 20, 2001. Nos. S-99-1249, S-99-1250.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Supplemental opinion: Former opinion modified. Motion for rehearing overruled.

John H. Marsh, of Knapp, Fangmeyer, Aschwege, Besse & Marsh, P.C., for appellant.

Don Stenberg, Attorney General, and Susan J. Gustafson for appellee.

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

PER CURIAM.

This matter is before us on a motion for rehearing filed by appellant, David Lee Quintana, regarding our opinion reported at *State v. Quintana, ante* p. 38, 621 N.W.2d 121 (2001). Quintana asserts this court erred in determining that the trial court's Confrontation Clause error was harmless beyond a reasonable doubt. Although the motion for rehearing is overruled, for the sake of clarity and completeness, we modify the opinion as discussed below.

In that portion of the opinion designated "Analysis," under the subheading "Harmless Error," the third full paragraph, *id.* at 50-51, 621 N.W.2d at 132-33, is withdrawn. In its place, the following is inserted:

> It is against this less than compelling "damaging potential" of the excluded cross-examination testimony that we must consider whether this Confrontation Clause violation constitutes harmless error. As discussed below, we conclude that the error was harmless.
>
> In determining whether the error was harmless, the court must consider this question, Had the jury known of Cash's arrest on July 30, 1999, and subsequent release and the circumstances surrounding these facts, would the inferences drawn from such information regarding the credibility of Cash's testimony have materially influenced the jury in reaching its verdict, in view of the entire record? See *State v. Johnson*, 255 Neb. 865, 587 N.W.2d 546 (1998), citing *Olden v. Kentucky*, 488 U.S. 227, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988), and *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). In other words, we must determine whether a reasonable jury would have received " ' "a significantly different impres-

sion of [the witness'] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination.'" *Id.* at 872, 587 N.W.2d at 551, quoting *Olden, supra*, and *Van Arsdall, supra*. Because Cash was the only witness who testified that Quintana and Rodriguez planned to rob Baumann when they confronted him, the jury necessarily determined that Cash's testimony was credible in finding Quintana guilty.

The record shows that during cross-examination, defense counsel vigorously attacked Cash's credibility. Defense counsel pointed out that contrary to Cash's testimony at trial, in a previous deposition, Cash had testified that Quintana and Rodriguez had no plan to do anything to Baumann other than "maybe beat the guy for a while." Cash explained what he meant by his earlier testimony was that there was no clear plan to kill Baumann. Defense counsel also pointed out that in addition to the deposition testimony, Cash previously testified at two preliminary hearings and at a previous trial without ever mentioning any plan to rob Baumann.

During Cash's cross-examination, the court also made a point of admonishing the jury, stating that

> there has been some evidence that you've heard concerning this particular witness having allegedly been making statements that may be inconsistent with his testimony today in court. This information about the prior statements is brought to your attention for the purposes of helping you decide if you believe the witness as he has testified in court today and, if so, how much you should rely upon his testimony. If you believe that he said something different earlier, then it would be up to you to decide if what he said today in court was true.

In view of the entire record, we conclude the fact that the jury was precluded from considering Cash's arrest and release did not materially influence the jury in finding Quintana guilty. Accordingly, the trial court's error in restricting the cross-examination of Cash was harmless beyond a reasonable doubt.

In addition to the above changes, under the subheading "Failure to Grant Mistrial," in the third sentence of the third full paragraph, *ante* at 62, 621 N.W.2d at 140, the phrase "previously robbing Baumann and" is withdrawn. The rest of the opinion shall remain unmodified.

FORMER OPINION MODIFIED. MOTION FOR REHEARING OVERRULED.

DONALD E. BRUNKEN, APPELLEE, V. BOARD OF TRUSTEES OF CITY OF OMAHA POLICE AND FIRE RETIREMENT SYSTEM, APPELLANT.

624 N.W.2d 629

Filed April 20, 2001. No. S-00-017.

1. **Administrative Law: Appeal and Error.** In reviewing an administrative agency decision on a petition in error, both the district court and the appellate court review the decision of the administrative agency to determine whether the agency acted within its jurisdiction and whether the decision of the agency is supported by sufficient relevant evidence.
2. ___: ___. The reviewing court in an error proceeding is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
4. **Municipal Corporations: Statutes.** When analyzing a municipal code, a legislative enactment, an appellate court follows the same rules as those of statutory analysis.
5. **Statutes.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning.
6. ___. An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
7. **Municipal Corporations: Ordinances: Public Officers and Employees: Pensions: Words and Phrases.** The plain and ordinary meaning of the expression "monthly compensation" as used in Omaha Mun. Code, ch. 22, art. III, § 22-76 (1996), is that amount of income received regularly by the retiring employee every month.

Appeal from the District Court for Douglas County: MICHAEL W. AMDOR, Judge. Reversed and remanded with directions.

Jo A. Cavel, Assistant Omaha City Attorney, for appellant.

Joseph C. Byam, of Byam & Hoarty, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Donald E. Brunken requested a recalculation upward of his retirement pension, which the board of trustees of the City of Omaha Police and Fire Retirement System denied. In an order filed December 7, 1999, the district court for Douglas County vacated and set aside the board of trustees' decision and ordered the recalculation upward. The board of trustees appeals. For the reasons stated below, we reverse the district court's order and remand the cause with directions to reinstate the board of trustees' decision.

STATEMENT OF FACTS

There is no dispute in this appeal that the board of trustees acted within its jurisdiction nor is there any dispute as to the relevant facts. Brunken was employed by the city of Omaha as a firefighter for 30 years. During the last 5½ years of his employment, he held the position of fire chief. On December 31, 1995, Brunken retired as a firefighter with the city.

When Brunken retired, he was awarded a "monthly service retirement pension payable each month" from the city, which was calculated pursuant to Omaha Mun. Code, ch. 22, art. III, § 22-76 (1996). Under § 22-76, participants in the city's retirement system "shall be entitled, upon such member's retirement, to a monthly service retirement pension payable each month for the remainder of such member's natural life after retirement equal to [a certain percentage] of the member's highest average monthly compensation" during any year of the member's last 5 years of service.

When Brunken retired, the city determined that his "highest average monthly compensation" was received during the calendar year 1995, the last year of his employment with the city. In 1995, Brunken's salary with the city was $94,278.31, which equaled $3,626.09 biweekly, or $7,856.53 monthly. Pursuant to § 22-76, the city calculated Brunken's monthly retirement pension to be 55 percent of the monthly compensation he received in 1995, or $4,321.09 per month. Later, this figure was adjusted upward by 2 cents, for reasons that are unexplained in the record.

Brunken contacted the city and requested a recalculation upward of his pension benefits. Brunken claimed that because his total taxable compensation for the year 1995 included a lump-sum payment of $7,117.38 for retroactive wages for 1994 received on November 4, 1995, as a result of contract negotiations, the city should have calculated his retirement pension based on his 1995 total compensation of $101,395.69 rather than $94,278.31. Brunken claimed he was entitled to an annual pension equal to 55 percent of $101,395.69, or $4,647.30 per month, a net increase of more than $300 per month over the pension Brunken had been awarded.

It is undisputed that although received on November 4, 1995, the lump-sum payment of $7,117.38 constituted "backpay" for work performed by Brunken in 1994. Pursuant to the rules of the Internal Revenue Service (IRS), the city had included this lump-sum amount in Brunken's 1995 W-2 statement. However, the city did not include the lump-sum amount in its calculations of Brunken's "highest average monthly compensation" pursuant to § 22-76.

On April 15, 1999, Brunken appeared before the board of trustees, requesting a recalculation upward of his pension benefits for the above-stated reasons. At this hearing, 15 exhibits were received into evidence by the board of trustees, including: the municipal ordinance provisions; an employer's tax guide prepared by the IRS (Publication 15-A, Employer's Supplemental Tax Guide, Supplement to Circular E), providing that the employer "[t]reat back pay as wages in the year paid"; and a copy of a May 12, 1992, interoffice memorandum from the city's law department written by the deputy city attorney to the city finance director, regarding the treatment to be accorded backpay in connection with the calculation of pension benefits. The memorandum stated, inter alia, that in calculating retirement pensions for the Police and Fire Retirement System, the "consistent approach [of the city] with respect to members of all Pension Systems has been that retroactive wage adjustments are allocated to the times that they would have been earned," and "it is apparent that employment has neither been accepted nor continued in reliance upon the fact that a lump-sum payment of

retroactive wages will be included in one's pension computation as though that total sum were received at the time of payment."

Brunken appeared before the board of trustees and admitted that the $7,117.38 received on November 4, 1995, was for "backpay" for 1994. Brunken did not claim at the hearing that he had been assured of or had otherwise relied on any representation that such "backpay" would be included in calculating his pension benefits. At the conclusion of the hearing, the board of trustees voted unanimously to deny Brunken's request to recalculate his pension benefits.

On May 4, 1999, Brunken filed a petition in error, appealing the board of trustees' decision to the district court for Douglas County. A hearing on Brunken's appeal was held on June 4, at which time the district court received into evidence the transcript and the exhibits from the April 15 hearing before the board of trustees.

In an order filed December 7, 1999, the district court noted that it was undisputed that Brunken had received $7,117.38 on November 4, 1995, as "backpay" for 1994 and that his total compensation for 1995 including the $7,117.38 was $101,395.69. The district court concluded that the word "compensation" as used in § 22-76 was "not embellished, limited, or modified" and that therefore, the compensation which the city should have used as a basis for its pension benefit calculation was Brunken's total 1995 compensation of $101,395.69. The district court vacated the board of trustees' decision and remanded the matter to the board of trustees for a recalculation of Brunken's pension benefits, which recalculation would add the $7,117.38 lump-sum payment for 1994 wages received in 1995.

The board of trustees appeals from the district court's December 7, 1999, order.

ASSIGNMENT OF ERROR

The board of trustees assigns three errors, which we restate as one. The board of trustees claims the district court erred in vacating the board of trustees' decision denying Brunken's request to recalculate his pension upward.

STANDARDS OF REVIEW

[1,2] In reviewing an administrative agency decision on a petition in error, both the district court and the appellate court review the decision of the administrative agency to determine whether the agency acted within its jurisdiction and whether the decision of the agency is supported by sufficient relevant evidence. *Cox v. Civil Serv. Comm. of Douglas Cty.*, 259 Neb. 1013, 614 N.W.2d 273 (2000). The reviewing court in an error proceeding is restricted to the record before the administrative agency and does not reweigh evidence or make independent findings of fact. *Id.*

[3] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *Tilt-Up Concrete v. Star City/Federal, ante* p. 64, 621 N.W.2d 502 (2001).

ANALYSIS

[4] This case presents a question of interpretation of § 22-76 of the Omaha Municipal Code. We have previously stated that when

> analyzing the Omaha Municipal Code, a legislative enactment, we follow the same rules as those of statutory analysis. . . .
>
> First, we look to the plain language of the code. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

Nelson v. City of Omaha, 256 Neb. 303, 310, 589 N.W.2d 522, 527 (1999). See, also, *Moulton v. Board of Zoning Appeals*, 251 Neb. 95, 103, 555 N.W.2d 39, 45 (1996) ("[t]his court will give the language of a city ordinance its plain and ordinary meaning"). As this case presents a question of statutory interpretation, we have an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *Tilt-Up Concrete v. Star City/Federal, supra.*

At issue generally in this case is whether under § 22-76 of the Omaha Municipal Code the lump-sum payment for 1994 wages that Brunken received in 1995 should be included in the calculation of Brunken's retirement pension. Specifically, this case

presents the question of statutory interpretation of whether the 1994 backpay of $7,117.38 received by Brunken on November 4, 1995, was "monthly compensation" under § 22-76 which should be included when calculating Brunken's "highest average monthly compensation" for retirement pension purposes. Based on the plain language of § 22-76, we conclude as a matter of law that the 1994 backpay of $7,117.38 was not "monthly compensation" includable in the pension calculation under § 22-76 and that the district court erred in concluding otherwise.

The board of trustees claims that the district court erred in vacating its decision and in directing the board of trustees to recalculate Brunken's pension benefits to include the $7,117.38 for 1994 backpay as 1995 monthly compensation. In support of its appeal, the board of trustees contends that (1) placing a sensible construction on § 22-76, backpay for the year 1994 should not be considered as 1995 "monthly compensation" in calculating Brunken's pension benefit; (2) the past practice of the city as evidenced by the 1992 interoffice memorandum was to allocate "backpay" to the time period in which it was earned for pension calculation purposes; and (3) there was relevant evidence to support the decision of the board of trustees rejecting Brunken's request for a recalculation of pension benefits upward.

In response, Brunken contends that (1) because the city included the lump-sum payment in his 1995 calculation for income tax purposes, the board of trustees was also required to include the lump-sum payment in its calculations for pension benefit purposes and (2) this court's opinion in *Halpin v. Nebraska State Patrolmen's Retirement System*, 211 Neb. 892, 320 N.W.2d 910 (1982), requires that we affirm the order of the district court. We reject Brunken's arguments, and we agree with the board of trustees that the district court erred in vacating the decision of the board of trustees.

With respect to the proper interpretation of § 22-76, we note that the determination of Brunken's pension benefits is derived from a calculation based on the language "highest average monthly compensation" found in § 22-76. The district court concluded that the word "compensation" as used in § 22-76 was "not embellished, limited, or modified" and, therefore, determined that "compensation" as used in § 22-76 should include all com-

pensation which Brunken received in 1995, his last and highest paid year of employment. Because the plain language of § 22-76 requires that the compensation used as a basis for calculating pension benefits be "monthly compensation," the district court erred as a matter of law in concluding that "compensation" as used in § 22-76 was not "embellished, limited, or modified" and directing the board of trustees to recalculate Brunken's pension benefits using the total amount Brunken had received in 1995.

Contrary to the district court's conclusion that "compensation" is "not embellished, limited, or modified," the word "compensation" found in § 22-76 which is to be used to determine pension benefits is in fact limited to compensation received "monthly." The term "monthly" is defined as "of or relating to a month . . . payable [or] reckoned by the month . . . occurring, appearing, or being made every month." Webster's Third New International Dictionary, Unabridged 1466 (1993). In addition, we note that elsewhere in § 22-76, the ordinance provides that participants in the city's retirement system will receive "a monthly . . . pension payable each month" indicating that the word "monthly" as used in § 22-76 is understood to mean "payable each month."

[5-7] In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. *Nelson v. City of Omaha*, 256 Neb. 303, 589 N.W.2d 522 (1999). Further, an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Id.* The plain and ordinary meaning of the expression "monthly compensation" as used in § 22-76 is that amount of income received regularly by the retiring employee every month. We agree with the board of trustees that the "happenstance" receipt of the $7,117.38, for 1994 backpay, in November 1995 did not alter Brunken's regular "monthly compensation" during 1995 and that if the backpay amount was included in Brunken's pension benefit calculation, it would artificially inflate his pension benefits. Because the plain and ordinary meaning of "monthly compensation" in § 22-76 is limited to regular compensation received every month, the district court erred as a matter of law in directing inclusion of the lump-sum backpay amount in the determination of Brunken's pension benefits.

Notwithstanding the plain meaning of "monthly compensation" found in § 22-76, which we have concluded requires reversal of the district court's order, Brunken nevertheless contends that because the lump-sum payment was included in his 1995 wage calculation for income tax purposes, the board of trustees is required to include the lump-sum payment in its calculation for pension benefit purposes. Other than his proffered interpretation, Brunken has presented no argument or evidence to support his contention that when the city enacted the provisions of the municipal code regarding police and fire department retirement pensions, it intended to incorporate IRS rules or regulations regarding income tax as part of the municipal code pertaining to pension benefit calculation. We have previously indicated that in the absence of evidence, a court will refuse to "read a meaning into the ordinance which the plain words do not provide." *Garza v. City of Omaha*, 215 Neb. 714, 716-17, 340 N.W.2d 409, 411 (1983). There is no evidence in the record on appeal that the city intended to give anything other than a plain and ordinary meaning to the words "highest average monthly compensation," and thus, we decline Brunken's invitation to look to IRS publications, rules, or regulations as binding on the manner in which to calculate pension benefits in § 22-76 of the Omaha Municipal Code.

Finally, Brunken urges us to affirm the district court's decision on the authority of *Halpin v. Nebraska State Patrolmen's Retirement System*, 211 Neb. 892, 320 N.W.2d 910 (1982). Brunken's reliance on *Halpin* is misplaced. In *Halpin*, a retired member of the state highway patrol system brought an action seeking a declaratory judgment that the calculation of state highway patrol officers' retirement benefits based on the income from the final 3 years of service should continue to include lump-sum payments of unused vacation and sick leave that were paid to patrol officers upon retirement as had been the method of calculation prior to 1979. The record in *Halpin* demonstrated that prior to 1979, highway patrol officers had been specifically told as an incentive to join and remain with the patrol that lump-sum payments of unused vacation and sick leave would be included in their pension benefit calculations and that such lump-sum payments had in fact been so included in the pension

benefit calculations. The record also contained evidence that the highway patrol used the inclusion of such unused benefits as a way of discouraging the abuse of the sick leave policy.

Based upon the record therein, we held in *Halpin* that in calculating the state highway patrol officers' retirement benefits, such lump-sum payments of unused vacation and sick leave should be included in the year they were paid. We noted that the evidence clearly demonstrated in *Halpin* that highway patrol officers had been promised that the calculation of their retirement benefits would include the lump-sum payment of unused leave, and such a promise constituted a contractual right which was protected from unconstitutional impairment by the board of trustees for the highway patrol retirement system.

The *Halpin* case is distinguishable from the case on appeal. In addition to differing code language, the record in the instant appeal contains no evidence that any promises or statements were made to Brunken or any member of the city's fire department that for purposes of calculating pension benefits, retroactive lump-sum backpay awards would be included as monthly compensation in the year such lump-sum awards were eventually paid. Brunken has not alleged or demonstrated a denial of any promise or contractual right or a change in practice. On the contrary, the city law department's May 12, 1992, interoffice memorandum makes it clear that unlike *Halpin*, the practice was to allocate the backpay to the years in which the sums were earned, not paid, for pension calculation purposes.

As noted above, the May 12, 1992, memorandum by the deputy city attorney to the city's finance director was received as evidence at Brunken's hearing before the board of trustees. In the memorandum, the deputy city attorney responded to a specific question as to whether the entirety of a retroactive pay adjustment for payroll years 1991 and 1992, which would be received by Omaha police officers in a lump sum in 1992, should be included exclusively in 1992 compensation for the purpose of pension benefit computations, or, instead, allocated to the years in which the wages were actually earned.

The memorandum distinguished the facts in *Halpin v. Nebraska State Patrolmen's Retirement System*, 211 Neb. 892, 320 N.W.2d 910 (1982), from those relating to the retroactive

pay adjustment at issue in the memorandum. The memorandum addressed the city's past practice concerning lump-sum payments of retroactive pay adjustments and indicated that for purposes of computing pension benefits, the city had historically attributed the pay adjustment to the years during which the work had been performed as distinguished from the year in which the adjustment was received. The memorandum advised the city to continue this practice.

While the city's interpretation is not binding on this court, we have previously recognized in a case involving the interpretation of the pension provisions of a city charter that "'"[l]ong-continued practical construction of a statute by the officers charged by law with its enforcement is entitled to considerable weight in interpreting that law." . . .'" *Belitz v. City of Omaha*, 172 Neb. 36, 45, 108 N.W.2d 421, 427 (1961), quoting *Flint v. Mitchell*, 148 Neb. 244, 26 N.W.2d 816 (1947). Accord *Rohrer v. Hastings Brewing Co.*, 83 Neb. 111, 119 N.W. 27 (1908). Thus, we conclude that *Halpin* is distinguishable from the instant case, and we further find support for our interpretation of § 22-76 in the city's prior established interpretation and handling of backpay awards in connection with pension benefit calculations.

CONCLUSION

Based upon a "plain and ordinary" construction of § 22-76, we conclude that the district court erred as a matter of law in vacating the board of trustees' decision. The board of trustees was correct that the lump-sum backpay received by Brunken in 1995 was the retroactive payment of wages earned in 1994 and should not be included in the board of trustees' computation of Brunken's "highest average monthly compensation" during 1995 for purposes of computing Brunken's pension benefits. There was sufficient relevant evidence to support the board of trustees' decision. Accordingly, we reverse the order of the district court vacating the board of trustees' decision, and we remand the cause with instructions to the district court to reinstate the decision of the board of trustees which denied Brunken's request for a recalculation upward of his retirement pension.

REVERSED AND REMANDED WITH DIRECTIONS.

JoAnn Brandon, Personal Representative of the Estate of Teena Brandon, deceased, appellant and cross-appellee, v. The County of Richardson, Nebraska, and Charles B. Laux, Richardson County Sheriff, appellees and cross-appellants.

624 N.W.2d 604

Filed April 20, 2001. No. S-00-022.

1. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
2. **Judgments: Appeal and Error.** In a bench trial of an action at law, the factual findings by the trial court have the effect of a jury verdict and will not be set aside unless they are clearly wrong.
3. ___: ___. When reviewing the sufficiency of the evidence to sustain a judgment, every controverted fact must be resolved in favor of the successful party, and such party is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
4. **Statutes: Appeal and Error.** Statutory interpretation presents a question 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.
5. ___: ___. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
6. **Actions: Negligence.** Nebraska's comparative negligence law, Neb. Rev. Stat. §§ 25-21,185 to 25-21,185.12 (Reissue 1995), applies only to civil actions in which contributory negligence is a defense.
7. **Negligence.** Contributory negligence is not a defense to an intentional tort.
8. **Negligence: Tort-feasors: Damages.** The plain language of Nebraska's comparative negligence law does not allow for allocation of damages to intentional tort-feasors.
9. **Actions: Mental Distress: Proof.** To recover for intentional infliction of emotional distress, a plaintiff must prove the following: (1) that there has been intentional or reckless conduct, (2) that the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community, and (3) that the conduct caused emotional distress so severe that no reasonable person should be expected to endure it.
10. **Actions: Mental Distress: Death.** A claim for intentional infliction of emotional distress survives the death of the victim.
11. **Mental Distress: Damages.** To recover for intentional infliction of emotional distress, it is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery or whether it is necessarily so.
12. **Mental Distress.** Whether conduct is extreme and outrageous is judged on an objective standard based on all the facts and circumstances of the particular case.

13. ___. In determining whether certain conduct is extreme and outrageous, the relationship between the parties and the susceptibility of the plaintiff to emotional distress are important factors to consider.
14. ___. Mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities that result from living in society do not rise to the level of extreme and outrageous conduct.
15. ___. Conduct which might otherwise be considered merely rude or abusive may be deemed outrageous when the defendant knows that the plaintiff is particularly susceptible to emotional distress.
16. ___. The extreme and outrageous character of conduct may arise from the abuse of a position of power.
17. **Mental Distress: Liability.** Liability arises for intentional infliction of emotional distress only when emotional distress has in fact resulted and is severe.
18. **Mental Distress.** Whether severe emotional distress can be found is a question of law; whether it existed in a particular case is a question of fact.
19. **Mental Distress: Evidence.** The extreme and outrageous character of the conduct is itself important evidence that severe emotional distress existed on account of the conduct.
20. **Wrongful Death: Damages.** In an action for wrongful death of a child, recoverable damages include parental loss of the child's society, comfort, and companionship.
21. **Wrongful Death: Damages: Words and Phrases.** The term "society" embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection.
22. **Wrongful Death: Damages.** When a child is wrongfully killed, a parent's investment in that child of money, affection, guidance, security, and love is destroyed.
23. ___: ___. Parental loss is not limited to or necessarily dependent upon deprivation of the child's monetary contribution toward parental well-being.
24. ___: ___. Damages for loss of society must be determined upon a consideration of the facts of each case.
25. ___: ___. There is no exact fiscal formula for determination of damages recoverable for loss of society, comfort, and companionship, a loss which is not subject to some strict accounting method based on monetary contributions, past or prospective.
26. **Parent and Child.** The relationship between parent and child has intrinsic value.
27. **Wrongful Death: Parent and Child: Damages.** Once a parent-child relationship is proved to exist, destruction of that relationship through the wrongful death of the child entitles the parent to damages. Evidence regarding the quality and extent of the parent-child relationship may then be utilized in determining the amount of those damages.
28. **Damages: Appeal and Error.** The amount of damages is a matter solely for the fact finder, whose action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of damages proved.
29. **Wrongful Death: Damages.** Damages for loss of society are not necessarily dependent on the personal qualities of the child.
30. **Wrongful Death: Damages: Evidence.** An award of $0 to a mother for loss of her daughter's society, comfort, and companionship is inadequate as a matter of law where the award bears no reasonable relationship to the evidence and shocks the conscience.

31. **Negligence.** Negligence must be measured against the particular set of facts and circumstances which are present in each case.
32. **Negligence: Proximate Cause.** A plaintiff is contributorily negligent if (1) he or she fails to protect himself or herself from injury, (2) his or her conduct concurs and cooperates with the defendant's actionable negligence, and (3) his or her conduct contributes to his or her injuries as a proximate cause.
33. **Negligence.** Whether contributory negligence is present in a particular case is a question for the trier of fact.
34. **Negligence: Proximate Cause: Words and Phrases.** A proximate cause is a cause (1) that produces a result in a natural and continuous sequence and (2) without which the result would not have occurred.
35. **Police Officers and Sheriffs: Liability.** Exceptions exist to the general rule that law enforcement officials may not be held liable for failure to protect individual citizens from criminal acts. One such exception to this "no-duty rule" is when there is a special relationship between the individual and law enforcement because the individual has agreed to aid law enforcement officials in the performance of their duties.
36. **Trial: Negligence: Proximate Cause.** Determination of causation is ordinarily a matter for the trier of fact.

Appeal from the District Court for Richardson County: ORVILLE L. COADY, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

David S. Buckel, and, of Counsel, Doni Gewirtzman and Marvin Peguese, of Lambda Legal Defense and Education Fund, Inc., Michael J. Hansen, P.C., Herbert J. Friedman, of Friedman Law Offices, and John Stevens Berry, of Berry, Kelley & Reiman, for appellant.

Richard L. Boucher and Kim K. Sturzenegger, of Boucher Law Firm, for appellees.

Kristin E. Yates, and, of Counsel, Shannon Minter and Jennifer Levi for amicus curiae Harry Benjamin International Gender Dysphoria Association.

Jeffry D. Patterson, of Healey & Wieland Law Firm, for amicus curiae Nebraska Association of Trial Attorneys.

Amy A. Miller, of American Civil Liberties Union of Nebraska, and, of Counsel, Michael Adams and Jennifer Middleton, of American Civil Liberties Union, New York, and of Counsel, Melvyn L. Cantor, Reuven L. Cohen, and Matthew D.

Strada, of Simpson, Thacher & Bartlett, for amici curiae American Civil Liberties Union Foundation et al.

John G. Taylor, of Taylor Law Office, and M. Elaine Johnston, Patrick Barnett, and Marc L. Moore, of White & Case, L.L.P., for amici curiae Parents of Murdered Children, Inc., and National Center for Victims of Crime.

Pamela Coukos, of Mehri, Malkin & Ross, P.L.L.C., and Susan Ann Koenig and Angela J. Dunne, of Law Office of Susan Ann Koenig, P.C., for amici curiae Nebraska Domestic Violence Sexual Assault Coalition et al.

Charles B. Crisman, Jr., and, of Counsel, W. Mason Emnett and Richard L. Parker for amici curiae Gender Public Advocacy Coalition et al.

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

HENDRY, C.J.

INTRODUCTION

On December 31, 1993, Teena Brandon (Brandon), Lisa Lambert, and Phillip Devine were found murdered in Lambert's rural Humboldt farmhouse in Richardson County, Nebraska. John L. Lotter and Thomas M. Nissen, also known as Marvin T. Nissen, were convicted of the murders. See *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), and *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997). Brandon's mother, JoAnn Brandon (JoAnn), brought an action against Richardson County and Sheriff Charles B. Laux for negligence, wrongful death, and intentional infliction of emotional distress in connection with Brandon's murder and the events leading up to her death.

The district court found the county negligent and awarded economic damages of $6,223.20 and noneconomic damages of $80,000. However, the court reduced the damage award on the negligence claim by 85 percent for the intentional torts of Lotter and Nissen, and by 1 percent for the negligence of Brandon. The court denied recovery on the intentional infliction of emotional distress claim and awarded "nominal damages" for loss of soci-

ety, comfort, and companionship. JoAnn appeals, and the county cross-appeals.

FACTUAL BACKGROUND

Brandon had been sexually abused as a child, and in her late teens, developed gender identity disorder, a condition in which one develops a strong dislike for one's own gender and assumes the characteristics, both behaviorally and emotionally, of the other gender. In November 1993, Brandon came to Richardson County after leaving Lincoln due to legal troubles. Brandon had been convicted of forgery in Lancaster County and had violated the terms of her probation. While in Richardson County, Brandon presented herself as a man. Brandon had obtained a driver's license identifying Brandon as a male by the name of Charles Brayman.

In December 1993, Brandon met Lana Tisdel, a young woman who resided in Falls City. Tisdel, believing Brandon to be a male, dated Brandon for approximately 1 month. After moving to Richardson County, Brandon also became acquainted with Lotter and Nissen. On December 15, Brandon was booked into the Richardson County jail on forgery charges for forging checks in Richardson County. Brandon was placed in an area of the jail where females are usually held. While Brandon was being held at the jail, Laux referred to Brandon as an "it" during a conversation with Tisdel which took place in Brandon's presence. A few days later, Nissen secured Brandon's release from jail by posting bail with money Tisdel gave to Nissen. Thereafter, Lotter and Nissen became suspicious of Brandon's sexual identity.

On December 24, 1993, several people, including Brandon and Tisdel, attended a party at Nissen's home. In the early morning hours of December 25, in an attempt to prove to Tisdel that Brandon was a female, Lotter and Nissen pulled Brandon's pants down in Tisdel's presence.

Later that same morning, Lotter and Nissen beat Brandon, hitting her in the head, kicking her in the ribs, and stepping on her back. Lotter and Nissen then drove Brandon to a remote location where both Lotter and Nissen sexually assaulted Brandon. After the sexual assaults, Nissen beat Brandon again.

When they returned to Nissen's house, Brandon escaped by kicking out a bathroom window and ran to the home of Linda Gutierres, Tisdel's mother.

When Brandon arrived at Gutierres' home at approximately 6 a.m., Brandon had a swollen, bloody lip, scratches, and a "shoe print" on her back, and she was crying. An ambulance was called, and Brandon was transported to the local hospital, where Brandon reported that she had been beaten and sexually assaulted. A rape examination was performed at the hospital, and the results, which showed that Brandon had been sexually penetrated, were turned over to law enforcement.

Around noon that same day, Brandon provided a written statement to the Falls City Police Department regarding the rapes. Later that day, Laux and Deputy Tom Olberding of the Richardson County sheriff's office conducted a tape-recorded interview with Brandon. Prior to the interview, Laux had been informed by the hospital staff that Brandon had been beaten and sexually penetrated. Olberding conducted the initial interview, during which Brandon described the rapes, including the location where the rapes occurred, and that Lotter and Nissen had used condoms during the rapes. Brandon also indicated that she had a pair of rolled-up socks in her pants at the time of the rapes. Laux was present in the interview room the entire time Olberding was questioning Brandon.

After Brandon had initially related the details of the rapes to Olberding and Laux, Laux began questioning Brandon regarding the details of the rapes a second time, beginning at approximately 3:40 p.m. on December 25, 1993. Shortly after Laux began questioning Brandon, Olberding left the room. At that time, Olberding had a brief conversation with Keith Hayes, an investigator with the Falls City Police Department, who was present outside the interview room. Olberding indicated that he left the room because he "didn't like the way [the interview] was going." Olberding returned to the interview room a short time later. (All quotations from the December 25 interview appearing in this opinion are taken from the tape-recorded version of the interview.)

While questioning Brandon about the incident that occurred at Nissen's house during which Lotter and Nissen pulled down Brandon's pants, the following exchange took place:

Q. [A]fter he pulled your pants down and seen you was a girl, what did he do? Did he fondle you any?

A. No.

Q. He didn't fondle you any, huh. Didn't that kind of amaze you? . . . Doesn't that kind of, ah, get your attention somehow that he would've put his hands in your pants and play with you a little bit?

. . . .

Q. [Y]ou were all half-ass drunk . . . . I can't believe that if he pulled your pants down and you are a female that he didn't stick his hand in you or his finger in you.

A. Well, he didn't.

Q. I can't believe he didn't.

While interviewing Brandon regarding the rapes, Laux's statements and questions included the following: "So they got ready to poke you"; "[t]hey tried sinking it in your vagina"; "So then after he couldn't stick it in your vagina he stuck it in your box or in your buttocks, is that right?"; "[D]id it feel like he stuck it in very far or not?"; "Did he tell you anything about this is how they do it in the penitentiary?"; "Was he enjoying it?"; "Did he think it was funny?"; "Did he play with your breasts or anything?"; and "Well, was he fingering you?"

Laux confronted Brandon regarding the position of her legs during the sexual assault by Nissen in the following manner:

Q. How did you have your legs when he was trying to do that?

A. He had them positioned on each side and he was positioned in between my legs.

Q. You had your legs, ah, your feet up around his back or did you just have them off to the sides or what?

A. I had one foot on the floor and the other on the seat.

. . . .

Q. He had you on the back seat and you had one leg on the seat the one leg up up over the front seat or where?

A. One leg on the floor and the other just laying [sic] on the seat not on top of the guy.

Q. You had one leg on the back seat and one leg laying [sic] on the floor. Now just earlier when I asked you, you

said you had one leg up around him and one leg over the seat.

A. No, I didn't.

Q. Yeah, because I can play it back for you.

A. Then play it back because I don't understand it.

After the above exchange took place, Laux asked Brandon no further questions about the position of her legs. The tape-recorded interview shows that Brandon's description of the position of her legs during the rapes was in fact consistent.

The following exchange occurred when Laux questioned Brandon about Lotter's sexually assaulting her:

Q. After he got his pants down he got a spread of you, or had spread you out, and he got a spread of you then, then what happened?

A. When he finished he got out of the car and got back in the driver's door.

Q. Well, how did, ah, let's back up here for a second. First of all you didn't say anything about him getting it up. Did he have a hard on when he got back there or what?

A. I don't know. I didn't look.

Q. You didn't look. Did he take a little time working it up, or what? Did you work it up for him?

A. No, I didn't.

Q. You didn't work it up for him?

A. No.

Q. Then you think he had it worked up on his own, or what?

A. I guess so, I don't know.

Q. You don't know. . . . Did, when he got in the back seat you were already spread out back there ready for him, waiting on him.

A. No, I was sitting up when he got back there.

Laux questioned Brandon about her prior sexual experience in the following manner:

Q. And you have never had any sex before?

A. No.

Q. How old are you?

A. 21.

Q. And if you're 21, you think you'd have, you'd have, trouble getting it in?

A. Who me?

Q. Yeah.

A. I guess so. He was.

Laux further asked questions regarding Brandon's gender identity crisis such as, "Do you run around once in a while with a sock in your pants to make you look like a boy?" At one point during the interview, the following exchange took place:

Q. Why do you run around with girls instead of, ah, guys being you are a girl yourself?

A. Why do I what?

Q. Why do you run around with girls instead of guys beings you're a girl yourself? Why do you make girls think you're a guy?

A. I haven't the slightest idea.

Q. You haven't the slightest idea? You go around kissing other girls? . . . . [T]he girls that don't know about you, thinks [sic] you are a guy. Do you kiss them?

A. What does this have to do with what happened last night?

Q. Because I'm trying to get some answers so I know exactly what's going on. Now, do you want to answer that question for me or not?

A. I don't see why I have to.

Q. Huh?

A. I don't see why I have to.

Olberding: You, you don't have to answer. It's, this is all voluntary information.

Laux: The only thing is if it goes to court, that answer, that question is going to come up in court and I'm going to want an answer for it before it goes to court. See what I'm saying? I'm trying to have the answer there so we can try to avoid that question if it's not the answer I want to hear.

Brandon: 'Cause I have a sexual identity crisis.

Q. Your what?

A. I have a sexual identity crisis.

Q. You want to explain that?

A. I don't know if I can even talk about it . . . .

Brandon agreed to file complaints against Lotter and Nissen and agreed to testify against them. At the conclusion of the interview, Laux told Brandon, "I'm not trying to make it rough on you, but I've got to have the information that we need and the only way by getting that is asking some very personal questions."

Laux and Olberding then went to the location where Brandon claimed the rapes occurred. At that location, they recovered two condoms, a pair of rolled-up socks, and a beer can. These items were collected as evidence.

On December 25 and 26, 1993, statements were taken from Tisdel; Gutierres; Lotter's girl friend, Rhonda McKenzie; and Tisdel's sister, Leslie Mayfield. Each of these statements corroborated certain aspects of Brandon's account of the events of December 25. When Gutierres was at the sheriff's office on December 25 to give her statement, Laux again referred to Brandon as an "it" in a conversation with Gutierres.

On December 28, 1993, Nissen voluntarily went to the police station and, after being read his *Miranda* rights, gave a statement to Olberding and Hayes. Nissen admitted that he had pulled Brandon's pants down to determine her gender. He further revealed that during an argument at his house over Brandon's lying about her gender, he hit Brandon in the mouth and kicked Brandon in the back. He admitted that he, Lotter, and Brandon were at the location where Brandon claimed the rapes occurred, but denied that he had sexually assaulted Brandon.

On December 29, 1993, Brandon came to the sheriff's office and identified the socks which were found at the rape scene as hers. The sheriff's office requested that Brandon return that afternoon for another interview. However, when Brandon arrived at the courthouse that afternoon, Lotter and Nissen, who had not yet been arrested, were outside the courthouse, and Brandon did not go in. Law enforcement did not make any attempt to contact Brandon about the missed interview.

At the time Brandon reported the rapes, Laux was aware that Lotter and Nissen had criminal records. He was aware that Lotter had once escaped from custody in the middle of the day wearing an orange prison uniform and had had to be chased down by deputies. He knew that Lotter had been involved in a scuffle with a Missouri Highway Patrol officer, which resulted

in the officer's drawing his gun on Lotter. Laux knew that people in the community were afraid of Lotter. Laux also knew that Nissen had been incarcerated in the penitentiary.

The sheriff's office was also aware that Lotter and Nissen had threatened to harm Brandon if she reported the rapes. Gutierres informed Laux that Lotter and Nissen had threatened Brandon's life if she reported the rapes. Before the interview with Brandon was conducted, Gutierres told Laux that Brandon was "afraid," "feared for her life," and was "scared to death" because Lotter and Nissen had threatened Brandon's life. Tammy Schweitzer, Brandon's sister, called Laux on December 27, 1993, and informed him that Brandon was afraid that Lotter and Nissen would kill Brandon for reporting the rapes.

After the rapes, Brandon spoke to JoAnn over the telephone on several occasions. On December 25, 1993, Brandon told JoAnn that she was afraid to return to JoAnn's home in Lincoln because Lotter and Nissen had her address book and would be able to locate her at JoAnn's home. Brandon decided to stay with her friend Lambert at Lambert's house in rural Humboldt because Brandon believed that Lotter and Nissen did not know where Lambert lived.

On December 31, 1993, Brandon, Lambert, and Devine, another friend, were found murdered in Lambert's house. That same day, Lotter and Nissen were arrested for the December 25 sexual assaults on Brandon. Lotter and Nissen were later charged with and convicted of the three murders. See *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), and *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997).

On January 2, 1994, several of Brandon's family members, including Schweitzer, went to the sheriff's office to obtain information regarding Brandon's death and to retrieve some of Brandon's personal effects. At that time, they encountered Laux, who called Schweitzer a "bitch" and asked her "what kind of sister did [you] have?"

On April 19, 1994, JoAnn filed a claim under the Political Subdivisions Tort Claims Act. The 6-month period for the county and Laux to respond to the claim expired without a response. JoAnn then withdrew the claim and brought an action against the county and Laux, alleging that the county was negligent by fail-

ing to protect Brandon and that Laux's conduct during the December 25, 1993, interview constituted intentional infliction of emotional distress. The county filed a demurrer to JoAnn's second amended petition, which was sustained without further leave to amend. On appeal, this court reversed, determining that sufficient facts had been pled to qualify as an exception to the rule that law enforcement officials may not be held liable for failure to protect individual citizens from harm by criminal conduct. See *Brandon v. County of Richardson*, 252 Neb. 839, 566 N.W.2d 776 (1997) (*Brandon I*). We determined that if true, the facts pled established that a special relationship was created between Brandon and the county when Brandon went to law enforcement officials and offered to testify and aid the prosecution of Lotter and Nissen. *Id.* We also determined that JoAnn should have been granted leave to amend her petition with respect to the intentional infliction of emotional distress claim. *Id.*

JoAnn then filed a third amended petition, and trial to the court without a jury commenced on September 22, 1999. At trial, portions of Laux's deposition testimony were admitted and read into evidence. In this testimony, Laux admitted that Brandon told him that Lotter and Nissen had threatened her and that he was aware that Brandon was afraid. At trial, Laux testified that he never offered Brandon special protection from Lotter and Nissen. Laux also testified that his manner of questioning Brandon during the December 25, 1993, interview was due to concerns he had as to whether Brandon was being truthful. He questioned Brandon's credibility because she had been charged with forgery and had been deceiving people in the community as to her gender and because she was taking a long time to answer questions during the interview. However, Laux admitted that Brandon's gender identity disorder was not relevant to whether she had been raped.

Laux also testified that Brandon failed to return to the sheriff's office for the second December 29, 1993, interview that had been scheduled for Brandon and that the sheriff's office believed Brandon had gone back to Lincoln. A dispatcher at the sheriff's office testified that some time between December 25 and 31, she received a telephone call from Brandon stating that Brandon was going back to Lincoln.

Several law enforcement officers involved in investigating the rapes and surrounding events testified at trial. Olberding testified that Brandon appeared "frightened" and "traumatized" when she arrived for the December 25, 1993, interview. Olberding further stated that when Laux began questioning Brandon, Olberding left the room for a short time because he did not believe further questioning was necessary and "didn't think it was right to do that." Olberding testified that he was aware Lotter and Nissen had threatened Brandon, that he believed Brandon was telling the truth during the December 25 interview, and that he believed on December 28 that there was probable cause to arrest Lotter and Nissen. Olberding stated that Brandon was not keeping the sheriff's office advised of her whereabouts between December 25 and 31. However, Olberding also testified that the sheriff's office never offered Brandon any protection from Lotter and Nissen if she stayed in Richardson County.

Deposition testimony of John Caverzagie, who was assistant chief for the Falls City Police Department in 1993, was also admitted at trial. Caverzagie listened to the December 25 tape-recorded interview and testified that he believed that "just about everything" Laux said during the interview was "very unprofessional" and agreed that such conduct was outrageous. Hayes, the investigator who was present outside the interview room while the interview was being conducted, read the transcript of the interview and testified that Laux's questioning was "intimidating" and that he could think of no legitimate reason to question Brandon about her gender identity crisis. Hayes agreed that Laux's conduct during parts of the interview indicated that Laux was treating Brandon "as an accused rather than the victim."

Jack Wyant, a retired Nebraska State Patrol criminal investigator, testified as an expert witness for JoAnn. Wyant testified that in his opinion, based on the information that was available to law enforcement, an attempt should have been made to bring Brandon in for safekeeping if Lotter and Nissen were not arrested. Wyant further testified that even if he felt he was not getting truthful and accurate answers from an alleged rape victim, he could see no reason to be rude or abrasive while questioning the alleged victim.

A prosecutor who had prosecuted numerous sexual assault cases and had worked with law enforcement regarding sexual assault cases testified as an expert witness for the county. In preparing her testimony, the prosecutor reviewed the transcript of the December 25, 1993, interview. However, the majority of the prosecutor's testimony dealt with her opinion regarding the manner in which the county conducted the overall rape investigation, including whether Lotter and Nissen should have been arrested sooner. The prosecutor was not asked for her opinion and did not render an opinion as to whether Laux's conduct during the December 25 interview was extreme and outrageous.

A portion of the prosecutor's testimony on direct examination specifically related to Laux's conduct during the December 25, 1993, interview. That testimony consisted of the following:

> "Q. . . . How would you characterize the interview by Sheriff Laux and Teena Brandon?"
>
> . . . .
>
> A. "My characterization of the interview was that it appeared to me that he was seeking her story, he was trying to get an idea of her version of events. He was trying to get detailed information from her about the chronology of events as well as what the events were.
>
> "As I reviewed the transcript of that I found that he certainly used some language that I didn't find particularly appropriate. There were times when it appeared that he was using what I would consider locker room talk and that I think some would find offensive.
>
> "But with respect to being confrontational necessarily with Teena Brandon, I didn't find that he was, quite frankly, as confrontational as many officers I've seen doing interviews with victims of sexual assault.
>
> "I can honestly say that I have interviewed victims of sexual assault prior to trial, prior to preliminary hearings, prior to depositions and have been myself much more confrontational with them about areas where I might feel that they have been inconsistent or where they have given information that seems difficult to understand and may bear on areas where a defense attorney is going to make a big stink so to speak.

"Q. And you mentioned some of the language was not appropriate, could you give us a few examples?

"A. Oh, one that sticks out in my mind is he is asking her about the actual sexual assault itself by either Lotter or Nissen, I don't recall which one, and it may have been with both of them, where he says, okay, you're in the back, you're, and I don't recall what he says, he says you're spread and they're getting ready to poke you or something along that line.

"And I, those are seemingly not very sensitive terms to use when you're talking to somebody about an alleged sexual assault. That one stands out in my mind."

On cross-examination, the prosecutor acknowledged that prosecutors have a different role in the investigation and prosecution of sexual assault cases than do law enforcement officers. The prosecutor gave no testimony indicating that the interviews of sexual assault victims that she had witnessed were conducted within hours of the sexual assault incident. She admitted that she had never interviewed a rape victim immediately after the rape occurred. The prosecutor also testified that she was not informed that Olberding left the interview room at one point due to his disagreement with Laux's conduct during the interview. When asked if she would instruct officers to interrogate a rape victim in a manner similar to that used by Laux, the prosecutor stated, "I don't think some of the language he used was what I would suggest to anybody."

Mario Scalora, a licensed clinical psychologist and assistant professor of psychology at the University of Nebraska at Lincoln, testified as a psychological expert for JoAnn. Scalora had been licensed as a clinical psychologist since 1989 and had worked with 300 to 400 victims of sexual abuse. Scalora reviewed Brandon's mental health records, Brandon's criminal record, Brandon's medical records regarding the emergency room examination performed subsequent to the rapes, police reports relating to the rapes, the entire transcript of the December 25, 1993, interview, and a portion of the tape-recorded December 25 interview. Scalora also conducted interviews with JoAnn and Schweitzer regarding Brandon's history from infancy up to the time of her death.

Based on this information, Scalora testified that Brandon was the victim of childhood sexual abuse, which had a substantial and negative effect on how Brandon perceived her own sexuality. Scalora testified that Brandon subsequently developed gender identity disorder, which may have been related to her childhood sexual abuse. He further testified that Brandon was "very negatively impacted" by the rapes Lotter and Nissen committed upon her. Regarding the impact of Laux's conduct during the December 25, 1993, interview, Scalora testified that considering Brandon's history, Brandon had "very open emotional sores" upon arriving at the December 25 interview. When asked for his opinion regarding what impact Laux's behavior during the December 25 interview had on Brandon, Scalora testified that "the interrogation had a significant negative effect on this woman." Scalora testified that Brandon's responses during the interview indicated that she believed she was not being taken seriously. Scalora further testified that considering the fact that Brandon had been raped just hours before the interview was conducted, "that type of interrogation process . . . is like pouring . . . vinegar on an open wound."

JoAnn also testified regarding Brandon's reaction to the December 25, 1993, interview. JoAnn testified that she spoke with Brandon on the telephone almost every day after the rapes. She described Brandon as "emotionally dead" during those conversations. JoAnn testified that Brandon told her that Laux was "more concerned about her identity crisis than he was about the rape" and that she was "scared" of Laux "[b]ecause of the way he was towards her."

JoAnn further testified that she had a close relationship with Brandon. JoAnn described Brandon as an "outgoing and happy" child. Schweitzer testified that her and Brandon's father was killed in a car accident before Brandon was born and that she and Brandon had a close relationship with their mother because "it was just the three of us all the time, so we had nobody but each other." Pat Brayman, Brandon's aunt, testified that Brandon "loved her mom dearly and she let her mother know that she loved her." JoAnn and Schweitzer testified that Brandon spent every Christmas with her family. A booklet of drawings and photographs documenting Brandon's life from infancy to young adulthood was admitted into evidence. Photographs in

the booklet depict Brandon's participation in family gatherings and other activities.

JoAnn testified that she began witnessing changes in Brandon at age 17 when Brandon began wearing masculine hair and clothing styles. JoAnn testified that when Brandon began portraying herself as a male, JoAnn discussed this issue with Brandon but often "didn't know what to say." JoAnn also attended counseling with Brandon. JoAnn testified that after Brandon began presenting herself as a man, Brandon became more distant from her family but still maintained contact. JoAnn testified that Brandon would call, stop by, or leave a rose in the door for JoAnn.

JoAnn also testified that Brandon was interested in becoming a commercial artist and had applied to the Colorado Institute of Art. After Brandon's death, JoAnn received a letter that Brandon's application had been accepted. JoAnn also stated that after the rapes occurred, Brandon told JoAnn that she wanted to come back to Lincoln and "get things back together" and "get her life back." Brandon told JoAnn that Brandon planned to return to Lincoln on January 3, 1994.

On December 6, 1999, the district court issued a "Memorandum Finding," determining that the county had a duty to protect Brandon due to the special relationship between the county and Brandon which was created when Brandon agreed to assist the county by testifying against Lotter and Nissen. The court determined that the county was negligent in that it failed to take measures to protect Brandon. The court awarded economic damages of $6,223.20 and noneconomic damages of $80,000 for Brandon's predeath pain and suffering. However, the court determined that Brandon herself was negligent and that the damage award should be reduced by 1 percent for such negligence. The court did not specifically state how Brandon was negligent. The court further reduced the damage award by 85 percent, allocating that percentage to the intentional torts of Lotter and Nissen. Thus, the court determined that the county was responsible for 14 percent of the noneconomic damages. The court entered judgment against the county for a total of $17,360.97.

The court denied recovery on the intentional infliction of emotional distress claim, determining that Laux's conduct was not extreme and outrageous because "the evidence does not

reach such high status" and that in addition there was "a failure to prove that [Brandon] suffered" as a result of Laux's conduct.

The court further determined that "the major award arises under [JoAnn]'s cause for pre-death pain and suffering." The court then stated that Brandon's "history does not support likely contributions of money to anyone" and that JoAnn, as Brandon's next of kin, was entitled to "nominal damages" for loss of society, comfort, and companionship. Interpreting the order as a whole, we conclude that the award of "nominal damages" was in effect an award of zero damages.

JoAnn appeals, and the county cross-appeals.

ASSIGNMENTS OF ERROR

JoAnn claims the district court erred in (1) reducing the damage award by 85 percent due to the intentional torts of Lotter and Nissen; (2) determining that Laux's conduct during the December 25, 1993, interview was not extreme and outrageous and that JoAnn failed to prove Brandon suffered severe emotional distress as a result of the conduct; (3) awarding "nominal damages" for loss of society, comfort, and companionship; and (4) determining that Brandon was negligent and reducing the damage award by 1 percent due to such negligence.

The county claims the district court erred in determining that the county was negligent.

STANDARD OF REVIEW

[1] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below. *Essen v. Gilmore*, 259 Neb. 55, 607 N.W.2d 829 (2000).

[2,3] In a bench trial of an action at law, the factual findings by the trial court have the effect of a jury verdict and will not be set aside unless they are clearly wrong. *Strategic Staff Mgmt. v. Roseland*, 260 Neb. 682, 619 N.W.2d 230 (2000). When reviewing the sufficiency of the evidence to sustain a judgment, every controverted fact must be resolved in favor of the successful party, and such party is entitled to the benefit of every inference that can reasonably be deduced from the evidence. *Baldwin v. City of Omaha*, 259 Neb. 1, 607 N.W.2d 841 (2000).

ANALYSIS

ALLOCATION OF DAMAGES

JoAnn first claims that the district court erred in its application of Neb. Rev. Stat. § 25-21,185.10 (Reissue 1995), by allocating 85 percent of the damages to the intentional torts of Lotter and Nissen, thereby reducing the judgment against the county for noneconomic damages by 85 percent. JoAnn claims the court impermissibly shifted liability from the county, a negligent tort-feasor, to Lotter and Nissen, intentional tort-feasors.

[4,5] Statutory interpretation presents a question 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. *Philpot v. Aguglia*, 259 Neb. 573, 611 N.W.2d 93 (2000). In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Id.*

Section 25-21,185.10 provides in relevant part:

> In any other action involving more than one defendant, the liability of each defendant for economic damages shall be joint and several and the liability of each defendant for noneconomic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of noneconomic damages allocated to that defendant in direct proportion to that defendant's percentage of negligence, and a separate judgment shall be rendered against that defendant for that amount.

JoAnn claims this section provides for allocation of damages among negligent tort-feasors only and does not allow for such allocation due to the acts of intentional tort-feasors. We determine that JoAnn's assertion is correct.

[6-8] Nebraska's comparative negligence law, Neb. Rev. Stat. §§ 25-21,185 to 25-21,185.12 (Reissue 1995), applies only to civil actions in which contributory negligence is a defense. § 25-21,185.07. This court has previously recognized that contributory negligence is not a defense to an intentional tort. " '[W]here the defendant's conduct is actually intended to inflict

harm upon the plaintiff, there is a difference, not merely in degree but in the kind of fault; and the defense [contributory negligence] never has been extended to such intentional torts.' " *Omaha Nat. Bank v. Manufacturers Life Ins. Co.*, 213 Neb. 873, 881-82, 332 N.W.2d 196, 202 (1983), quoting William L. Prosser, Handbook of the Law of Torts § 65 (4th ed. 1971). Furthermore, § 25-21,185.10 provides that "[e]ach defendant shall be liable only for the amount of noneconomic damages allocated to that defendant in direct proportion to that defendant's percentage of *negligence* . . . ." (Emphasis supplied). Section 25-21,185.10 does not provide for allocation of damages to a defendant for his or her intentional torts. The plain language of Nebraska's comparative negligence law does not allow for allocation of damages to intentional tort-feasors.

Negligent and intentional torts are different in degree, in kind, and in society's view of the relative culpability of each act. *Turner v. Jordan*, 957 S.W.2d 815 (Tenn. 1997). See, also, *Welch v. Southland Corp.*, 134 Wash. 2d 629, 635, 952 P.2d 162, 166 (1998) (recognizing negligent and intentional torts are of " 'wholly different legal realm' "); *Merrill Crossings Associates v. McDonald*, 705 So. 2d 560, 562 (Fla. 1997) (negligent acts are " 'fundamentally different' " from intentional acts); *Veazey v. Elmwood Plantation Associates, Ltd.*, 650 So. 2d 712, 719 (La. 1994) (recognizing intentional torts are of "fundamentally different nature" than negligent torts). Because of these differences, allowing allocation of damages between negligent and intentional tort-feasors presents practical difficulties. *Turner, supra*. Fact finders are likely to allocate most, if not all, of the damages to the intentional tort-feasor due to the higher degree of social condemnation attached to intentional, as opposed to negligent, torts. *Id.* Thus, allocation of a percentage of the damages to an intentional tort-feasor reduces the negligent party's incentive to comply with the applicable standard of care. *Id.* See, also, *Veazey, supra*. Furthermore, it would be irrational to allow a party who negligently fails to discharge a duty to protect to reduce its liability because there is an intervening intentional tort when the intervening intentional tort is exactly what the negligent party had a duty to protect against. *Merrill Crossings Associates, supra*. See, also, *Turner, supra*; *Kansas State Bank*

& Tr. Co. v. Specialized Transportation Services, Inc., 249 Kan. 348, 819 P.2d 587 (1991).

Other courts have concluded that allocation of damages to intentional tort-feasors is not allowed under comparative negligence law. See, *Whitehead v. Food Max of Mississippi, Inc.*, 163 F.3d 265 (5th Cir. 1998); *Welch, supra*; *Merrill Crossings Associates, supra*; *Turner, supra*; *Veazey, supra*; *McLean v. Kirby Co.*, 490 N.W.2d 229 (N.D. 1992); *Kansas State Bank & Tr. Co., supra*. Several of these courts have simply determined, as we have, that the plain meaning of their statutes does not authorize allocation of damages to intentional tort-feasors. *Whitehead, supra*; *Welch, supra*; *Merrill Crossings Associates, supra*; *McLean, supra*.

For these reasons, we determine the trial court erred in allocating 85 percent of the noneconomic damages to the intentional torts of Lotter and Nissen.

Intentional Infliction of Emotional Distress

JoAnn next claims the trial court erred in denying recovery for intentional infliction of emotional distress. JoAnn claims the trial court erred in determining that Laux's conduct during the December 25, 1993, interview was not extreme and outrageous and in finding that JoAnn failed to prove that Brandon suffered as a result of Laux's conduct.

[9,10] This court has long held that three elements must be alleged and proved before a plaintiff can recover on a cause of action for intentional infliction of emotional distress. *Iwanski v. Gomes*, 259 Neb. 632, 611 N.W.2d 607 (2000). To recover for intentional infliction of emotional distress, a plaintiff must prove the following: (1) that there has been intentional or reckless conduct, (2) that the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community, and (3) that the conduct caused emotional distress so severe that no reasonable person should be expected to endure it. *Id.*; *Brandon I.* A claim for intentional infliction of emotional distress survives the death of the victim. *Brandon I.* The parties in the present case have not raised any issues regarding whether the first element of the tort, intentional

or reckless conduct, had been met. The dispute is to the second and third elements.

[11] Regarding the second element of the tort, it is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery or whether it is necessarily so. Restatement (Second) of Torts § 46, comment *h.* (1965). See, also, *Behringer v. Behringer*, 884 S.W.2d 839 (Tex. App. 1994). Only if reasonable minds may differ does the fact finder then determine whether the conduct in a particular case is sufficiently extreme and outrageous as to result in liability. Restatement, *supra.* See, also, *Behringer, supra.* The district court in the present case determined that Laux's conduct during the December 25, 1993, interview was not extreme and outrageous, stating that "the evidence does not reach such high status." The district court further stated that Laux's conduct was "reasonable and necessary to prepare [Brandon] to testify at public trial in the face of confrontation by and on behalf of Nissen and Lotter."

It is unclear whether the district court found the evidence of outrageous conduct to be insufficient as a matter of fact or as a matter of law. However, we determine, as set forth below, that the material facts are undisputed and that Laux's conduct was extreme and outrageous as a matter of law.

[12-15] Whether conduct is extreme and outrageous is judged on an objective standard based on all the facts and circumstances of the particular case. *Doe v. Calumet City*, 161 Ill. 2d 374, 641 N.E.2d 498, 204 Ill. Dec. 274 (1994). In determining whether certain conduct is extreme and outrageous, the relationship between the parties and the susceptibility of the plaintiff to emotional distress are important factors to consider. *Drejza v. Vaccaro*, 650 A.2d 1308 (D.C. 1994). Mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities that result from living in society do not rise to the level of extreme and outrageous conduct. Restatement, *supra*, comment *d.* However, conduct which might otherwise be considered merely rude or abusive may be deemed outrageous when the defendant knows that the plaintiff is particularly susceptible to emotional distress. *Doe, supra.* See, also, Restatement, *supra*, comment *f.*

[16] The extreme and outrageous character of conduct may also arise from the abuse of a position of power. *Doe, supra.* See, also, Restatement, *supra*, comment *e*. The Restatement specifically mentions police officers among those who may be held liable for intentional infliction of emotional distress due to abuse of their position. Restatement, *supra*. See, also, *Doe, supra.*

In considering the relationship between the parties in the present case, the record shows that prior to conducting the interview, Laux had developed a negative attitude toward Brandon because of her gender identity disorder. Laux's reference to Brandon as an "it" when Brandon was housed in the jail on December 15, 1993, reflects this negative attitude. Laux again referred to Brandon as an "it" on the very day the interview was conducted. Laux's comment to Schweitzer, asking her "what kind of sister did [you] have?" reflects that this attitude continued even after Brandon's death. The record further reflects that Laux, as a law enforcement official, was in a position of power in relation to Brandon, the victim of a crime who sought assistance from law enforcement.

Furthermore, Brandon was in a particularly vulnerable emotional state at the time the interview was conducted, having been beaten and raped earlier that day. See *Drejza, supra* (being victim of rape, standing alone, is enough to demonstrate particularly vulnerable emotional condition). At the time the interview was conducted, Laux knew that Brandon had been beaten as the results of the beating were readily visible on Brandon's face. Laux knew that the hospital examination showed that Brandon had been sexually penetrated. Laux was informed prior to conducting the interview that Brandon was "afraid," "feared for her life," and was "scared to death" because Lotter and Nissen had threatened Brandon. Laux was also aware that Brandon was upset and crying during the interview.

Despite this knowledge, Laux proceeded to use crude and dehumanizing language during the entire interview. Examples of such language include statements such as "they got ready to poke you," "sinking it in your vagina," "stuck it in your box or in your buttocks," "he got a spread of you," "had spread you out," and "was he fingering you?"

At several points during the interview, Laux expressed disbelief at what Brandon was telling him, through both verbal statements and his tone of voice. Laux told Brandon that he "can't believe" that Lotter did not "stick his hand in you or his finger in you" during the incident in which Lotter and Nissen pulled down Brandon's pants. He accused Brandon of giving differing accounts regarding the position of her legs during the rapes when in fact Brandon's accounts were consistent. He expressed disbelief that Brandon could be 21 years old and yet the rapists would have "trouble getting it in."

Some of Laux's statements indicate a belief that Brandon willingly participated in the sexual acts, such as "[d]id you work it up for him?" (referring to the rapist's penis) and "you were already spread out back there ready for him, waiting on him." Laux asked other questions which expressed simply a prurient interest in the rapes, including: "[D]id it feel like he stuck it in very far or not?"; "Did he have a hard on when he got back there or what?"; "Did he take a little time working it up . . . ?"; and "Did he play with your breasts or anything?"

Laux also asked questions that were entirely irrelevant as to whether Brandon had been raped, such as "Did he tell you anything about this is how they do it in the penitentiary?" and "Was he enjoying it? Did he think it was funny?" Laux proceeded to question Brandon about her gender identity disorder, asking her if she had kissed other girls, which had nothing to do with the situation under investigation. Olberding even interjected at this point, telling Brandon that she did not have to answer the questions Laux was asking about her gender identity disorder. Laux himself admitted at trial that Brandon's gender identity disorder had nothing to do with whether Brandon had been raped.

The tone used during the interview is also something to be considered in determining the outrageousness of Laux's conduct. See *Drejza v. Vaccaro*, 650 A.2d 1308 (D.C. 1994). The tape recording reveals that Laux's tone throughout the interview was demeaning, accusatory, and intimidating. The tone in which many of the questions were asked expressed Laux's disbelief of what Brandon was telling him and that Laux was not taking Brandon seriously.

The above-discussed facts are not in dispute. There is no question that Laux was in a position of authority in relation to Brandon and that Laux knew Brandon was in a particularly vulnerable emotional state prior to conducting the interview. The facts of what happened during the actual interview itself are also not subject to dispute because the tape recording provides a record of exactly what was said during the interview and the manner in which those words were said.

The county does not dispute these facts, but attempts to justify Laux's conduct, claiming that Laux was pursuing the legitimate objectives of clarifying inconsistencies in Brandon's account, fact finding, and preparing Brandon to testify against Lotter and Nissen at trial. Laux also claimed that his manner of questioning Brandon was due, in part, to the fact that Brandon was taking a long time to answer questions. However, these justifications do not withstand scrutiny. A review of the tape recording reveals that Brandon's answers were spontaneous and were given without hesitation. Having listened to the tape-recorded interview, we also find no instances in which Laux attempted to clarify any actual inconsistencies in Brandon's account. Furthermore, the questions Laux asked which were entirely irrelevant to whether the rapes had occurred and that expressed simply a prurient interest in the rapes can hardly be said to constitute legitimate "fact finding."

Any claim that Laux was preparing Brandon to testify at trial is also not persuasive. The interview in the present case occurred only hours after Brandon was beaten and raped. The alleged perpetrators had not yet been arrested and there was no imminent trial to prepare for at that point. As stated in *Drejza*, 650 A.2d at 1315 n.18:

> As a matter of common sense, an interview with a distraught rape victim an hour or so after her ordeal ended was hardly the occasion for a detective . . . to question her like a defense attorney or a prosecutor, to try to assess her ability to withstand potential humiliating aspects of a criminal trial, or to challenge her intention to press charges. Such an inquiry could be conducted at a later date, preferably by a prosecutor, after the victim had been given a reasonable amount of time to regain control over her emotions

> and faculties. . . . It would surely be reasonable for her not to expect to be challenged or belittled, almost as soon as she arrived, by the very authorities whose assistance she was requesting.

Not only do the justifications offered by the county for Laux's conduct not withstand scrutiny, such justifications do not change the undisputed facts regarding the circumstances under which the interview was conducted or what occurred during the interview as revealed by the tape recording. These justifications are simply the county's interpretation of the undisputed facts.

Likewise, the testimony given by the prosecutor who testified on behalf of the county was only a "characterization" of the undisputed underlying facts. The prosecutor rendered no opinion as to whether Laux's conduct during the interview was extreme and outrageous. When asked to "characterize" Laux's conduct during the interview, the prosecutor testified that Laux's conduct was less "confrontational" than the conduct of many officers she had witnessed interviewing sexual assault victims. However, many of Laux's statements and questions, such as "did it feel like he stuck it in very far or not?"; "[d]id he tell you anything about this is how they do it in the penitentiary?"; "[w]as he enjoying it?"; "[d]id he think it was funny?"; "[d]id he have a hard on when he got back there or what?"; "[d]id you work it up for him?"; and "when he got in the back seat you were already spread out back there ready for him, waiting on him," neither challenge nor test Brandon's version of the events. Such questions exhibit simply a prurient interest in the rapes and are not relevant to whether Brandon had been raped. Furthermore, the prosecutor gave no testimony regarding whether the interviews she had witnessed had occurred within hours of the sexual assault of the victim, as did the interview conducted by Laux.

The prosecutor further testified that she had been much more confrontational than Laux when interviewing rape victims regarding areas where the victim might have been inconsistent. However, in the present case, there are no instances in which Laux attempted to clarify any actual inconsistencies in Brandon's account. Additionally, the prosecutor testified that the interviews she conducted occurred prior to depositions, preliminary hearings, and trials and that she had never interviewed a rape victim

shortly after the rape occurred. Such testimony is consistent with the fact that the role of a prosecutor in preparing a rape victim to testify at trial is different from the role of a law enforcement officer questioning the victim shortly after the rape occurred.

Furthermore, of critical importance is the fact that the record does not show that the prosecutor listened to the actual tape recording of the December 25, 1993, interview. The record makes reference only to her review of the transcribed interview. There is no testimony from the prosecutor regarding Laux's tone during the interview, which is very significant in determining whether Laux's conduct was extreme and outrageous.

Every law enforcement officer who testified in this case testified as to the inappropriateness of Laux's conduct. Olberding, who was present during the interview, left the interview at one point because he disagreed with the way Laux was conducting the interview and interjected at another point during the interview, telling Brandon that she did not have to answer questions about her gender identity disorder. Caverzagie, a law enforcement officer who listened to the tape-recorded interview, testified that he believed that "just about everything" Laux said during the interview was "very unprofessional" and agreed that such conduct was outrageous.

Based upon the undisputed facts in this case, we determine as a matter of law that Laux's conduct was extreme and outrageous, beyond all possible bounds of decency, and is to be regarded as atrocious and utterly intolerable in a civilized community. The district court erred in not so holding.

[17,18] Although the district court determined that Laux's conduct was not extreme and outrageous, the district court nevertheless went on to find that JoAnn had failed to prove the third element of intentional infliction of emotional distress—that Brandon suffered as a result of Laux's conduct. Liability arises for intentional infliction of emotional distress only when emotional distress has in fact resulted and is severe. *Hassing v. Wortman*, 214 Neb. 154, 333 N.W.2d 765 (1983); Restatement (Second) of Torts § 46, comment *j*. (1965). Whether severe emotional distress can be found is a question of law; whether it existed in a particular case is a question of fact. Restatement, *supra*.

[19] Although outrageous conduct and severe emotional distress are separate elements of the tort of intentional infliction of emotional distress, the two are related. *American Medical Intern. v. Giurintano*, 821 S.W.2d 331 (Tex. App. 1991). The extreme and outrageous character of the conduct is itself important evidence that severe emotional distress existed on account of the conduct. Restatement, *supra*. See, also, *Brower v. Ackerley*, 88 Wash. App. 87, 943 P.2d 1141 (1997); *Behringer v. Behringer*, 884 S.W.2d 839 (Tex. App. 1994); *American Medical Intern., supra*.

The district court's erroneous determination that Laux's conduct was not extreme and outrageous effectively removed from the fact finder's consideration important evidence bearing on the question of whether Brandon sustained emotional distress, that being *the extreme and outrageous character of the conduct itself*. The extreme and outrageous character of Laux's conduct during the interview, as discussed previously, is itself important evidence that Brandon, a distraught rape and physical assault victim, suffered as a result of Laux's conduct. The district court failed to consider this evidence in determining whether Brandon suffered severe emotional distress as a result of Laux's conduct.

Since we have determined that Laux's conduct was extreme and outrageous, such conduct, in addition to the other evidence that was adduced on this issue, must now be considered by the trial court as bearing upon the factual determination of whether severe emotional distress existed in this particular case. Because the trial court failed to consider this evidence, the issue of whether Laux's conduct caused Brandon to suffer emotional distress so severe that no reasonable person should be expected to endure it must be remanded to the district court. If the court finds that Brandon did not suffer severe emotional distress or that Laux's conduct was not a proximate cause of any severe emotional distress Brandon may have suffered, JoAnn may not recover on her claim for intentional infliction of emotional distress. If the court finds that Brandon suffered severe emotional distress and that Laux's conduct was a proximate cause of such emotional distress, the court shall award damages for intentional infliction of emotional distress.

NOMINAL DAMAGE AWARD ON LOSS OF SOCIETY CLAIM

JoAnn claims the district court erred in determining that she was entitled to "nominal damages" for loss of society, comfort, and companionship. As stated previously, we interpret the district court's award of "nominal damages" as an award of zero damages.

[20,21] This court has consistently recognized that in an action for wrongful death of a child, recoverable damages include parental loss of the child's society, comfort, and companionship. *Reiser v. Coburn*, 255 Neb. 655, 587 N.W.2d 336 (1998); *Williams v. Monarch Transp.*, 238 Neb. 354, 470 N.W.2d 751 (1991). See, also, *Crewdson v. Burlington Northern RR. Co.*, 234 Neb. 631, 452 N.W.2d 270 (1990); *Selders v. Armentrout*, 190 Neb. 275, 207 N.W.2d 686 (1973). " 'The term "society" embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection.' " *Williams*, 238 Neb. at 359, 470 N.W.2d at 755.

[22,23] When a child is wrongfully killed, a parent's investment in that child of money, affection, guidance, security, and love is destroyed. *Reiser, supra*; *Williams, supra*. Destruction of such value is recognized whether the child is a minor or an adult. *Reiser, supra*; *Williams, supra*. Parental loss is not limited to or necessarily dependent upon deprivation of the child's monetary contribution toward parental well-being. *Reiser, supra*; *Williams, supra*.

[24,25] Damages for loss of society must be determined upon a consideration of the facts of each case. *Reiser, supra*; *Williams, supra*. There is no exact fiscal formula for determination of damages recoverable for loss of society, comfort, and companionship, a loss which is not subject to some strict accounting method based on monetary contributions, past or prospective. *Reiser, supra*; *Williams, supra*. Because it is impossible to generalize the extent to which persons enjoy each other's companionship and society, the value of such highly personal relationships must be decided on a case-by-case basis. *Williams, supra*.

[26-28] In *Reiser*, this court recognized that the relationship between parent and child has "intrinsic value" and reversed an award of zero damages for loss of society in the wrongful death

of an 18-year-old. Because the parent-child relationship has intrinsic value, once a parent-child relationship is proved to exist, destruction of that relationship through the wrongful death of the child entitles the parent, who is the surviving next-of-kin, to damages. See *Reiser, supra*. Evidence regarding the quality and extent of the parent-child relationship may then be utilized in determining the amount of those damages. See, *Reiser, supra*; *Williams, supra*. The amount of damages is a matter solely for the fact finder, whose action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of damages proved. *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 609 N.W.2d 338 (2000).

JoAnn testified that she had a close relationship with Brandon. Schweitzer testified that she and Brandon had a close relationship with JoAnn because "we had nobody but each other." Brayman, Brandon's aunt, testified that Brandon "loved her mom dearly and she let her mother know that she loved her." Brandon spent every Christmas with her family.

Although JoAnn often "didn't know what to say" when Brandon began experiencing her sexual identity crisis, JoAnn and Brandon did discuss the issue. JoAnn also attended counseling with Brandon. Even after Brandon began presenting herself as a man, Brandon would call JoAnn, stop by to see her, or leave a rose in the door for her. Brandon spoke to JoAnn nearly every day on the telephone after the rapes occurred. Brandon was interested in becoming a commercial artist, and Brandon told JoAnn that she wanted to come back to Lincoln and "get her life back."

[29] The record in the present case shows that a relationship between JoAnn and Brandon did indeed exist. The county does not assert that there was no relationship between JoAnn and Brandon. The county asserts that the award of "nominal damages" was reasonable because JoAnn's relationship with Brandon was "strained and undeveloped" due to Brandon's legal troubles and gender identity disorder. Brief for appellee at 23. However, Brandon's personal problems are relevant only to the extent that they impacted her relationship with JoAnn. Damages for loss of society are not necessarily dependent on the personal qualities of the child. We have previously recognized that "[w]e will not enter into a discussion in which we compare the relative

accomplishments of deceased children in wrongful death actions." *Caradori v. Fitch*, 200 Neb. 186, 194, 263 N.W.2d 649, 655 (1978). See, also, *Brahatcek v. Millard School District*, 202 Neb. 86, 273 N.W.2d 680 (1979).

[30] The county's argument addresses the extent and quality of the relationship between JoAnn and Brandon, not whether such relationship existed. Contrary to the county's assertion, the parent-child relationship has intrinsic value, even if that relationship is less than perfect. A parent-child relationship may exist in spite of any personal problems the child might have, as the record in this case demonstrates. In recognizing the "intrinsic value of the relationship between parent and child," as we did in *Reiser v. Coburn*, 255 Neb. 655, 664, 587 N.W.2d 336, 342 (1998), we conclude that an award of $0 for the loss of Brandon's society, comfort, and companionship sustained by JoAnn as a result of Brandon's death bears no reasonable relationship to the evidence and shocks the conscience. The award of $0 on JoAnn's loss of society claim is therefore inadequate as a matter of law.

Finding of Negligence Against Brandon

In her final assignment of error, JoAnn asserts that the district court erred in finding that Brandon was contributorily negligent. The court reduced the damage award by 1 percent due to such negligence. The district court made no specific finding as to how Brandon was negligent.

[31-33] Negligence must be measured against the particular set of facts and circumstances which are present in each case. *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 609 N.W.2d 338 (2000). A plaintiff is contributorily negligent if (1) he or she fails to protect himself or herself from injury, (2) his or her conduct concurs and cooperates with the defendant's actionable negligence, and (3) his or her conduct contributes to his or her injuries as a proximate cause. *Nickell v. Russell*, 260 Neb. 1, 614 N.W.2d 349 (2000); *Carroll v. Chase County*, 259 Neb. 780, 612 N.W.2d 231 (2000); *Baldwin v. City of Omaha*, 259 Neb. 1, 607 N.W.2d 841 (2000). Whether contributory negligence is present in a particular case is a question for the trier of fact. *Harrison v. Seagroves*, 250 Neb. 495, 549 N.W.2d 644 (1996).

Although the district court stated no basis for its finding that Brandon was negligent, the county asserts several bases which the county claims support a finding that Brandon was negligent. The county first asserts that Brandon failed to give consistent, complete, and accurate statements to law enforcement, including failing to report that Lotter and Nissen had threatened her life. However, this assertion is not supported by the record. The record shows that the information Brandon provided was generally consistent, complete, and accurate and was additionally supported by statements given by witnesses and by physical evidence. The claim that Brandon never told law enforcement that Lotter and Nissen threatened her life is also not supported by the record. Although the tape-recorded interview itself does not contain a statement by Brandon regarding the threat, Laux admitted that Brandon told him that Lotter and Nissen had threatened her.

The county next alleges Brandon failed to keep the sheriff's office accurately informed as to her whereabouts and failed to return for the second interview on December 29, 1993. However, the evidence does not demonstrate how Brandon's conduct in failing to keep the sheriff's office accurately informed as to her whereabouts and failing to return for the second December 29 interview concurred and cooperated with the county's negligence. The county was negligent by failing to protect Brandon. The record is absolutely clear that there was never any plan to provide protection to Brandon, which would require her to keep law enforcement accurately informed as to her whereabouts. Furthermore, nothing in the record indicates that Brandon's failure to return for the second December 29 interview contributed to the county's failure to protect Brandon. The record also indicates that when Brandon arrived at the courthouse for the second December 29 interview, Lotter and Nissen were outside, so Brandon did not go in.

[34] The record further fails to show that Brandon's conduct contributed to the injury as a proximate cause. A proximate cause is a cause (1) that produces a result in a natural and continuous sequence and (2) without which the result would not have occurred. *Norman, supra.* The record does not show that had Brandon kept law enforcement accurately informed of her

whereabouts or returned for the second interview on December 29, 1993, the result would have been different. The record shows that the county took no action to protect Brandon and had no plan to do so, regardless of Brandon's whereabouts or whether she returned for the second December 29 interview.

We find no evidence in the record to support a finding that Brandon was contributorily negligent. The district court's finding of 1 percent contributory negligence against Brandon was clearly wrong.

CROSS-APPEAL

In its cross-appeal, the county claims the district court erred in finding the county negligent. The county first claims that there was no special relationship between the county and Brandon and that, therefore, the county did not have a duty to protect Brandon.

[35] In *Brandon I*, we noted that exceptions exist to the general rule that law enforcement officials may not be held liable for failure to protect individual citizens from criminal acts. One such exception to this "no-duty rule" is when there is a special relationship between the individual and law enforcement because the individual has agreed to aid law enforcement officials in the performance of their duties. *Id.* In *Brandon I*, we stated:

> We conclude that Brandon has stated facts sufficient to qualify for an exception to the no-duty rule because the victim witnessed a crime and agreed to aid the police. A special relationship was created when the victim went to law enforcement officials and offered to testify and aid in the prosecution of Lotter and Nissen.

252 Neb. at 844, 566 N.W.2d at 780. The fact that Brandon went to law enforcement and offered to testify and aid in the prosecution of Lotter and Nissen was proved at trial. There was a special relationship between the county and Brandon, and therefore the county had a duty to protect Brandon. The county's argument that it did not have a duty to protect Brandon is without merit.

The county next claims that it discharged the duty to protect Brandon by "conducting a reasonable investigation of her rape." Brief for appellee at 32. However, the specific finding of negli-

gence against the county was its failure to protect Brandon. Because of its special relationship with Brandon, the county had a duty to Brandon beyond simply performing a reasonable investigation of her complaint. The fact that the county conducted a reasonable investigation of the rape allegations does not demonstrate that the county discharged its duty to protect Brandon from the danger posed by Lotter and Nissen.

The county further claims that the district court's specific findings of negligence against the county were not a proximate cause of Brandon's death. The district court determined the county should have (1) investigated Brandon's location, (2) offered Brandon transportation to Lincoln and the relative safety of her family, (3) offered Brandon protective custody, and (4) arranged an interview for Brandon with social services. The district court found it unreasonable for the county to not make such an effort and that "its lack of effort and failure was a violation of its duty to protect [Brandon.]" The county claims that its failure to take any of the above-mentioned actions was not a proximate cause of Brandon's death because had any of those actions been taken, the result would have been no different.

[36] As stated previously, a proximate cause is a cause that produces a result in a natural and continuous sequence, and without which the result would not have occurred. *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 609 N.W.2d 338 (2000); *Baldwin v. City of Omaha*, 259 Neb. 1, 607 N.W.2d 841 (2000). Determination of causation is ordinarily a matter for the trier of fact. *Baldwin, supra.*

The record in this case is clear that the county did nothing to discharge its duty to protect Brandon from the threat posed by Lotter and Nissen. The complete lack of protection by the county left Brandon vulnerable to Lotter and Nissen, who followed through on their threats and murdered Brandon. Based on the record, we conclude that the district court did not err in determining that the county's negligence was a proximate cause of Brandon's death.

Lastly, the county claims JoAnn's third amended petition, upon which the case was tried, did not include an allegation that the county was negligent in failing to protect Brandon, but alleged only that the county was negligent by failing to arrest

Lotter and Nissen. The record shows that the pleadings were amended to conform to the proof at trial. The county does not argue or assign any error claiming that such amendment was improper. The county contends that even after the pleadings were amended to conform to the proof at trial, the pleadings did not include an allegation that the county was negligent in failing to protect Brandon. However, the record clearly shows that these amendments did include an allegation that the county was negligent in failing to protect Brandon, stating that the county breached its duty to Brandon "by failing to arrest Lotter and Nissen and to protect Brandon from them."

The county's assignment of error is without merit.

CONCLUSION

We affirm the district court's determination that the county had a duty to protect Brandon, its finding that the county was negligent in failing to discharge that duty, and its finding that Brandon suffered predeath pain and suffering damages in the amount of $80,000.

We reverse the district court's allocation of 85 percent of the predeath pain and suffering damages to the intentional torts of Lotter and Nissen as Nebraska's comparative negligence law does not allow for allocation of damages to the acts of intentional tort-feasors. We also reverse the district court's determination that Laux's conduct during the December 25, 1993, interview was not extreme and outrageous. We further reverse the district court's award of "nominal damages" for loss of society, comfort, and companionship and its finding that Brandon was 1 percent contributorily negligent.

We therefore remand this cause to the district court (1) for a determination of whether JoAnn has proved that Brandon suffered emotional distress so severe that no reasonable person should be expected to endure it and, if so, whether Laux's conduct was a proximate cause of any such distress; (2) to award damages for intentional infliction of emotional distress if JoAnn has proved both that Brandon suffered severe emotional distress and that Laux's conduct was a proximate cause of that distress; and (3) for a determination of the amount of damages for loss of society.

Upon remand, the district court shall not reduce the award of $80,000 for Brandon's predeath pain and suffering or reduce any additional amounts that may be awarded for loss of society or intentional infliction of emotional distress by allocating a percentage of the damage to intentional acts on the part of Lotter and Nissen. Further, as there is no evidence to support a finding of negligence on the part of Brandon, the district court shall not reduce any damages awarded to JoAnn due to any acts of Brandon.

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

JULIAN DANIELS, APPELLANT, V. ALLSTATE INDEMNITY COMPANY, AN ILLINOIS CORPORATION, APPELLEE.

624 N.W.2d 636

Filed April 20, 2001. No. S-00-051.

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: Appeal and Error.** Statutory interpretation presents a question 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.
4. **Waiver: Words and Phrases.** A waiver is a voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by or inferred from a person's conduct.
5. **Waiver: Estoppel.** Ordinarily, to establish a waiver of a legal right, there must be a clear, unequivocal, and decisive act of a party showing such a purpose, or acts amounting to an estoppel on his or her part.
6. **Insurance: Contracts: Waiver.** An insurance company may waive the cancellation provisions of an insurance policy.
7. ___: ___: ___. The rule is that some act of conduct amounting to a recognition of the continued validity of a policy as a binding obligation upon the insurer is necessary to constitute an effective waiver of policy provision for forfeiture for nonpayment of premiums.

8. **Insurance: Contracts: Agents: Estoppel.** Where a notice of cancellation emanates from the insured's failure to promptly pay premium indebtedness, but the agent subsequently assures the insured that the policy will not be canceled if the delinquent premium is paid within a specified time, the insurer is estopped from insisting upon cancellation where the insured relies on the assurances to his or her detriment.
9. **Summary Judgment.** If a genuine issue of fact exists, summary judgment may not properly be entered.
10. **Appeal and Error.** An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.
11. **Administrative Law: Motor Vehicles: Insurance: Time.** Neb. Rev. Stat. § 60-544 (Reissue 1998), prior to its amendment, clearly provided that a cancellation or termination of liability insurance certified under Neb. Rev. Stat. § 60-529 (Reissue 1998) was not effective until at least 10 days after a notice of cancellation or termination was filed with the Department of Motor Vehicles.
12. **Statutes.** It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.
13. **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.
14. **Insurance: Contracts: Proof.** The burden of establishing an effective cancellation before a loss is on the insurer.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Reversed and remanded for further proceedings.

Gary F. Smolen for appellant.

Waldine H. Olson and Amy Sherman Geren, of Nolan, Roach, Olson, Fieber & Lautenbaugh, for appellee.

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

GERRARD, J.

FACTUAL AND PROCEDURAL BACKGROUND

Julian Daniels, the appellant, obtained an automobile liability insurance policy from Allstate Indemnity Company (Allstate) in January 1997. Daniels was required to keep a proof of financial responsibility on file with the Department of Motor Vehicles (DMV) pursuant to Neb. Rev. Stat. § 60-524 (Reissue 1998). On or about July 10, 1998, Daniels received a bill for his insurance premium. The bill stated that a minimum payment of $107.75 was due on July 31 and that another payment of $102.77 would

be due on August 31. The bill stated that Daniels' coverage would not continue unless Allstate received the minimum amount due before July 31.

Daniels did not make the required payment prior to July 31, 1998. Instead, Daniels went to an Allstate office in Omaha on August 13 to pay his bill in cash. Allstate's records indicate that Daniels made a payment of $110. Daniels averred in an affidavit that he discussed his coverage with the "only female employee" in the office, asked if the payment was sufficient to keep his coverage in effect, and was told that it was. This employee was apparently a secretary.

Daniels received a cancellation notice from Allstate via certified mail on August 15, 1998, stating that Daniels' policy would be canceled on August 31 if the minimum amount due of $205.52 was not received before that date. The notice was sent on August 11, prior to Daniels' visit to the Allstate office. Daniels' affidavit states that he acted under the assumption that the notice was out of date and that the representations of the Allstate employee were valid regarding Daniels' continuing insurance coverage.

Donald McKamy, the Allstate agent responsible for Daniels' account, averred that the August 13, 1998, payment was Daniels' past-due payment for July and that he did not make any representations that Daniels' August 13 payment would keep Daniels' policy in effect. Lee Wulf, an evaluation consultant for Allstate, claimed in a letter to Daniels' attorney that a "special notice" was sent of the remaining deficiency after Daniels' August 13 payment. Daniels denies receiving such a notice, and such a notice is not in the record.

Daniels was involved in an automobile accident on September 9, 1998. Daniels averred that on September 10, he again contacted Allstate to ask if his policy was in force, and the same female employee he had spoken to before told him that his policy was in force but that another $101 needed to be paid. Daniels made that payment on September 11 and averred that he was assured there had been no lapse in coverage.

On September 17, 1998, Allstate sent a letter to Daniels informing him that it was denying liability for the September 9 accident due to cancellation of the policy effective August 31.

The record does not contain any indication that Allstate at any time informed the DMV that Daniels' policy had been canceled.

Daniels filed a petition in the district court seeking a declaratory judgment that his insurance policy was in full force and effect on September 9, 1998. Allstate counterclaimed for a declaration that the policy was not in force on September 9 and that Allstate had no contractual obligation to indemnify or defend Daniels as a result of the September 9 accident. Allstate moved for summary judgment; Daniels did not file a cross-motion for summary judgment. The district court granted Allstate's motion for summary judgment, finding that Daniels failed to make required premium payments and did not have insurance coverage with Allstate at the time of the accident. Daniels appeals from the district court's judgment in favor of Allstate.

ASSIGNMENTS OF ERROR

Daniels assigns, consolidated and restated, that the district court erred in entering summary judgment despite sufficient evidence that Allstate (1) orally waived the cancellation provisions of the written insurance contract and written notice of cancellation and (2) failed to comply with the notice requirements of Neb. Rev. Stat. § 60-544 (Reissue 1998).

STANDARD OF REVIEW

[1,2] 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. *Allstate Ins. Co. v. LaRandeau, ante* p. 242, 622 N.W.2d 646 (2001). 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. *Bates v. Design of the Times, Inc., ante* p. 332, 622 N.W.2d 684 (2001).

[3] Statutory interpretation presents a question 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. *Tilt-Up Concrete v. Star City/Federal, ante* p. 64, 621 N.W.2d 502 (2001).

ANALYSIS

ORAL WAIVER OF CANCELLATION

Daniels argues first that Allstate was not entitled to summary judgment because the evidence, taken in the light most favorable to him, would support the conclusion that Allstate waived its right to cancel his insurance policy for the nonpayment of premiums. Specifically, Daniels claims that Allstate is estopped by the actions of its employee on August 13, 1998, when Daniels claims he was assured that his payment of $110 would keep his policy in effect. Daniels also claims Allstate is estopped because of the payment it accepted on September 11, which Daniels argues was made on the assurance that Daniels' insurance coverage had not lapsed.

[4,5] A waiver is a voluntary and intentional relinquishment of a known right, privilege, or claim, and may be demonstrated by or inferred from a person's conduct. *Fritsch v. Hilton Land & Cattle Co.*, 245 Neb. 469, 513 N.W.2d 534 (1994). See, also, *Lowry v. State Farm Mut. Auto. Ins. Co.*, 228 Neb. 171, 421 N.W.2d 775 (1988). Ordinarily, to establish a waiver of a legal right, there must be a clear, unequivocal, and decisive act of a party showing such a purpose, or acts amounting to an estoppel on his or her part. *Schoemaker v. Metropolitan Utilities Dist.*, 245 Neb. 967, 515 N.W.2d 675 (1994); *Fritsch v. Hilton Land & Cattle Co., supra.*

[6] It is long established that an insurance company may waive the cancellation provisions of an insurance policy. For instance, in *Schoneman v. Insurance Co.*, 16 Neb. 404, 406, 20 N.W. 284, 285 (1884), this court stated:

> That an insurance company may waive any provision in a policy intended for its benefit is too well established to require the citation of authorities.
>
> In other words, where there has been a breach in the conditions of a policy, the company may, if it see fit, take advantage of such breach and cancel the policy. It need not do so, however, but may waive the forfeiture, and this may be done by acts as well as words.

[7,8] The rule is that some act of conduct amounting to a recognition of the continued validity of a policy as a binding obligation upon the insurer is necessary to constitute an effective waiver of policy provision for forfeiture for nonpayment of premiums. *Bohannon v. Guardsman Life Ins. Co.*, 224 Neb. 701, 400 N.W.2d 856 (1987); *Tighe v. Security Nat. Life Ins. Co.*, 191 Neb. 271, 214 N.W.2d 622 (1974). Thus, where a notice of cancellation emanates from the insured's failure to promptly pay premium indebtedness, but the agent subsequently assures the insured that the policy will not be canceled if the delinquent premium is paid within a specified time, the insurer is estopped from insisting upon cancellation where the insured relies on the assurances to his or her detriment. See 2 Lee R. Russ & Thomas F. Segalla, Couch on Insurance § 31:112 (3d ed. 1997).

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. *Bates v. Design of the Times, Inc., ante* p. 332, 622 N.W.2d 684 (2001). In the instant case, the evidence, taken in the light most favorable to Daniels, would support the findings that Daniels was induced, by the representations of an Allstate employee, to believe that his insurance coverage remained in effect without lapsing; that Daniels relied on such representations to his detriment because he did not fully pay his premium indebtedness prior to the accident; and that he made such payment after the accident after being assured that his insurance coverage had not lapsed.

Allstate argues that Daniels' averments are not credible, because Allstate claims that Daniels made inconsistent statements to its adjuster and because Daniels should not have relied on any statements made by Allstate employees on August 13, 1998, when a contrary written notice was received on August 15. Daniels argues that Daniels' statements are consistent and that he disregarded the written notice because it was prepared and mailed prior to the payment he made on August 13. Allstate's arguments attack only Daniels' credibility and do not demonstrate the absence of a genuine issue of material fact; rather, they illustrate the factual question that remains to be decided by a trier of fact.

[9] If a genuine issue of fact exists, summary judgment may not properly be entered. *City State Bank v. Holstine*, 260 Neb. 578, 618 N.W.2d 704 (2000). We determine that when the evidence is viewed in the light most favorable to Daniels, there exists a genuine issue of material fact as to whether Allstate waived its right to cancel Daniels' insurance policy for nonpayment of premiums. The judgment of the district court must be reversed, and the cause remanded for further proceedings.

FAILURE TO NOTIFY DMV

[10] Given our resolution of Daniels' first assignment of error, it is not essential that we reach the remaining issue in this appeal. However, an appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings. *Gestring v. Mary Lanning Memorial Hosp.*, 259 Neb. 905, 613 N.W.2d 440 (2000); *Snyder v. Contemporary Obstetrics & Gyn.*, 258 Neb. 643, 605 N.W.2d 782 (2000). Because notice to the DMV is likely to recur after remand, we take this opportunity to address the issue.

Nebraska's Motor Vehicle Safety Responsibility Act, Neb. Rev. Stat. ch. 60, art. 5 (Reissue 1998 & Cum. Supp. 2000), requires that persons whose motor vehicle operators' licenses have been suspended or revoked are required, in order to hold a license or register a vehicle, to maintain proof of financial responsibility. See §§ 60-524 and 60-525. A person can maintain such proof by filing, with the DMV, a written certificate from an insurance carrier that there is a motor vehicle liability policy in effect for the benefit of the person required to provide proof of financial responsibility. See § 60-529. Daniels' affidavit indicates that he was required to maintain proof of financial responsibility pursuant to § 60-524.

Daniels' argument is based upon § 60-544, which provided:

> When an insurance carrier has certified a motor vehicle liability policy under sections 60-529 to 60-531, the insurance so certified shall not be canceled or terminated until at least ten days after a notice of cancellation or termination of the insurance so certified shall be filed in the office of the department, except that such a policy subsequently pro-

> cured and certified shall, on the effective date of its certification, terminate the insurance previously certified with respect to any motor vehicle designated in both certificates.

We note, for the sake of completeness, that § 60-544 has subsequently been amended to provide that cancellation or termination is effective 10 days after the notice of cancellation or termination is sent to the insured, rather than 10 days after the notice is filed in the office of the DMV. See § 60-544 (Cum. Supp. 2000). However, Allstate concedes that the prior version of § 60-544, as quoted above, was in effect and is controlling in the instant case. See *Bowers v. Dougherty*, 260 Neb. 74, 615 N.W.2d 449 (2000) (statutes covering substantive matters in effect at time of transaction govern).

The plain language of § 60-544 states that a motor vehicle liability policy certified under § 60-529 shall not be canceled or terminated until at least 10 days after a notice of cancellation or termination is filed with the DMV. We have not previously considered the effect of this statute, nor are we likely to consider its effect in the future given the amendment to § 60-544 in 1999. However, the general rule is that where statutory provisions require notice to a government agency in order to effect cancellation of a policy, such notice must be given to effect a cancellation, and conversely, there is no cancellation where notice is given merely in accordance with the provisions of the policy. 2 Lee R. Russ & Thomas F. Segalla, Couch on Insurance § 31:19 (3d ed. 1997). See, also, e.g, *American Cas. Reading Pa. v. Nordic Leasing, Inc.*, 42 F.3d 725 (2d Cir. 1994) (applying Vermont law); *Aplin v. American Sec. Ins. Co.*, 568 So. 2d 757 (Ala. 1990); *Transamerica Ins. Co. v. Tab Transp., Inc.*, 12 Cal. 4th 389, 906 P.2d 1341, 48 Cal. Rptr. 2d 159 (1995); *Georgia Farm Bureau Mutual Insurance Company v. Phillips*, 251 Ga. 244, 304 S.E.2d 725 (1983); *Govern. Emp. Ins. v. Concord Gen. Mut. Ins.*, 458 A.2d 1205 (Me. 1983); *Great West Cas. Co. v. Christenson*, 450 N.W.2d 153 (Minn. App. 1990); *Liberty Mut. Ins. Co. v. Bethel*, 207 A.D.2d 449, 615 N.Y.S.2d 462 (1994); *Brisker v. Ibrahim*, 29 Ohio App. 3d 16, 502 N.E.2d 679 (1985); *Vrabel v. Scholler*, 372 Pa. 578, 94 A.2d 748 (1953); *U. S. F. and G. Co. v. Security F. and I. Co.*, 248 S.C. 307, 149 S.E.2d 647 (1966); *Lang v. Kurtz*, 100 Wis. 2d 40, 301 N.W.2d 262 (Wis. App. 1980).

The purpose of such a statute is to protect the public by allowing the DMV to prevent operation of a motor vehicle by the insured without providing proof of continued financial responsibility. See, *American Cas. Reading Pa. v. Nordic Leasing, Inc.*, *supra*; *Lang v. Kurtz*, *supra*; *U. S. F. and G. Co. v. Security F. and I. Co.*, *supra*. The prior version of § 60-544 effectuated this purpose by requiring insurers to notify the DMV prior to the cancellation or termination of liability coverage and by continuing coverage until appropriate notice was given.

[11,12] The plain language of the relevant version of § 60-544 clearly provided that a cancellation or termination of liability insurance certified under § 60-529 was not effective until at least 10 days after a notice of cancellation or termination was filed with the DMV. It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute. *Nelson v. City of Omaha*, 256 Neb. 303, 589 N.W.2d 522 (1999). In this case of last impression, Daniels presented evidence supporting the reasonable inference that his Allstate policy was certified with the DMV, thus requiring Allstate to give notice to the DMV pursuant to § 60-544 prior to termination or cancellation of the policy. Allstate presented no evidence of compliance with the version of § 60-544 in effect in 1998.

[13,14] Allstate argues that Daniels could have used discovery procedures to obtain and present such evidence. However, it was Allstate's burden, not Daniels', to present evidence of compliance with § 60-544. 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. *Morrison Enters. v. Aetna Cas. & Surety Co.*, 260 Neb. 634, 619 N.W.2d 432 (2000). Moreover, the burden of establishing an effective cancellation before a loss is on the insurer. See *Baker v. St. Paul Fire & Marine Ins. Co.*, 240 Neb. 14, 480 N.W.2d 192 (1992). Once the notice requirements of § 60-544 were implicated, it was Allstate's burden to demonstrate compliance with § 60-544 in order to show that it was entitled to judgment as a matter of law. Absent such evidence, the district court erred in granting Allstate's motion for summary judgment.

CONCLUSION

Daniels presented evidence showing a genuine issue of material fact regarding a waiver by Allstate of the cancellation of Daniels' insurance policy, and Allstate failed to present evidence that it complied with the statutorily required notice to the DMV prior to cancellation of Daniels' insurance policy. The district court erred in granting Allstate's motion for summary judgment. 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.

ROGER J. ADAMS, AN INDIVIDUAL, AND ST. PAUL FIRE & MARINE INSURANCE COMPANY, A CORPORATION, APPELLANTS, V. STATE OF NEBRASKA, APPELLEE.
BETTY ADAMS, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.
625 N.W.2d 190

Filed April 26, 2001. Nos. S-99-138, S-99-139.

1. **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.
2. **Summary Judgment.** Summary judgment is proper where the facts are uncontroverted and the moving party is entitled to judgment as a matter of law.
3. **Police Officers and Sheriffs: Motor Vehicles: Proximate Cause: Damages.** Pursuant to Neb. Rev. Stat. § 81-8,215.01 (Reissue 1994), in case of death, injury, or property damage to any innocent third party proximately caused by the action of a law enforcement officer employed by the State during vehicular pursuit, damages shall be paid to such third party by the State.
4. **Police Officers and Sheriffs: Motor Vehicles: Words and Phrases.** Pursuant to Neb. Rev. Stat. § 81-8,215.01 (Reissue 1994), vehicular pursuit means an active attempt by a law enforcement officer operating a motor vehicle to apprehend one or more occupants of another motor vehicle when the driver of the fleeing vehicle is or should be aware of such attempt and is resisting apprehension by maintaining or increasing his or her speed, ignoring the officer, or attempting to elude the officer while driving at speeds in excess of those reasonable and proper under the conditions.
5. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning absent anything to the contrary; thus, an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

6. **Police Officers and Sheriffs: Motor Vehicles: Proximate Cause: Damages: Liability.** Pursuant to Neb. Rev. Stat. § 81-8,215.01 (Reissue 1994), if an officer's actions during a vehicular pursuit proximately cause damage to an innocent third party, the State is strictly liable for those damages.
7. **Police Officers and Sheriffs: Motor Vehicles: Liability.** Neb. Rev. Stat. § 81-8,215.01 (Reissue 1994) does not create on the part of the State a secondary liability derived from the pursuee's liability during a vehicular pursuit; rather, it creates a primary liability based on the actions of officers the State employs.
8. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not passed upon by the trial court.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and SIEVERS and CARLSON, Judges, on appeal from the District Court for Saunders County, ALAN G. GLESS and MARY C. GILBRIDE, Judges. Judgment of Court of Appeals affirmed.

P. Shawn McCann, of Sodoro, Daly & Sodoro, P.C., for appellants.

C. Thomas White, Jay L. Welch, and Douglas L. Kluender, of Welch, White & Wulff, for appellee.

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

MCCORMACK, J.

NATURE OF CASE

This matter involves two consolidated suits brought by Roger J. Adams, St. Paul Fire & Marine Insurance Company (St. Paul), and Betty Adams (collectively the plaintiffs) against the State of Nebraska for damages and injuries arising out of an alleged vehicular pursuit by the Nebraska State Patrol. The State Claims Board denied the Adamses' claims. Two lawsuits were instituted, one on behalf of Roger and St. Paul, and the other on behalf of Betty. The trial court granted the State's motions for summary judgment. The Nebraska Court of Appeals reversed, and we granted the State's petition for further review.

BACKGROUND

On May 23, 1997, Roger and his insurer, St. Paul, filed suit against the State under the State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1994), for damages resulting from a

collision between Roger and James W. Kreizel. Betty, who witnessed the crash, filed a separate suit seeking damages for emotional distress, mental anguish, and loss of consortium.

The accident occurred on April 29, 1994, when Roger was driving his 1955 Ford Thunderbird eastbound on U.S. Highway 77 in Saunders County. Kreizel was driving westbound on Highway 77. Kreizel pulled out across the centerline to pass another westbound vehicle and crashed head on into Roger's car. Both Roger and Kreizel sustained extensive personal injuries and property damage as a result of the accident.

Moments before the crash, Kreizel passed Saunders County Deputy Sheriff Mitchell Bridges, who was traveling eastbound on Highway 77, and Nebraska State Trooper Todd Steckelberg, who was following about 100 yards behind Bridges. Bridges radioed Steckelberg and told him that Kreizel was traveling at a rate of speed greater than 80 m.p.h. The two of them turned their vehicles around to pursue Kreizel.

The evidence conflicts as to whether Steckelberg and Bridges had activated the emergency lights of their vehicles and began the pursuit prior to the collision between Roger's vehicle and Kreizel's vehicle. According to Bridges and Steckelberg, before they had completed the turn and before they could turn on the emergency lights of their vehicles, Kreizel crossed the centerline and crashed into Roger. Betty, however, who was following closely behind Roger, testified at her deposition that she saw a cruiser with its emergency lights turned on following about an eighth of a mile behind Kreizel's vehicle. After Betty saw the lights, she saw Kreizel come up behind a pickup towing a trailer in the westbound lane. She said Kreizel swerved across the centerline, apparently to pass the other truck, then swerved back behind the truck. Betty said Kreizel then swerved back across the centerline and crashed into Roger.

Betty testified that the crash sent Roger's car into a spin and that the car ultimately came to rest in the westbound lane. Kreizel's truck came to rest in the ditch on the south side of the road. After the crash, Betty immediately stopped her car near where the crash occurred. However, she said that when she got out of her car, a law enforcement officer was already there. A second officer arrived almost immediately thereafter.

As a result of the accident, Roger suffered extensive personal injuries requiring medical treatment. Both Roger and Betty settled with Kreizel for $45,000, the maximum amount under Kreizel's insurance policy. As part of this settlement, they signed a release, which provided in part as follows:

> FOR THE SOLE CONSIDERATION OF Forty Five Thousand & 00 Dollars ($45,000.00), receipt of which I acknowledge, I fully and forever release and discharge James W. Kreizel their [sic] heirs, administrators, executors, successors and assigns, and all other persons and organizations who are or might be liable, from all claims for all damages which I sustained as the result of an accident which occurred on or about 4-29, 1994, at Or Near Wahoo Saunders County, Ne.
>
> By executing this release, I intend and agree that this release applies to all of my claims arising from said accident, present and future, including, but not limited to, damage to or destruction of property; claims for known or unknown injuries, developments, consequences and permanency of those injuries; and there is no misunderstanding in this regard.

This release was on a preprinted form with blanks provided in which the Adamses wrote the amount, the person released, the date, and the location of the accident. The record also shows that Roger and Betty collected $105,000 from St. Paul: $5,000 under their medical payments coverage and $100,000 under their underinsured motorist coverage.

Roger and St. Paul filed a tort claim with the State Claims Board on April 25, 1996. Betty filed a separate claim on the same date. Both claims were denied. Roger and St. Paul filed suit in the district court, and Betty filed another suit in the same court. The State filed consolidated motions for summary judgment, and the motions for summary judgment were sustained. The plaintiffs then filed two separate appeals, which have been consolidated.

The Court of Appeals reversed the trial court's granting of the summary judgment in favor of the State. The Court of Appeals determined that there existed a genuine issue of material fact regarding whether a vehicular pursuit had taken place as defined

in § 81-8,215.01 and whether the accident occurred as a result of this pursuit. The Court of Appeals held that the State and Kreizel may be joint tort-feasors, so that a release of Kreizel does not necessarily release the State, and further held that the Adamses did not intend to release the State from liability when they released Kreizel. See *Adams v. State*, Nos. A-99-138, A-99-139, 2000 WL 1218431 (Neb. App. Aug. 29, 2000) (not designated for permanent publication).

ISSUES ON APPEAL

The State, in its petition for further review, frames three issues: (1) whether the Court of Appeals erred in holding that under § 81-8,215.01, state law enforcement officers and fleeing criminals are joint tort-feasors; (2) whether the Court of Appeals erred in holding that a material question of fact existed about whether a vehicular pursuit occurred; and (3) whether the Court of Appeals erred in implicitly holding that law enforcement vehicles are underinsured motorists against whom a settling underinsured motorist insurer may have a right of subrogation.

STANDARD OF REVIEW

[1,2] 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. *Casey v. Levine, ante* p. 1, 621 N.W.2d 482 (2001). Summary judgment is proper where the facts are uncontroverted and the moving party is entitled to judgment as a matter of law. *Prochaska v. Douglas Cty.*, 260 Neb. 642, 619 N.W.2d 437 (2000).

ANALYSIS

State as Joint Tort-feasor

The first error the State assigns in its petition for further review is that the Court of Appeals erred in holding that under § 81-8,215.01, state law enforcement officers and fleeing criminals are joint tort-feasors.

The question before the Court of Appeals was not whether the State may be a joint tort-feasor, because that question had not been raised before the trial court in the motions for summary

judgment. Rather, the question before the Court of Appeals was whether the release the Adamses gave to Kreizel also released the State. In order to decide the release question, the Court of Appeals was required to decide whether the State's potential liability in this case was primary or secondary. If the State's potential liability was secondary and derived from Kreizel's liability, then the State would have been released when Kreizel was released. See *Brown v. American Tel. & Tel. Co.*, 252 Neb. 95, 560 N.W.2d 482 (1997). If, on the other hand, the State's liability were primary, then the release of Kreizel would not necessarily have released the State unless the language of the release also described the State. See *id.*

In deciding this question, the Court of Appeals stated: "We agree with the plaintiffs . . . that the State may be jointly and not secondarily liable." *Adams v. State*, 2000 WL 1218431 at *5. The State claims that by asserting that the State may be jointly liable, the Court of Appeals erroneously injected negligence principles into a strict liability statute.

It is apparent that in the context of its opinion, the Court of Appeals was not deciding the question of joint liability. Rather, it was deciding the question of whether the State's potential liability was primary or secondary. However, to the extent that the Court of Appeals addressed the issue of joint liability, it was in error. On the other hand, to the extent that it determined that the State's liability is not secondary but primary, it was correct.

The plaintiffs sued on theories of negligence as well as statutory strict liability under § 81-8,215.01. If the State were found negligent, it would be primarily liable in tort for the damages its agents proximately caused.

[3,4] If, on the other hand, the State were found liable under § 81-8,215.01, its liability would still be primary. Section § 81-8,215.01, as it existed prior to the amendments in 1996, provided:

> In case of death, injury, or property damage to any innocent third party proximately caused by the action of a law enforcement officer employed by the state during vehicular pursuit, damages shall be paid to such third party by the state.

> For purposes of this section, vehicular pursuit shall mean an active attempt by a law enforcement officer operating a motor vehicle to apprehend one or more occupants of another motor vehicle when the driver of the fleeing vehicle is or should be aware of such attempt and is resisting apprehension by maintaining or increasing his or her speed, ignoring the officer, or attempting to elude the officer while driving at speeds in excess of those reasonable and proper under the conditions.

[5] Statutory language is to be given its plain and ordinary meaning absent anything to the contrary; thus, an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Ameritas Life Ins. v. Balka*, 257 Neb. 878, 601 N.W.2d 508 (1999).

[6] While the State argues that under § 81-8,215.01, its liability derives from the pursuee's liability, a reading of the plain language of the statute shows that the focus of the inquiry in determining whether the State is liable is the officer's actions. If the officer's actions during a vehicular pursuit proximately cause damage to an innocent third party, the State is strictly liable for those damages. § 81-8,215.01. The statute does indeed eliminate the need to assess an officer's culpability, but his conduct must still be examined to determine whether such conduct proximately caused the plaintiff's injuries. Thus, we reject the State's argument that the officer's conduct is not to be examined in determining whether the State is liable under § 81-8,215.01.

[7] The pursuee's conduct comes into play only in determining whether a vehicular pursuit occurred. The language of the statute makes the pursuee's conduct merely a factual circumstance that must be proved in order to establish that a vehicular pursuit occurred. It is not a part of the proximate cause analysis. Thus, the statute does not create on the part of the State a secondary liability derived from the pursuee's liability during a vehicular pursuit; rather, it creates a primary liability based on the actions of officers the State employs. Because the State has primary liability, its liability is not dependent on Kreizel's liability. We therefore conclude that the Court of Appeals correctly determined that the State's liability was not secondary and that it was not released merely because Kreizel was released.

VEHICULAR PURSUIT

The State, in its briefs, argues that there is no genuine issue of material fact as to whether a vehicular pursuit occurred. In particular, the State first argues that the only possible inference from Kreizel's testimony is that he had no knowledge of any pursuit and that without knowledge of a pursuit, there can be no vehicular pursuit as defined in § 81-8,215.01. Under § 81-8,215.01, vehicular pursuit means

> an active attempt by a law enforcement officer operating a motor vehicle to apprehend one or more occupants of another motor vehicle when the driver of the fleeing vehicle is or should be aware of such attempt and is resisting apprehension by maintaining or increasing his or her speed, ignoring the officer, or attempting to elude the officer while driving at speeds in excess of those reasonable and proper under the conditions.

While the State maintains that Kreizel did not know he was being pursued, Kreizel's testimony reflects uncertainty. While he said he did not see any emergency lights or hear any sirens before the accident, he admitted that he could not remember much about the accident. In particular, he did not recall whether he was intoxicated or had anything to drink that night. He did not recall at what time the accident happened. He did not remember seeing any police cruisers before the crash. He did not remember whether he was speeding or not at the time of the accident. He did not recall any of the details of the accident except looking around the truck and trailer in front of him and seeing headlights. He did not remember one way or the other whether anyone was trying to pull him over. He did not remember crossing the centerline and trying to pass the truck, and he did not recall applying his brakes at any time.

Based on these facts, the plaintiffs argue that the credibility of Kreizel's testimony is doubtful. In any event, the plaintiffs argue that Kreizel's credibility is a fact question for the trier of fact and should not be decided on summary judgment. We agree and conclude that there exists a question of fact regarding whether Kreizel had knowledge of a police pursuit.

The State further argues that the officers had not begun a vehicular pursuit, as defined under § 81-8,215.01, because they

had not activated the emergency lights or sirens of their vehicles before the accident occurred. Steckelberg and Bridges both stated in their respective affidavits that they had not finished turning their vehicles around and had not activated the lights or sirens before Kreizel crashed into Roger. Their testimony, however, was not uncontradicted. Betty testified that she observed flashing police lights *before* the crash occurred and that the flashing lights appeared to be a short distance behind Kreizel's vehicle. Betty also testified that the state trooper at the scene came to Roger's hospital room and admitted that he and the other officer had been chasing Kreizel because Kreizel was speeding and driving erratically.

In its brief, the State claims that Betty's testimony that she saw the lights at the same time she observed the collision is "physically and mathematically impossible and incredible." Brief for appellee at 5. As stated above, Betty did not actually say she saw the lights at the same time as the collision; she said she saw the lights before the collision. In addition, the State does not demonstrate with words or equations why Betty's testimony is physically and mathematically impossible and incredible. Indeed, it is far from clear how her testimony could be impossible, and the extent to which it is incredible is a question for the trier of fact.

The plaintiffs also point to the "Investigator's Motor Vehicle Accident Report," signed by Steckelberg, as evidence that a pursuit had begun. The report states in part:

> Vehicle #2 [Kreizel's vehicle] was clocked at 83mph on radar by this Officer. When attempting to catch up with this vehicle, I observed #2 attempt to pass a truck pulling a horse trailer. I could clearly see oncoming traffic, as #2 attempted to go over to the South shoulder striking vehicle #1 [Roger's vehicle] who was Eastbound, head on.

The State maintains that no reasonable inference can be made from the motor vehicle accident report that a pursuit was taking place. Contrary to the State's argument, the report is in fact susceptible to two interpretations. On the one hand, it could be read as expressing the fact that Steckelberg indeed did try to chase and catch up to Kreizel's vehicle. Under this interpretation, Steckelberg would have completed turning his vehicle and

would have been chasing behind Kreizel at the time when Kreizel crossed into the opposite lane. This interpretation would be consistent with Betty's testimony that she saw police lights a short distance behind Kreizel's vehicle. On the other hand, it could be inferred that Steckelberg's turning of his vehicle, to which he testified in his affidavit, was part of his attempt to catch up with Kreizel's vehicle. Under this interpretation, Steckelberg would have begun turning his cruiser, and in the process of doing so, would have seen Kreizel's vehicle pull into oncoming traffic and hit Roger's vehicle. Under our standard of review, we must resolve all reasonable inferences in favor of the nonmoving party. Thus, we must accept the inference that favors the plaintiffs.

It is clear from the foregoing discussion that the evidence conflicts as to whether or not a pursuit had begun at the time of the accident. Moreover, the State admitted at oral argument that there may be a question of fact as to whether a pursuit occurred. Thus, to the extent the trial court's grant of summary judgment was based on this ground, it was in error. The Court of Appeals correctly determined that an issue of fact existed.

SUBROGATION

The State next argues that government vehicles are not underinsured vehicles under Neb. Rev. Stat. § 60-575 (Reissue 1993) (now codified at Neb. Rev. Stat. § 44-6407(4) (Reissue 1998)) of the Underinsured Motorist Insurance Coverage Act, and because they are not, an underinsured motorist insurer does not have a right of subrogation against the State as it otherwise would against an underinsured motorist.

[8] A review of the State's motion for summary judgment reveals that this issue was not raised for the trial court's determination. An appellate court will not consider an issue on appeal that was not passed upon by the trial court. *In re Estate of Jakopovic, ante* p. 248, 622 N.W.2d 651 (2001). We therefore decline to consider the subrogation issue on appeal.

CONCLUSION

We therefore conclude that the Court of Appeals erred to the extent that it addressed the issue of joint liability. However, the

Court of Appeals correctly determined that the State's liability, if it exists, is primary, not secondary, and that a question of fact exists as to whether or not a vehicular pursuit occurred. As such, the Court of Appeals correctly concluded that the trial court erred in granting the State's motion for summary judgment.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALLISON P. ISHAM, APPELLANT.

625 N.W.2d 511

Filed April 26, 2001. No. S-00-599.

1. **Pleadings: Appeal and Error.** A denial of a plea in bar involves a question of law.
2. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Double Jeopardy.** The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
4. **Constitutional Law: Double Jeopardy.** The protection provided by the double jeopardy clause of the Nebraska Constitution is coextensive with that provided by the U.S. Constitution.
5. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Drunk Driving: Blood, Breath, and Urine Tests: Proof.** Under Neb. Rev. Stat. § 60-6,206(1) (Reissue 1998), the director of the Department of Motor Vehicles shall revoke the driver's license of a person who is arrested either for refusing to submit to a chemical test or for having a concentration of .10 grams or more by weight of alcohol per 210 liters of breath.
6. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Double Jeopardy.** The administrative revocation of a driver's license pursuant to Neb. Rev. Stat. § 60-6,206 (Reissue 1998) after refusal to submit to a chemical test does not constitute punishment for purposes of double jeopardy.
7. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Double Jeopardy: Legislature: Intent.** In analyzing whether administrative license revocation under Neb. Rev. Stat. § 60-6,206 (Reissue 1998) constitutes punishment for purposes of double jeopardy, an appellate court must inquire (1) whether the Legislature intended the statutory sanction to be criminal or civil and (2) whether the statutory sanction is so punitive in purpose or effect as to transform what was clearly intended as a civil sanction into a criminal one.
8. **Statutes: Legislature: Intent.** Whether the Legislature intended a civil or criminal sanction is simply a matter of statutory construction.
9. **Statutes: Legislature: Intent: Proof.** Once a determination is made that a sanction was intended to be civil in nature, a court will reject the Legislature's manifest intent

only where a party challenging the statute provides the clearest proof that the statutory scheme is so punitive in either purpose or effect as to negate the State's intention.

10. **Statutes: Legislature: Intent.** In analyzing whether the purpose or effect of a civil sanction statute is so punitive as to negate the Legislature's intent, the following factors are considered: (1) whether the sanction involves an affirmative disability or restraint, (2) whether it has historically been regarded as a punishment, (3) whether it comes into play only on a finding of scienter, (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence, (5) whether the behavior to which it applies is already a crime, (6) whether an alternative purpose to which it may rationally be connected is assignable for it, and (7) whether it appears excessive in relation to the alternative purpose assigned.
11. ___: ___: ___. In analyzing whether the purpose or effect of a civil sanction statute is so punitive as to negate the Legislature's intent, the factors must be considered in relation to the statute on its face and are helpful, but are neither exhaustive nor dispositive.
12. **Double Jeopardy.** The Double Jeopardy Clause protects against only multiple criminal punishments or prosecutions.
13. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Legislature: Intent.** The Legislature intended administrative license revocation to be a civil sanction, and it is not so punitive in purpose or effect as to negate the Legislature's intent.

Appeal from the District Court for Scotts Bluff County, ROBERT O. HIPPE, Judge, on appeal thereto from the County Court for Scotts Bluff County, G. GLENN CAMERER, Judge. Judgment of District Court affirmed.

Sterling T. Huff, of Michael J. Javoronok Law Firm, for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

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

CONNOLLY, J.

The appellant, Allison P. Isham, was arrested for driving under the influence of alcohol. After Isham's driver's license was administratively revoked, she was charged with driving under the influence. Isham filed a plea in bar, contending that once her license was administratively revoked, any later criminal prosecution violated the Double Jeopardy Clauses of the Fifth Amendment to the U.S. Constitution and art. I, § 12, of the

Nebraska Constitution. The county court overruled the plea in bar, and the district court affirmed, applying *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998). We conclude that the Legislature intended administrative license revocation to be a civil sanction and that Isham has failed to show that it is so punitive in purpose or effect as to negate the Legislature's intent. Accordingly, we find no double jeopardy violation and affirm.

BACKGROUND

On December 11, 1999, Isham was stopped by police officer Kurt D. Luce after he saw her disobey a traffic signal and observed that she was driving slowly. When Luce approached Isham, he could smell a moderate odor of alcohol and observed that her eyes were glassy and her speech was slurred. Luce had Isham perform several field sobriety tests, gave her a preliminary breath test, and then placed her under arrest. Isham was taken to the county jail, and an Intoxilyzer test was performed. The test revealed that Isham had an alcohol concentration level greater than the legal limit. Luce confiscated Isham's driver's license and provided her with a formal notice of administrative revocation.

Isham contested the administrative revocation of her license. Following a hearing, the hearing officer recommended that Isham's license be revoked. The director of the Department of Motor Vehicles adopted the findings of the hearing officer and revoked Isham's driver's license for 90 days beginning January 25, 2000.

Isham was also charged by complaint with driving under the influence of alcohol. On January 7, 2000, Isham appeared in county court and entered a plea of not guilty to the charge. On January 25, Isham made a motion to withdraw her plea and enter a plea in bar, contending that once her license was administratively revoked, any later criminal prosecution put her twice in jeopardy in violation of the Fifth Amendment to the U.S. Constitution and art. I, § 12, of the Nebraska Constitution. The county court sustained the motion to withdraw the plea. The county court then denied the plea in bar and entered a plea of not guilty on Isham's behalf. Isham appealed to the district court, which affirmed. Isham appeals.

ASSIGNMENT OF ERROR

Isham assigns, rephrased, that the district court erred in affirming the order of the county court that overruled Isham's plea in bar.

STANDARD OF REVIEW

[1,2] A denial of a plea in bar involves a question of law. *State v. Franco*, 257 Neb. 15, 594 N.W.2d 633 (1999). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *State v. Rieger*, 260 Neb. 519, 618 N.W.2d 619 (2000); *State v. Sheets*, 260 Neb. 325, 618 N.W.2d 117 (2000).

ANALYSIS

Isham contends that the Double Jeopardy Clauses of the U.S. and Nebraska Constitutions prohibit both an administrative revocation of her driver's license and a prosecution for driving under the influence. In particular, Isham argues that the administrative revocation of a driver's license constitutes punishment for double jeopardy purposes and that any further criminal prosecution constitutes multiple punishments, which is forbidden by the Double Jeopardy Clauses.

[3,4] The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998). The protection provided by the double jeopardy clause of the Nebraska Constitution is coextensive with that provided by the U.S. Constitution. See *State v. Howell, supra.*

[5,6] Under Neb. Rev. Stat. § 60-6,206(1) (Reissue 1998), the director of the Department of Motor Vehicles shall revoke the driver's license of a person who is arrested either for refusing to submit to a chemical test or for having a concentration of .10 grams or more by weight of alcohol per 210 liters of breath. See Neb. Rev. Stat. § 60-6,196(1) (Supp. 1999). We have previously determined that the administrative revocation of a driver's license pursuant to § 60-6,206 after refusal to submit to a chemical test does not constitute punishment for purposes of double

jeopardy. *State v. Howell, supra*; *State v. Hansen*, 249 Neb. 177, 542 N.W.2d 424 (1996).

In *Hansen*, we relied on *United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989), and held that administrative license revocation was remedial in nature and, thus, did not expose a defendant to multiple punishments for the same offense. After *Hansen* was decided, the U.S. Supreme Court in *Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997), abrogated the analysis used in *Halper* and reaffirmed its previously established analysis of multiple punishment under the Double Jeopardy Clause as set out in *United States v. Ward*, 448 U.S. 242, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (1980), and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963). See *State v. Howell, supra*. In *Howell,* we applied the analysis from *Hudson* and again reached the conclusion that administrative license revocation, coupled with prosecution for driving under the influence, did not violate principles of double jeopardy.

[7-9] As we explained in *Howell*, in analyzing whether administrative license revocation under § 60-6,206 constitutes punishment for purposes of double jeopardy, we must inquire (1) whether the Legislature intended the statutory sanction to be criminal or civil and (2) whether the statutory sanction is so punitive in purpose or effect as to transform what was clearly intended as a civil sanction into a criminal one. See, also, *Hudson v. United States, supra*. As to the first part of the test, whether the Legislature intended a civil or criminal sanction is simply a matter of statutory construction. *Hudson v. United States, supra*; *State v. Howell, supra*. Regarding the second part of the test, once a determination is made that a sanction was intended to be civil in nature, "[a] court will reject the legislature's manifest intent only where a party challenging the [statute] provides the clearest proof that the statutory scheme is so punitive in either purpose or effect as to negate the State's intention." *Seling v. Young*, 531 U.S. 250, 261, 121 S. Ct. 727, 148 L. Ed. 2d 734 (2001). See, *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997); *United States v. Ward, supra*; *State v. Howell, supra*.

[10,11] In analyzing whether the purpose or effect of the statute is so punitive as to negate the Legislature's intent, we consider the following factors:

> (1) "[w]hether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of *scienter*"; (4) "whether its operation will promote the traditional aims of punishment—retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned."

Hudson v. United States, 522 U.S. at 99-100, quoting *Kennedy v. Mendoza-Martinez, supra*. See *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998). These factors must be considered in relation to the statute on its face and are helpful, but are neither exhaustive nor dispositive. *United States v. Ward, supra*; *State v. Howell, supra*.

In *Howell*, we determined that the Legislature intended administrative license revocation to be a civil sanction because it specifically stated in Neb. Rev. Stat. 60-6,205(1) (Reissue 1998) that it intended administrative license revocation to protect the public from the health and safety hazards posed by drivers who are under the influence of alcohol. See, also, *State v. Hansen*, 249 Neb. 177, 542 N.W.2d 424 (1996). But Isham notes that before 1996, § 60-6,205(1) included a statement that the legislative purpose was also to "deter others from driving while under the influence of alcohol." See § 60-6,205(1) (Reissue 1993). Based on this language, Isham contends that administrative license revocation was intended to be punitive. Isham further points to legislative history to argue that the Legislature intended administrative license revocation to be punitive. We discussed these issues in *Howell*, however, and concluded that administrative license revocation was designed primarily to serve remedial purposes. See, also, *State v. Hansen, supra*.

In *Howell*, we stated that the mere presence of a deterrent purpose is insufficient to render a sanction criminal, noting that

all civil sanctions will have some deterrent effect. See, also, *Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997); *United States v. Ursery*, 518 U.S. 267, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996). We also noted that administrative license revocation employs distinctly civil procedures. Finally, we stated that a driver's license is a privilege, not a right, and that revocation of a privilege is usually not considered punishment. See, also, *Hudson v. United States, supra*; *State v. Hansen, supra*. Thus, we concluded in *Howell* that the Legislature intended administrative license revocation to be a civil sanction and that Howell had failed to prove that it was not so punitive in purpose or effect as to negate the Legislature's intent. Like our decision in *Howell*, nearly every other court which has addressed the issue has also concluded that no double jeopardy problem is posed by the administrative suspension or revocation of a driver's license following a drunk driving arrest or refusal to submit to a chemical test. See *State v. Price*, 333 S.C. 267, 510 S.E.2d 215 (1998) (citing cases).

Isham also contends that our decisions in *State v. Franco*, 257 Neb. 15, 594 N.W.2d 633 (1999), and *State v. Spotts*, 257 Neb. 44, 595 N.W.2d 259 (1999), require a different result. In particular, Isham contends that the "same elements" test from *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), should be applied instead of the test from *Hudson v. United States, supra*. We disagree.

In *Franco*, we applied the *Hudson* test and determined that the Legislature intended forfeiture actions to be criminal proceedings. As a result, we were required to determine if the Double Jeopardy Clause prohibited cumulative punishments under both the forfeiture and the drug possession statutes. This analysis required a determination of whether there were violations of two distinct offenses or only one offense under *Blockburger v. United States, supra*. See, also, *State v. Spotts, supra*.

[12] In this case, we have applied the same test utilized in *Franco*, but have determined that unlike forfeiture proceedings, administrative license revocation is civil in nature and is not so punitive in purpose or effect as to negate the Legislature's intent. Once this determination has been made, the analysis stops

because the Double Jeopardy Clause protects against only multiple criminal punishments or prosecutions. See *Hudson v. United States, supra.* Thus, *Blockburger* is not applied, and our decisions in *Franco* and *Spotts* do not change our analysis in this case.

CONCLUSION

[13] We conclude that the Legislature intended administrative license revocation to be a civil sanction and that Isham has failed to show that it is so punitive in purpose or effect as to negate the Legislature's intent. Accordingly, there are no multiple criminal punishments or prosecutions involved and no double jeopardy violation. The order of the district court is affirmed.

AFFIRMED.

GERRARD, J., concurring.

For the reasons stated in my concurrence in *State v. Howell*, 254 Neb. 247, 575 N.W.2d 861 (1998), I concur in the judgment of the court.

VICKI AUSTIN, APPELLANT, V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, APPELLEE.

625 N.W.2d 213

Filed May 4, 2001. No. S-99-1239.

1. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a trial court's refusal to give a requested instruction, an appellant must prove 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 refusal to give the tendered instruction.
2. **Insurance: Contracts: Intent: Appeal and Error.** In an appellate review of an insurance policy, the court construes the policy as any other contract to give effect to the parties' intentions at the time the writing was made. Where the terms of a contract are clear, they are to be accorded their plain and ordinary meaning.
3. **Insurance: Contracts.** In construing insurance policy provisions, a court must determine from the clear language of the policy whether the insurer in fact insured against the risk involved.
4. ___: ___. The language of an insurance policy should be read to avoid ambiguities, if possible, and the language should not be tortured to create them.
5. ___: ___. There is no legal requirement that each word used in an insurance policy must be specifically defined in order to be unambiguous.

6. **Insurance: Contracts: Motor Vehicles.** The purpose of the Uninsured and Underinsured Motorist Insurance Coverage Act is to give a person injured by an uninsured motorist the same protection he or she would have had if he or she had been injured in an accident caused by an automobile covered by a standard liability policy.
7. **Insurance: Motor Vehicles: Legislature: Intent.** The Uninsured and Underinsured Motorist Insurance Coverage Act should be liberally construed to accomplish the indicated legislative purpose. However, a court is not free to rewrite statutes to provide a meaning or purpose they do not contain.
8. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only where reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Tiffany N. Floth and Joseph B. Muller, of Law Offices of Ronald J. Palagi, P.C., for appellant.

Mark C. Laughlin and Tracy J. Edgerton, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

This is a breach of contract action brought by appellant, Vicki Austin, against appellee, State Farm Mutual Automobile Insurance Company (State Farm). Austin filed a claim with State Farm under her uninsured motorist policy for damages incurred after Jennifer C. White, an uninsured motorist, hit Austin with her car. State Farm declined to pay the damages, claiming that White acted intentionally and that intentional acts are not within the policy coverage. Austin brought suit, and after a trial on the merits, a jury found for State Farm. The trial court entered judgment accordingly. We affirm.

BACKGROUND

On May 5, 1994, Austin was a passenger in a car driven by Sharilyn Ross, who was attempting to exit a parking lot. White, an uninsured motorist, attempted to cut in front of Ross' car, but Ross did not permit her to do so. Austin testified that White yelled an expletive at her, so Austin exited the car and walked

over to White's car. Austin said that White slapped her, then drove off and hit a parked car. Austin said that at that point, she thought the confrontation had ended, so she started to walk back to Ross' car. As she was walking, she noticed White's car coming toward her. White's car then struck Austin, pinning her right leg between White's car and Ross' car.

White, on the other hand, denied yelling an expletive and said that Austin came over to her car, cursed at her, and punched her through her open window. White then slapped Austin, and Austin hit White again. White claimed that the next thing she can remember is seeing Austin pinned between her car and Ross' car. White did not remember hitting a parked car, backing up, or driving toward Austin. After she hit Austin, White left the scene, but she was soon apprehended by the police.

As a result of this incident, Austin suffered a fractured right ankle that required surgery. She filed a claim with State Farm for uninsured motorist benefits under her policy. State Farm denied the claim, stating that an intentional tort is not an accident under the policy. Austin brought this action for breach of contract, and the jury returned a verdict for State Farm.

ASSIGNMENTS OF ERROR

Austin claims the trial court erred in (1) submitting jury instructions Nos. 9 and 10 to the jury, (2) rejecting Austin's proposed jury instruction No. 4, and (3) overruling Austin's motion for a directed verdict.

ANALYSIS

JURY INSTRUCTIONS

[1] Austin first alleges that the trial court's instructions to the jury were erroneous and that the trial court instead should have given one of Austin's tendered instructions to the jury. To establish reversible error from a trial court's refusal to give a requested instruction, an appellant must prove 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 refusal to give the tendered instruction. *In re Application of SID No. 384*, 259 Neb. 351, 609 N.W.2d 679 (2000). The issue in this case is the first

requirement, namely, whether Austin's tendered instruction was a correct statement of the law.

The dispute regarding the jury instructions in this case stems from a dispute about the meaning of the term "accident" as it is used in Austin's insurance policy. Austin's policy states: "We [State Farm] will pay damages for ***bodily injury*** an ***insured*** is legally entitled to collect from the owner or driver of an ***uninsured motor vehicle***. The ***bodily injury*** must be caused by accident arising out of the operation, maintenance or use of an ***uninsured motor vehicle***." (Emphasis in original.) The term "accident" is not defined in the policy.

Austin claims that the term should be defined from the insured's perspective. In that regard, she claims that the trial court should have used her tendered instruction No. 4, which provides:

> The uninsured motorist coverage provides coverage to Plaintiff for bodily injuries caused by an accident. As used in the insurance policy and these Instructions, the term "accident" means an event that Plaintiff did not expect to occur. In determining whether Plaintiff's injuries were the result of an "accident", you may only consider whether, from Plaintiff's point of view, the injuries she sustained were the result of an unusual or unexpected event.

State Farm, on the other hand, argues that the trial court, in instruction No. 9, correctly defined the term according to the ordinary sense of the word without regard to the perspective from which it is viewed. The trial court's instruction No. 9 provides:

> The State Farm policy provides coverage only for bodily injury which is caused by accident. The court instructs you that the word "accident" means an unexpected happening without intention or design.
>
> An accident occurs when injuries are sustained as a result of negligence, recklessness, or wanton misconduct where no intent or purpose to injure is shown.

The trial court also gave instruction No. 10, which defines the terms in instruction No. 9. Instruction No. 10 states in relevant part:

> Recklessly shall mean acting with respect to a material element of an offense when any person disregards a sub-

stantial and unjustifiable risk that the material element exists or will result from his or her conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to the actor, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

Intentional means that an act is done with design or purpose, that is, deliberately.

The question in this case is whether the term "accident," which is undefined in State Farm's policy, is to be given its plain and ordinary meaning, or whether the meaning changes because Austin is making a claim under an uninsured motorist policy. If the term is defined according to its plain and ordinary meaning, without regard to the perspective from which it is viewed, then it does not cover intentional torts. As such, the trial court's instruction would be correct, whereas Austin's tendered instruction would not. If, on the other hand, the term's meaning changes in the uninsured motorist context and it is to be defined from Austin's perspective, then the term covers intentional torts. Accordingly, Austin's tendered instruction would be correct and the trial court's instruction would not.

[2-5] In an appellate review of an insurance policy, the court construes the policy as any other contract to give effect to the parties' intentions at the time the writing was made. Where the terms of the contract are clear, they are to be accorded their plain and ordinary meaning. *Callahan v. Washington Nat. Ins. Co.*, 259 Neb. 145, 608 N.W.2d 592 (2000). In construing insurance policy provisions, a court must determine from the clear language of the policy whether the insurer in fact insured against the risk involved. *Columbia Nat. Ins. v. Pacesetter Homes*, 248 Neb. 1, 532 N.W.2d 1 (1995). The language of an insurance policy should be read to avoid ambiguities, if possible, and the language should not be tortured to create them. *American Family Ins. Group v. Hemenway*, 254 Neb. 134, 575 N.W.2d 143 (1998). There is no legal requirement that each word used in an insurance policy must be specifically defined in order to be unambiguous. *Id.*

[6] While the term "accident" is not defined in the policy, we have previously defined it in the liability insurance context as

"an unexpected happening without intention." *Sullivan v. Great Plains Ins. Co.*, 210 Neb. 846, 851, 317 N.W.2d 375, 379 (1982). In its ordinary sense, "accident" means "a happening that is not expected, foreseen, or intended." Webster's New World College Dictionary 8 (3d ed. 1996). The term, in its ordinary sense, has no reference to anyone's perspective. Instead, it refers to an unexpected, unintended, or unforeseen happening, regardless of the perspective from which it is viewed. As such, intentional acts by definition cannot be accidents. See, *Landry v. Dairyland Ins. Co.*, 166 Vt. 634, 701 A.2d 1035 (1997) (word "accident" ordinarily implies lack of intent by responsible parties, rather than victim's lack of foresight); *Roller v. Stonewall Ins. Co.*, 115 Wash. 2d 679, 801 P.2d 207 (1990). We conclude, therefore, that as used in the State Farm policy the word "accident" does not cover intentional torts. To hold otherwise would be to contravene the purpose of the Uninsured and Underinsured Motorist Insurance Coverage Act. We have often stated that the purpose of the act is to give a person injured by an uninsured motorist the same protection he or she would have had if he or she had been injured in an accident caused by an automobile covered by a standard liability policy. *Allied Mut. Ins. Co. v. Action Elec. Co.*, 256 Neb. 691, 593 N.W.2d 275 (1999); *Pettid v. Edwards*, 195 Neb. 713, 240 N.W.2d 344 (1976); *Stephens v. Allied Mut. Ins. Co.*, 182 Neb. 562, 156 N.W.2d 133 (1968). Given this purpose, uninsured motorist insurance operates as a substitute liability policy. See *Stephens v. Allied Mut. Ins. Co., supra.* It is clear from the purpose of the act that an insured may only recover from his or her uninsured motorist insurer the amount he or she would have recovered from the uninsured motorist's liability carrier had such motorist been carrying a liability policy.

Under a standard liability policy, intentional acts are excluded from coverage. Indeed, it is against public policy to insure against liability for intentional acts. See *Jones v. Norval*, 203 Neb. 549, 279 N.W.2d 388 (1979). Thus, if White had been covered by a standard liability policy, Austin could not have recovered from White's liability insurer because of the intentional act exclusion in such policy. Because Austin could not recover under a standard liability policy, she likewise cannot recover

under an uninsured motorist policy, given the purpose of the act. To hold otherwise would be to put Austin in a better position than she otherwise would have been if White had carried liability insurance. See *Roller v. Stonewall Ins. Co.*, 115 Wash. 2d at 685, 801 P.2d at 210 (" '[t]he injured party is not entitled to be put in a better position, by virtue of being struck by an underinsured motorist, than she would be had she been struck by a fully insured motorist' ").

[7] We have stated that we liberally construe the Uninsured and Underinsured Motorist Insurance Coverage Act to accomplish the indicated legislative purpose. *Emery v. State Farm Mut. Auto. Ins. Co.*, 195 Neb. 619, 239 N.W.2d 798 (1976). However, "we are not free to rewrite the statutes to provide a meaning or purpose they do not contain." *Id.* at 624, 239 N.W.2d at 801. To hold as Austin requests would be to expand the act beyond its intended scope.

DIRECTED VERDICT

[8] Austin argues that the trial court should have granted her motion for directed verdict because there was no evidence that White intentionally hit her. A directed verdict is proper at the close of all the evidence only where reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law. *King v. Crowell Memorial Home, ante* p. 177, 622 N.W.2d 588 (2001).

As State Farm argues, the testimony shows that White and Austin had a verbal argument followed by a physical altercation. There was testimony that both White and Austin took aggressive action toward each other. The testimony also shows that after the physical altercation, White drove her car into a parked car, put her car in reverse and drove around Ross' car, and then drove directly toward Austin. Reasonable minds could certainly differ as to whether or not White intended to hit Austin with her car. As such, the trial court correctly denied Austin's motion for directed verdict.

CONCLUSION

We conclude, therefore, that as used in the State Farm uninsured motorist policy, the term "accident" does not include

intentional acts. As such, Austin's tendered instruction is an incorrect statement of the law and was correctly refused. We further conclude that based on the evidence adduced at trial, reasonable minds could differ as to whether White intended to hit Austin with her car. Accordingly, we find that the trial court correctly denied Austin's motion for directed verdict.

AFFIRMED.

PATRICK J. MERTZ, APPELLEE, V. PHARMACISTS MUTUAL INSURANCE COMPANY, APPELLANT.

625 N.W.2d 197

Filed May 4, 2001. No. S-00-097.

1. **Summary Judgment.** Summary judgment is proper where the facts are uncontroverted and 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. **Jurisdiction: States.** Which state's law governs an issue is a question of law.
4. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court.
5. **Contracts: Jurisdiction.** Nebraska has adopted the Restatement (Second) of Conflict of Laws § 188 (1971) for contract disputes involving a conflict of laws.
6. ___: ___. The importance of any factor under the Restatement (Second) of Conflict of Laws § 188 (1971) will depend upon the contract issue in dispute.
7. **Restrictive Covenants: States: Presumptions.** With respect to covenant not to compete clauses, the Restatement (Second) of Conflict of Laws § 196 (1971) creates a presumption that the state where services are to be performed is the state having the most significant relationship to the transaction unless another state has a more significant relationship under the general principles stated in the Restatement, *supra*, § 6.
8. **Restrictive Covenants: States.** A state's policies on the validity of covenant not to compete clauses are not offended where no evidence is submitted to demonstrate that an employee ever performed services in that state.
9. **Restrictive Covenants: States: Public Policy.** A state's policy consideration on protecting parties' expectations in contract transactions does not outweigh Nebraska's strong public policy considerations on the validity of covenant not to compete clauses.
10. **Restrictive Covenants: Employer and Employee: States.** Nebraska law controls a dispute over the validity of a covenant not to compete clause when the employee performed all services within the State of Nebraska and another state does not have a more significant relationship to the transaction.

11. **Restrictive Covenants: Employer and Employee.** In determining whether a covenant not to compete clause is valid, an appellate court considers whether the restriction is (1) reasonable in the sense that it is not injurious to the public, (2) not greater than is reasonably necessary to protect the employer in some legitimate interest, and (3) not unduly harsh and oppressive on the employee.
12. ___: ___. An employer has a legitimate business interest in protection against a former employee's competition by improper and unfair means, but is not entitled to protection against ordinary competition from a former employee.
13. **Restrictive Covenants: Employer and Employee: Goodwill: Words and Phrases.** In order to distinguish between "ordinary competition" and "unfair competition," the Nebraska Supreme Court has consistently focused on the employee's opportunity to appropriate the employer's goodwill by initiating personal contacts with the employer's customers.
14. **Restrictive Covenants: Employer and Employee: Goodwill.** A determination that an employer had a legitimate business interest in customer goodwill does not automatically validate a covenant not to compete.
15. **Restrictive Covenants: Employer and Employee.** As a general rule, a covenant not to compete in an employment contract may be valid only if it restricts the former employee from working for or soliciting the former employer's clients or accounts with whom the former employee actually did business and has personal contact.
16. **Restrictive Covenants: Employer and Employee: Goodwill.** When a covenant not to compete clause restricts a former employee from soliciting or selling to individuals and businesses that were not customers of the employer, it is broader than reasonably necessary to protect the employer's legitimate interest in customer goodwill.
17. **Restrictive Covenants: Case Overruled.** To the extent that *Dana F. Cole & Co. v. Byerly*, 211 Neb. 903, 320 N.W.2d 916 (1982), can be interpreted as an exception to the rule concerning restrictive covenants announced in *Polly v. Ray D. Hilderman & Co.*, 225 Neb. 662, 407 N.W.2d 751 (1987), it is disapproved and overruled.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

Edward G. Warin and Patrick J. Barrett, of McGrath, North, Mullin & Kratz, P.C., for appellant.

George B. Achola, of Walentine, O'Toole, McQuillan & Gordon, P.C., for appellee.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

Pharmacists Mutual Insurance Company (Pharmacists) appeals from a summary judgment order in favor of appellee, Patrick J. Mertz, a former employee. The district court found a

covenant not to compete clause in the party's employment agreement unenforceable.

The threshold question in this appeal is whether we apply Nebraska or Iowa substantive law. We look to the Restatement (Second) of Conflict of Laws §§ 6 and 196 (1971) to determine the enforceability of the noncompete clause. Applying the above sections, we determine Nebraska law controls, and the covenant's restriction is greater than is reasonably necessary to protect Pharmacists' interest. We affirm.

BACKGROUND

In 1996, Pharmacists and Mertz entered into a written employment agreement in Iowa for Mertz to work as an insurance agent for Pharmacists. Pharmacists is an Iowa corporation authorized to underwrite and sell insurance in Nebraska. Pharmacists offers a full line of business and personal insurance products, but particularly focuses on pharmacists and pharmacies. At the time the agreement was negotiated and executed, Mertz lived in Iowa. After Mertz was hired, he moved to Nebraska to work as Pharmacists' only sales representative for most of Nebraska, except for some of the western counties. Mertz voluntarily resigned his employment in 1999.

The agreement contained a covenant not to compete clause, which stated:

> It is agreed between the Representative and the Company that the Company has a continuing interest and right in the relationship it has with the customers and the goodwill that exists between its customers and the Company. In recognition of this interest and right and in consideration of employment and attendant benefits of employment, the Representative agrees that he/she will not sell or solicit Property and Casualty Insurance or Life and Health Insurance to pharmacists or pharmacies or any current customer of Pharmacists Mutual Insurance Company, The Pharmacists Life Insurance Company or Pro Advantage Services, Inc. for a period of three (3) years within the geographical territory serviced by the Representative at the time of termination of this agreement or in any territory serviced by him/her within three (3)

> years prior to his/her termination. The Representative acknowledges that many of PHARMACISTS MUTUAL INSURANCE COMPANY's policies are written for a term of three (3) years, and that a three (3) year prohibition as set forth in this paragraph is reasonable.

The agreement did not contain a choice-of-law provision.

Mertz filed a petition for declaratory judgment in district court seeking to have the covenant not to compete clause declared unenforceable as a matter of law. Pharmacists filed a counterclaim for breach of contract. Mertz then filed a motion for partial summary judgment on the covenant's enforceability. In his affidavit, Mertz specifically states that he conducted business only within the State of Nebraska. This fact was not contradicted by Pharmacists. The court determined that Nebraska's substantive law should apply and that under Nebraska law, the covenant not to compete clause was overly broad and was therefore unenforceable.

ASSIGNMENTS OF ERROR

Pharmacists assigns as error the district court's finding that (1) there were no genuine issues of material fact; (2) Nebraska's substantive law controlled the issue of whether the covenant not to compete clause was enforceable; (3) under Nebraska law, the covenant not to compete clause was unenforceable as a matter of law; and (4) the covenant did not fall into an exception to unenforceability recognized by Nebraska law.

STANDARD OF REVIEW

[1,2] Summary judgment is proper where the facts are uncontroverted and the moving party is entitled to judgment as a matter of law. *Prochaska v. Douglas Cty.*, 260 Neb. 642, 619 N.W.2d 437 (2000); *Alegent Health Bergan Mercy Med. Ctr. v. Haworth*, 260 Neb. 63, 615 N.W.2d 460 (2000). 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. *Bates v. Design of the Times, Inc.*, *ante* p. 332, 622 N.W.2d 684 (2001); *Allstate Ins. Co. v. LaRandeau*, *ante* p. 242, 622 N.W.2d 646 (2001).

[3,4] Which state's law governs an issue is a question of law. See *Powell v. American Charter Fed. Sav. & Loan Assn.*, 245 Neb. 551, 514 N.W.2d 326 (1994). When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court. *North Bend Senior Citizens Home v. Cook, ante* p. 500, 623 N.W.2d 681 (2001); *Doksansky v. Norwest Bank Neb.*, 260 Neb. 100, 615 N.W.2d 104 (2000).

ANALYSIS

Pharmacists argues that Iowa's substantive law should determine the validity of the agreement's covenant not to compete clause and that under Iowa law, the covenant is enforceable. Mertz argues that the district court correctly found that Nebraska law should govern this issue and that under Nebraska law, the covenant is overbroad and therefore unenforceable.

CONFLICT OF LAWS

[5] Pharmacists correctly notes that this court has adopted the Restatement (Second) of Conflict of Laws § 188 (1971). See *Powell v. American Charter Fed. Sav. & Loan Assn., supra.* The Restatement, *supra* at 575, provides, in relevant part:

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

(Emphasis supplied).

[6] But the indication of this rule is that the importance of any particular factor will depend upon the contract issue in dispute. For instance, when the issue in dispute is contract formation, the state where the negotiations and contracting occurred would have the most significant relationship to the transaction. In this case, no one disputes whether a contract was validly executed. Rather, the issue is whether the covenant not to compete is enforceable. Thus, we must determine which state has the most significant relationship to this transaction with respect to the covenant not to compete.

We find guidance from the Restatement, *supra*, § 196. While § 188 sets out the general contacts to consider in contract cases involving conflict of law disputes, §§ 189 through 197 deal with conflict of laws disputes with regard to specific types of contracts. The Restatement, *supra*, § 196 at 623, applies to contracts for the rendition of services and provides:

> The validity of a contract for the rendition of services and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where the contract requires that the services, or a major portion of the services, be rendered, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which the [sic] event the local law of the other state will be applied.

The comments to § 196 indicate this rule was intended to apply to questions regarding the validity of a noncompetition clause. See *id.*, comment *a.* at 624 ("[t]he law selected by application of the present rule determines such questions as . . . the validity of a clause forbidding the employee from entering a business competitive with that of the employer for a stated period after the termination of the employment . . .").

[7] The effect of § 196 is to create a presumption that the state where services are to be performed is the state having the most significant relationship to the transaction when the issue is the validity of a covenant not to compete. If another state has a more significant relationship under the general principles stated in the Restatement, *supra*, § 6, then the law of that state would be applied.

Under the Restatement (Second) of Conflict of Laws § 6(2) at 10 (1971), the general factors to consider for any type of dispute when choosing the applicable rule of law are as follows:

> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
>
> (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.

[8] In this case, no evidence was submitted showing that Mertz ever performed any services in Iowa. In his affidavit, Mertz stated he had conducted business only in Nebraska. The uncontroverted evidence shows that Mertz was hired to work in Nebraska and that all of his services were performed in this state. Thus, only competition in Nebraska is affected by this agreement, and Iowa's policies on the validity of such covenants are not offended.

[9,10] Although protecting parties' expectations is always a central policy consideration in contracts, that interest does not supersede all other public policies. In Nebraska, this court has refused to enforce postemployment covenants not to compete which are broader than reasonably necessary to protect legitimate business interests on the ground that such covenants are against public policy and void. See *Presto-X-Company v. Beller*, 253 Neb. 55, 568 N.W.2d 235 (1997). Iowa's interest in protecting the expectations of the parties is outweighed by Nebraska's strong public policy considerations on this issue. See *Rain and Hail Ins. Service, Inc. v. Casper*, 902 F.2d 699 (8th Cir. 1990) (affirming district court's refusal to enforce choice-of-law provision designating Iowa law as governing covenant not to compete because application of Iowa law would be contrary to fundamental policy under Nebraska law). Accordingly, Nebraska law should be applied to determine the validity of the covenant.

ENFORCEABILITY

[11] Under Nebraska law, in order to determine whether a covenant not to compete is valid, we consider whether the restriction is (1) reasonable in the sense that it is not injurious to the public, (2) not greater than is reasonably necessary to protect the employer in some legitimate interest, and (3) not unduly harsh and oppressive on the employee. See, *Professional Bus. Servs. v. Rosno*, 256 Neb. 217, 589 N.W.2d 826 (1999); *Moore v. Eggers Consulting Co.*, 252 Neb. 396, 562 N.W.2d 534 (1997).

In this case, the district court found the restriction was greater than reasonably necessary to protect the employer's legitimate interest. Mertz does not argue that the covenant is injurious to the public or unduly harsh and oppressive on the employee. Therefore, our focus is whether the covenant is greater than is reasonably necessary to protect the employer in some legitimate interest.

[12,13] An employer has a legitimate business interest in protection against a former employee's competition by improper and unfair means, but is not entitled to protection against ordinary competition from a former employee. *Professional Bus. Servs. v. Rosno, supra.* In order to distinguish between "ordinary competition" and "unfair competition," this court has consistently focused on the employee's opportunity to appropriate the employer's goodwill by initiating personal contacts with the employer's customers:

> "'"Where an employee has substantial personal contact with the employer's customers, develops goodwill with such customers, and siphons away the goodwill under circumstances where the goodwill properly belongs to the employer, the employee's resultant competition is unfair, and the employer has a legitimate need for protection against the employee's competition."'"

Id. at 224, 589 N.W.2d at 831. See, also, *Moore v. Eggers Consulting Co., supra*; *Whitten v. Malcolm*, 249 Neb. 48, 541 N.W.2d 45 (1995); *Vlasin v. Len Johnson & Co.*, 235 Neb. 450, 455 N.W.2d 772 (1990).

[14] The record reflects that Mertz was Pharmacists' only employee in most of Nebraska for 3 years. Presumably, he would have had the opportunity to appropriate Pharmacists'

goodwill. See *American Sec. Servs. v. Vodra*, 222 Neb. 480, 385 N.W.2d 73 (1986) (concluding that sales representatives have unique opportunity to appropriate employer's goodwill). Thus, Pharmacists has a legitimate interest in protecting its existing client base from unfair competition from a former employee. But "[a] determination that an employer had a legitimate business interest in customer goodwill does not automatically validate a covenant not to compete." *Professional Bus. Servs. v. Rosno*, 256 Neb. at 224, 589 N.W.2d at 832.

[15] As a general rule, "a covenant not to compete in an employment contract 'may be valid only if it restricts the former employee from working for or soliciting the former employer's clients or accounts with whom the former employee actually did business and has personal contact.' " *Id.* at 225-26, 589 N.W.2d at 832, quoting *Polly v. Ray D. Hilderman & Co.*, 225 Neb. 662, 407 N.W.2d 751 (1987).

Here, the covenant not to compete clause restrained Mertz from selling or soliciting "Property and Casualty Insurance or Life and Health Insurance to pharmacists or pharmacies or any current customer" of Pharmacists companies. The covenant does not limit itself to those clients Mertz did business with or personally contacted.

Pharmacists argues, however, that this court's recent decision in *Professional Bus. Servs. v. Rosno*, 256 Neb. 217, 589 N.W.2d 826 (1999), is similar to the covenant in this case and argues that this covenant is not overly broad. In *Professional Bus. Servs.*, the covenant prohibited the employee from soliciting, contacting, or performing services " 'for any of Employer's clients,' " and the district court sustained a demurrer. 256 Neb. at 219, 589 N.W.2d at 829. The employee argued the covenant was invalid because it prohibited him from soliciting any of the employer's clients regardless of whether or not he had personal contact with them. This court held that the employer's second amended petition stated a valid cause of action because it alleged that the employee had substantial personal contact with virtually all of the employer's clients. *Id.*

[16] This case is distinguishable from *Professional Bus. Servs.* because even if Pharmacists could show that Mertz had personal contact with virtually every client it had in Nebraska,

the covenant also restricted Mertz from soliciting or selling to individuals and businesses that were not customers of Pharmacists. Not only did the covenant fail to limit its terms to those clients with whom Mertz actually did business or had personal contact, it fails to limit itself in any way to Pharmacists' existing client base in Nebraska. Mertz stated in his affidavit that the Nebraska Pharmacists Association reports there are 1,500 pharmacists and 630 pharmacies in Nebraska. Of the 630 pharmacies, Mertz stated that only 84 were served by Pharmacists. The covenant is therefore broader than reasonably necessary to protect Pharmacists' legitimate interest in customer goodwill. See, e.g., *Moore v. Eggers Consulting Co.*, 252 Neb. 396, 562 N.W.2d 534 (1997).

Furthermore, Pharmacists argues that there is an exception to the rule first announced in *Polly v. Ray D. Hilderman & Co., supra*. Pharmacists contends this court recognized an exception in *Dana F. Cole & Co. v. Byerly*, 211 Neb. 903, 320 N.W.2d 916 (1982).

In *Dana F. Cole & Co.*, this court held that a covenant which restricted a former branch manager of an accounting firm from practicing within 75 miles of the office he managed was reasonable and enforceable. The covenant was found valid in light of evidence showing that the branch managers had personal relationships with the clients served and that one of the employer's branch offices had lost a significant amount of business in the past when a manager left its employ.

The factors we considered in *Dana F. Cole & Co.* were

> "the degree of inequality in bargaining power; the risk of the covenantee losing customers; the extent of respective participation by the parties in securing and retaining customers; the good faith of the covenantee; the existence of sources or general knowledge pertaining to the identity of customers; the nature and extent of the business position held by the covenantor; the covenantor's training, health, education, and needs of his family; the current conditions of employment; the necessity of the covenantor changing his calling or residence; and the correspondence of the restraint with the need for protecting the legitimate interests of the covenantee."

211 Neb. at 906-07, 320 N.W.2d at 918, quoting *Philip G. Johnson & Co. v. Salmen*, 211 Neb. 123, 317 N.W.2d 900 (1982) (listing factors cited by *Dana F. Cole & Co.* but affirming lower court's refusal to enforce covenant on ground that restriction included former clients and was therefore impermissibly broad).

We later clarified, however, that the factors cited by *Philip G. Johnson & Co.* and *Dana F. Cole & Co.* are part of a balancing test used under the third inquiry of the validity test to determine whether a restraint is unduly harsh or oppressive on the employee—a consideration not at issue in this case. See, *American Sec. Servs. v. Vodra*, 222 Neb. 480, 385 N.W.2d 73 (1986); *Chambers-Dobson, Inc. v. Squier*, 238 Neb. 748, 472 N.W.2d 391 (1991). Moreover, it was not until 1987 that this court decided *Polly v. Ray D. Hilderman & Co.*, 225 Neb. 662, 407 N.W.2d 751 (1987), 5 years after *Dana F. Cole & Co.* was decided. See *Polly v. Ray D. Hilderman & Co., supra.*

[17] If *Dana F. Cole & Co. v. Byerly, supra*, were decided today, we would have also determined whether the restriction was greater than is reasonably necessary to protect the employer in some legitimate interest. To the extent that *Dana F. Cole & Co.* can be interpreted as an exception to the rule set forth in *Polly v. Ray D. Hilderman & Co., supra*, it is disapproved and overruled.

Finally, Pharmacists cites *Moore v. Eggers Consulting Co.*, 252 Neb. 396, 562 N.W.2d 534 (1997), for the proposition that this court has recently reconsidered the rule announced in *Polly v. Ray D. Hilderman & Co., supra*. Pharmacists argues that the emphasis in *Polly* was on whether the former employee actually did business with or had personal contacts with the employer's clients, whereas the emphasis in *Moore* was on the reasonableness of the geographic restrictions. It is correct that *Polly* was not decided on the basis of the geographic restriction. However, this court did not say such restrictions were irrelevant. Rather, we found the restriction invalid regardless of whether the geographic restriction was reasonable. As we pointed out in *Moore v. Eggers Consulting Co., supra*, covenants not to compete may also be greater than reasonably necessary based on the scope of a geographic restriction when the restriction has no relationship to a client base. See, also, *American Sec. Servs. v. Vodra, supra* (analyzing whether covenant was reasonable restriction in terms

of space and time). The analysis in *Moore*, however, does not indicate that this court has abandoned the standard announced in *Polly*. On the contrary, part of the reason this court found the covenant unenforceable in *Moore* was because it attempted to prohibit the employee from soliciting clients that he "did not personally work with and had never met." 252 Neb. at 403, 562 N.W.2d at 540.

We conclude that the district court correctly determined that the covenant not to compete clause was unenforceable as a matter of law. The judgment of the district court is affirmed.

AFFIRMED.

STEPHAN, J., not participating.

RAYMA GEBHARD, APPELLANT, V. DIXIE CARBONIC, APPELLEE.
625 N.W.2d 207

Filed May 4, 2001. No. S-00-820.

1. **Workers' Compensation: Appeal and Error.** Under the provisions of Neb. Rev. Stat. § 48-185 (Cum. Supp. 2000), 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. ___: ___. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of fact of the single judge who conducted the original hearing; the findings of fact of the single judge will not be disturbed on appeal unless clearly wrong.
3. ___: ___. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
4. **Workers' Compensation.** A basic principle underlying the Nebraska Workers' Compensation Act is that only employees are entitled to workers' compensation benefits.
5. **Workers' Compensation: Employer and Employee.** The existence of an employer-employee relationship is essential in establishing the nature and scope of the relief to which an employee is entitled for his or her work-related injury.
6. **Workers' Compensation: Jurisdiction: Proof.** The plaintiff in Workers' Compensation Court must prove that she or he has employee status to invoke the jurisdiction of the court.
7. **Employer and Employee: Contracts.** The relationship of employer-employee arises from the contract between the parties. Whether an employer-employee relationship exists must be decided on the facts of each case.

8. **Workers' Compensation: Appeal and Error.** 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.
9. **Workers' Compensation: Courts: Jurisdiction.** Where a claimant is under a conditional offer of employment at the time of an alleged injury, the Workers' Compensation Court does not have jurisdiction, pursuant to Neb. Rev. Stat. § 48-115 (Reissue 1998), to make a determination of compensability.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Martin V. Linscott, of Harris Law Offices, for appellant.

Joseph W. Grant, of Gaines, Pansing & Hogan, for appellee.

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

GERRARD, J.

We are presented in this case with the issue whether a person is an employee for purposes of the Nebraska Workers' Compensation Act when that person is injured during a preemployment physical examination.

FACTS

In October 1998, Rayma Gebhard responded to an advertisement in the newspaper for a position as a laborer working on the line at Dixie Carbonic in Beatrice, Nebraska. Gebhard testified that she spoke with a manager at Dixie Carbonic about potential employment with the company. The Workers' Compensation Court found, and Gebhard agrees, that Gebhard was given a conditional offer of employment by Dixie Carbonic. The conditions precedent to her employment were that Gebhard would need to pass a drug test, pass a lower back physical examination, and complete a job orientation.

After Gebhard passed the required drug test, Gebhard went to Madonna Rehabilitation Hospital in Lincoln for the physical examination on November 2, 1998. Gebhard testified that after several other physical tests, she was asked to lift some weighted boxes. Gebhard said that during these tests, she was asked to lift a box weighing 60 pounds from a shelf at approximately waist level to approximately shoulder height. Gebhard testified that on

her first attempt at lifting the box, she lifted the box one-half foot, felt something pull in her lower back, and dropped the box onto the counter. Gebhard did not tell the therapist administering the test that she was experiencing pain, and Gebhard said that the therapist told her that she had not passed the physical examination.

Gebhard continued to experience pain in her back, and she eventually filed a petition in the Workers' Compensation Court seeking a determination of benefits. After a hearing, the single judge determined that Gebhard had not passed the physical examination because she had failed to lift the 60-pound box. The single judge then noted that Dixie Carbonic did not hire Gebhard because she failed to pass the physical examination and was therefore unable to do the job. Before addressing Gebhard's claim that she suffered an injury during the physical examination, the court addressed the issue whether Gebhard was an employee at the time of the physical examination for purposes of the Nebraska Workers' Compensation Act.

Initially, the single judge noted that Gebhard was not on Dixie Carbonic's payroll at the time she participated in the physical examination and that Gebhard would not have been on the payroll until she satisfied all three conditions necessary to obtain employment with Dixie Carbonic. The court then went on to reason that

> [i]n order to be an employee, the employee must be in the service of the employer. In order to be in the service of the employer, the employee must be hired. Passing a drug test and passing a physical or low back screen are conditions precedent to the employment [in this case]. If [Gebhard] did not pass the drug screen, she is not employed. If [Gebhard] cannot pass the physical, she is not employed.

The single judge concluded that Gebhard was not an employee of Dixie Carbonic when she took the physical examination and, therefore, dismissed Gebhard's claim.

Gebhard appealed to a Workers' Compensation Court review panel, which affirmed the single judge's determination without a detailed opinion. Gebhard appealed, and we moved the case to our docket pursuant to our authority to regulate the dockets of the appellate courts.

ASSIGNMENTS OF ERROR

Gebhard assigns, restated, that the Workers' Compensation Court erred in (1) finding that she was not a covered employee under the Nebraska Workers' Compensation Act at the time of her physical examination and (2) failing to provide the parties with a reasoned decision as to the occurrence of an injury and as to the entitlement of temporary total disability.

STANDARD OF REVIEW

[1-3] Under the provisions of Neb. Rev. Stat. § 48-185 (Cum. Supp. 2000), 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. *Fay v. Dowding, Dowding, ante* p. 216, 623 N.W.2d 287 (2001). In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of fact of the single judge who conducted the original hearing; the findings of fact of the single judge will not be disturbed on appeal unless clearly wrong. *Id.* An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Id.*

ANALYSIS

In the case at bar, Gebhard urges us to adopt a rule that would make injuries which occur during a prehiring physical examination compensable under the Nebraska Workers' Compensation Act, even when passing the physical is a precondition to employment. For the reasons that follow, we decline to adopt such a rule absent an employer-employee relationship between the parties.

[4-6] A basic principle underlying the Nebraska Workers' Compensation Act is that only employees are entitled to workers' compensation benefits. *Williams v. Williams Janitorial Service*, 207 Neb. 344, 299 N.W.2d 160 (1980); Neb. Rev. Stat.

§ 48-101 (Reissue 1998). The existence of an employer-employee relationship is essential in establishing the nature and scope of the relief to which an employee is entitled for his or her work-related injury. *Schweitzer v. American Nat. Red Cross*, 256 Neb. 350, 591 N.W.2d 524 (1999). The plaintiff in Workers' Compensation Court must prove that she or he has employee status to invoke the jurisdiction of the court. *Pettit v. State*, 249 Neb. 666, 544 N.W.2d 855 (1996). Thus, whether Gebhard was an employee of Dixie Carbonic at the time of her injury presents a jurisdictional issue. See *id.*

The Nebraska Workers' Compensation Act provides that the term "employee" shall be construed, in relevant part, to mean:

> (2) Every person in the service of an employer who is engaged in any trade, occupation, business, or profession . . . under any contract of hire, expressed or implied, oral or written, including aliens and also including minors . . . .
>
> As used in subdivisions (1) and (2) of this section, the terms employee and worker shall not be construed to include any person whose employment is not in the usual course of the trade, business, profession, or occupation of his or her employer.

Neb. Rev. Stat. § 48-115 (Reissue 1998).

[7] The relationship of employer-employee arises from the contract between the parties. *Hemmerling v. Happy Cab Co.*, 247 Neb. 919, 530 N.W.2d 916 (1995); *Stephens v. Celeryvale Transport, Inc.*, 205 Neb. 12, 286 N.W.2d 420 (1979). Whether the ultimate issue is workers' compensation coverage, liability for acts of a servant, or some other matter, the question is, What was the real agreement between the parties? *Id.* The answer to the contract question is not at all dependent upon the ultimate issue, i.e., the criteria to be applied in determining the nature of the contract is the same whether it involves workers' compensation coverage or something else. *Id.* Whether an employer-employee relationship exists must be decided on the facts of each case. *Pettit v. State, supra.*

[8] In the instant case, Gebhard has conceded that passing the physical examination was a condition precedent to her employment with Dixie Carbonic. Brief for appellant at 9. Further, the workers' compensation single judge specifically found that

Gebhard was given a conditional offer of employment and that Dixie Carbonic would not hire her unless, among other conditions, she passed the physical examination. 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. *Hagelstein v. Swift-Eckrich, ante* p. 305, 622 N.W.2d 663 (2001). The record in this case supports the findings of the single judge in all respects.

Nonetheless, Gebhard cites various other jurisdictions' case law to support her position that an injury which occurs during a prehiring physical examination should be compensable under the Nebraska Workers' Compensation Act. However, the cases cited by Gebhard are distinguishable from the case at bar, and further, we are guided solely by the provisions of the Nebraska Workers' Compensation Act.

First, Gebhard cites *Woodell v. Brown & Root, Inc.*, 2 Ark. App. 106, 616 S.W.2d 781 (1981), in which the Court of Appeals of Arkansas addressed a situation where the plaintiff was injured during a physical examination conducted by his employer after the plaintiff was hired. In determining that the injury was compensable under the workers' compensation act, the *Woodell* court relied almost exclusively on the fact that the employment records of the defendant established that the plaintiff was an employee of the defendant at the time he was injured and the fact that the plaintiff was paid for 10 hours of work by the defendant on the day of the injury. Further, the *Woodell* court noted that there was no evidence presented to rebut such evidence. Thus, the *Woodell* court concluded that the plaintiff was an employee and had the exclusive remedy of the Arkansas workers' compensation act.

Next, Gebhard points to the result in *Lotspeich v. Chance Vought Aircraft*, 369 S.W.2d 705 (Tex. Civ. App. 1963). In that case, the plaintiff had taken a physical examination on the defendant's premises after she was hired but within 3 days prior to beginning work. The court in *Lotspeich* held that the plaintiff was an employee at the time of the physical examination. In so holding, the court cited the fact that the physical examination was conducted on the defendant's premises, under the defendant's direction and control, and wholly for the defendant's benefit. *Id.*

Finally, Gebhard cites to *Good Samaritan Hosp. v. Jacobson*, 98 Md. App. 587, 634 A.2d 969 (1993), as support. In *Good Samaritan Hosp.*, the plaintiff was injured during a physical examination on the defendant's premises and the plaintiff filed for workers' compensation benefits. The plaintiff was paid for the time she spent at the physical examination, and the defendant withheld state and federal taxes from such pay. *Id.* In a note, with respect to the plaintiff's status at the time she went for her physical examination, the court in *Good Samaritan Hosp.* stated that "[a]dministratively, it would seem there was little else to be done to effectuate full employment." 98 Md. App. at 590 n.1, 634 A.2d at 971 n.1. Moreover, the court noted that the defendant told the plaintiff to report to the jobsite for the physical examination and paid her for the time she spent at the site for the physical. *Id.* The court held that an injury occurring during a physical examination can constitute a compensable injury.

In the cases cited by Gebhard, the employee clearly had more of a contractual relationship with the employer than a mere conditional offer of employment. In *Good Samaritan Hosp. v. Jacobson, supra*, the employee was paid for the time spent at the physical and taxes were withheld from such pay. Similarly, in *Woodell v. Brown & Root, Inc., supra*, the employer's employment records established that the plaintiff was an employee on the day of the injury and that the plaintiff had been paid for work done on that day. In *Lotspeich v. Chance Vought Aircraft, supra*, the employee had been hired and was required to take the physical before starting work. Thus, the cases cited by Gebhard are distinguishable from the facts in the instant case.

Moreover, we are guided in this case by the language of § 48-115, which requires that a person be under a contract of hire in order to be considered an employee. Whether a contract of hire is established is ordinarily a question of fact. *Kaiser v. Millard Lumber*, 255 Neb. 943, 587 N.W.2d 875 (1999). The burden of proof is upon the employee to prove the nature of the relationship. *Williams v. Williams Janitorial Service*, 207 Neb. 344, 299 N.W.2d 160 (1980); *Stephens v. Celeryvale Transport, Inc.*, 205 Neb. 12, 286 N.W.2d 420 (1979). In the instant case, the single judge effectively determined that Gebhard failed to meet her burden of proving that she was an employee of Dixie Carbonic at the

time of the alleged injury and the record supports the judge's findings. Further, Gebhard's concession that her offer of employment was conditional supports the conclusion that no contract of hire existed between Gebhard and Dixie Carbonic.

Adherence to the contractual aspect of the employer-employee relationship is mandated by § 48-115 and is in line with our prior cases. Thus, we decline to extend coverage of the Nebraska Workers' Compensation Act to claimants in the absence of a clearly established employer-employee relationship. See *Schweitzer v. American Nat. Red Cross*, 256 Neb. 350, 591 N.W.2d 524 (1999). See, also, *Younger v. City and County of Denver*, 810 P.2d 647 (Colo. 1991); *Cust-O-Fab v. Bohon*, 876 P.2d 736 (Okla. App. 1994).

[9] Because Gebhard had a mere conditional offer of employment from Dixie Carbonic, we conclude that Gebhard was not under any contract of hire, pursuant to § 48-115, at the time of her alleged injury. Therefore, the Workers' Compensation Court did not have jurisdiction under the Nebraska Workers' Compensation Act to make a determination of compensability.

CONCLUSION

Because no employer-employee relationship existed between Dixie Carbonic and Gebhard at the time of her alleged injury, we conclude that the Workers' Compensation Court did not have jurisdiction to determine compensability and, therefore, affirm the judgment of the court.

AFFIRMED.

NEBRASKA NUTRIENTS, INC., A NEBRASKA CORPORATION, ET AL., APPELLANTS, V. WYMAN SHEPHERD AND LEO CORBET, APPELLEES. NEBRASKA NUTRIENTS, INC., A NEBRASKA CORPORATION, APPELLEE, RAYMOND CLAYTON ROLES, INDIVIDUALLY, APPELLANT, AND TRI-STATE CONSTRUCTION & SUPPLY, INC., A NEBRASKA CORPORATION, APPELLEE, V. WYMAN SHEPHERD AND LEO CORBET, APPELLEES.

626 N.W.2d 472

Filed May 11, 2001. Nos. S-95-624, S-98-782.

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 of the decisions made by the lower courts.
2. **Jurisdiction: Final Orders: Appeal and Error.** After an appeal to an appellate court has been perfected in a civil case, a lower court is without jurisdiction to hear a case involving the same matter between the same parties. However, a party may appeal from a court's order only if the decision is a final, appealable order.
3. **Appeal and Error.** A notice of appeal from a nonappealable order does not render void for lack of jurisdiction acts of the trial court taken in the interval between the filing of the notice and the dismissal of the appeal by the appellate court.
4. **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 in an action, when such order in effect 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. **Actions: Statutes.** Special proceedings entail civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes.
6. **Declaratory Judgments.** An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
7. **Injunction: Equity.** An action for injunction sounds in equity.
8. **Rescission: Equity.** Rescission is equitable in nature.
9. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, reaching a conclusion independent of the findings of the trial court. Where credible evidence is in conflict on a material issue of fact, the appellate court will consider 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.
10. **Actions: Fraud: Rescission: Proof.** A party alleging fraudulent representation as the basis for rescission must prove all elements of fraudulent conduct by clear and convincing evidence. The elements of proof are (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4)

that it was made with the intention that the plaintiff should rely upon it; (5) that the plaintiff reasonably did so rely; and (6) that he or she suffered damage as a result.

11. **Fraud: Proof: Circumstantial Evidence.** Whether a party's reliance upon a misrepresentation was reasonable is a question of fact. While direct evidence in a fraud case is not essential, proof of fraud drawn from circumstantial evidence must not be guesswork or conjecture; such proof must be rational and logical deductions from the facts and circumstances from which they are inferred.
12. **Joint Ventures: Words and Phrases.** A joint venture arises from an agreement to enter into an undertaking in the objects of which the parties have a community of interest and a common purpose in performance, and each of the parties must have equal voice in the manner of its performance and control of the agencies used therein, though one may entrust performance to the other.
13. **Contracts: Parties.** An agreement to make a future contract is not binding upon either party unless all terms and conditions are agreed upon and nothing is left to future negotiation. When an agreement stipulates that certain terms shall be settled later by the parties, such terms do not become binding unless and until they are settled by later agreement.
14. **Contracts: Parties: Intent.** Even though the parties have expressed an agreement to make a future contract in terms so vague and indefinite as to be incapable of interpretation with a reasonable degree of certainty, they may cure this defect by later verbal clarification or their subsequent conduct that indicates their own practical interpretation.
15. ___: ___: ___. The fact that one party, with the knowledge and approval of the other, has begun performance is nearly always evidence that the party regards the contract as consummated and intends to be bound thereby.
16. **Verdicts: Appeal and Error.** A civil jury verdict will not be disturbed on appeal unless clearly wrong.
17. **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.
18. **Damages: Appeal and Error.** The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved.
19. **Expert Witnesses.** Four factors govern the admissibility of expert testimony: (1) whether the witness is qualified as an expert, (2) whether the testimony is relevant, (3) whether the testimony will assist the trier of fact, and (4) whether the probative value of the testimony, even if relevant, is outweighed by the danger of unfair prejudice or other considerations.
20. **Breach of Contract: Damages.** In a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position the injured party would have occupied if the contract had been performed, that is, to make the injured party whole.
21. ___: ___. One injured by a breach of contract is entitled to recover all damages, including the gains prevented as well as the losses sustained, provided the damages are reasonably certain and such as might be expected to follow the breach.
22. **Trial: Expert Witnesses.** Expert testimony should not be received if it appears that the witness is not in possession of such facts as will enable the expert to express a rea-

sonably accurate conclusion, and where the opinion is based on facts shown not to be true, the opinion lacks probative value. The opinion must have a sufficient factual basis so that the opinion is not mere conjecture or guess.

23. **Damages: Evidence.** Although in many instances, lost profits from a new business are too speculative and conjectural to permit recovery of damages, where the evidence is available to furnish a reasonably certain factual basis for computation of probable losses, recovery of lost profits cannot be denied, even though a new business venture is involved.
24. **Expert Witnesses: Appeal and Error.** An appellate court is not a superexpert and will not lay down categorically which factors and principles an expert may or may not consider. Such matters go to the weight and credibility of the opinion itself and not to its admissibility.
25. **Damages: Proof.** Uncertainty as to the fact of whether damages were sustained at all is fatal to recovery, but uncertainty as to amount is not if the evidence furnishes a reasonably certain factual basis for computation of the probable loss.
26. **Jury Instructions: Judgments: Appeal and Error.** Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court.
27. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
28. ___: ___: ___. 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.
29. **Trial: Evidence: Appeal and Error.** When a motion in limine to exclude evidence is overruled, the movant must object when the particular evidence which was sought to be excluded by the motion is offered during trial in order to preserve error for appeal.
30. **Jury Instructions: Appeal and Error.** Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error.
31. ___: ___. It is an instruction's meaning, not its phraseology, that is the crucial consideration, and a claim of prejudice will not lie when the instruction's meaning is reasonably clear.
32. **Judges: Proof: Appeal and Error.** It is the burden of the complaining party to establish that judicial prejudice has occurred.
33. **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.
34. **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.

35. **Judgments: Verdicts.** On a motion for judgment non obstante veredicto, or notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence.
36. ___: ___. In order to sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.
37. **Jury Misconduct: Appeal and Error.** The trial court's ruling on a question involving jury misconduct will not be disturbed on appeal absent an abuse of discretion.
38. **Jury Misconduct: Trial.** When an allegation of jury misconduct is made and is supported by a showing which tends to prove that serious misconduct occurred, the trial court should conduct an evidentiary hearing to determine whether the alleged misconduct actually occurred. If it occurred, the trial court must then determine whether it was prejudicial to the extent that the defendant was denied a fair trial. If the trial court determines that the misconduct did not occur or that it was not prejudicial, adequate findings are to be made so that the determination may be reviewed.
39. **Motions for New Trial: Jury Misconduct: Proof.** In order for a new trial to be granted due to juror misconduct, the party claiming the misconduct has the burden to show by clear and convincing evidence that prejudice has occurred.
40. **Judgments: States: Appeal and Error.** Whether the law of Nebraska or that of another state controls the disposition of an issue by a Nebraska court is an issue of law, for which an appellate court is obligated to reach a conclusion independent of that reached by the trial court.
41. **Parties: Actions: States.** Although substantive rights of parties to an action are governed by the state where the cause of action arose, procedural matters are dictated by the law of the forum.
42. **Attorney Fees.** Under Nebraska law, attorney fees and expenses may be recovered only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS II, Judge. Appeal in No. S-95-624 dismissed. Judgment in No. S-98-782 affirmed in part, and in part reversed and vacated.

Todd R. McWha and Terrance O. Waite, of Waite & McWha, and John E. DeWulf, of Roshka, Heyman & DeWulf, P.L.C., for appellants Nebraska Nutrients, Inc., Raymond Clayton Roles, and Tri-State Construction & Supply, Inc.

Thomas E. Johnson, Kirk S. Blecha, and Patrick J. Ickes, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellant Raymond Clayton Roles (case No. S-98-782).

Robert B. Reynolds and R. Kevin O'Donnell, of McGinley, O'Donnell, Reynolds, & Edwards, P.C., and Robert W. Mullin and Maren Lynn Chaloupka, of The Van Steenberg Firm, for appellee Wyman Shepherd.

Richard A. Dudden, of Padley & Dudden, P.C., and G. Gregory Eagleburger, of The Eagleburger Law Group, for appellee Leo Corbet.

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

STEPHAN, J.

In 1990, Arizona residents Raymond Clayton Roles, Wyman Shepherd, and Leo Corbet formed two Nebraska corporations known as Nebraska Nutrients, Inc. (Nebraska Nutrients), and Tri-State Construction & Supply, Inc. (Tri-State), for the purpose of building and operating a plant near Sutherland, Nebraska, to manufacture ethanol and yeast products. In 1993, when the plant was approximately 95 percent complete but not yet operational, Roles and Nebraska Nutrients filed this action for declaratory judgment and injunctive relief in the district court for Lincoln County, which action was later amended to include Tri-State, seeking a determination that Roles was the sole officer, director, and shareholder of the two corporations and had full authority to negotiate a sale of the plant. In separate answers, Shepherd and Corbet each asserted an ownership interest in the corporations and the plant by virtue of a written agreement dated November 1, 1990, and counterclaimed against Roles for damages based upon an alleged breach of the agreement. Following a bifurcated trial in which the court sitting without a jury found in favor of Shepherd and Corbet on the claims for declaratory judgment and injunctive relief and a jury returned verdicts in their favor on the counterclaims, the district court entered judgments in favor of Shepherd and Corbet in the amounts of $6,649,141 and $5,571,945, respectively. Thereafter, the district court overruled Roles' motion for a new trial or judgment notwithstanding the verdict and awarded attorney fees and expenses to Shepherd and Corbet as a judgment against Roles. Roles perfected this timely appeal.

I. BACKGROUND

1. Factual Background

Corbet, a former state senator and gubernatorial candidate in Arizona, has been licensed by that state as an attorney and real estate broker. In November 1989, he arranged a luncheon meeting in Phoenix, Arizona, for the purpose of introducing Roles and Shepherd, with whom he had been acquainted for several years. In arranging the meeting, Corbet hoped to broker the sale of a ranch owned by Shepherd to Roles.

Roles is a successful developer of more than 100 mobile home parks and recreational vehicle resorts in Arizona. He became acquainted with Corbet through their mutual involvement in Arizona politics. Shepherd's background is more diverse. After receiving his high school diploma through the general educational development program, Shepherd began his career by building self-serve gas stations in five states. Although he is not a licensed engineer, he subsequently built a small oil refinery in Louisiana. According to Shepherd, this company was worth approximately $25 million by 1981, when changes in crude oil laws affected his profits. In response to such changes, Shepherd converted the refinery into an ethanol plant, using blackstrap molasses imported from Brazil as the energy source. After some initial financial difficulties, including a bankruptcy filing, Shepherd's molasses-based ethanol plant was operational for several years. Following the enactment in 1986 of new legislation requiring the exclusive use of Louisiana products in the manufacture of ethanol in that state, Shepherd converted his plant to corn-based production of ethanol at a cost of approximately $20 million. The converted plant operated successfully for 3 months until Louisiana completely abolished its ethanol subsidy program, at which time Shepherd again filed bankruptcy. This bankruptcy proceeding was pending when Shepherd became involved with the Sutherland plant.

Although the real estate sale envisioned by Corbet when he introduced Roles to Shepherd never came to fruition, the three men entered into discussions of other investment opportunities and eventually decided to build and operate a plant to manufacture ethanol and yeast products. After making preliminary

inquiries, they decided to build the plant on a site near Sutherland, Nebraska. They chose to pursue this venture in Nebraska because the then Nebraska Ethanol Authority and Development Board (Ethanol Authority), a state agency created to promote the building of ethanol plants in Nebraska, had funds available for investment in ventures manufacturing ethanol from corn. In addition, the men were aware of proposed legislation in Nebraska subsidizing ethanol production.

The three men originally planned to build the Sutherland plant with incremental construction funding provided by the Ethanol Authority. In furtherance of this plan, they caused a preliminary application for investment funds to be submitted to the Ethanol Authority on March 15, 1990. This document was submitted on behalf of "International Nutrient, Inc.," an Arizona corporation, and signed by Shepherd as its president. The preliminary application proposed a plant which could produce approximately 6 million gallons of ethanol per year, as well as torula yeast, corn gluten feed, and corn oil. The projected total investment was $9.5 million. The Ethanol Authority approved the preliminary application on April 13, 1990. On the following day, the Governor of Nebraska signed new legislation which created a 20-cents-per-gallon producer incentive for ethanol production in the state.

On July 17, 1990, Nebraska Nutrients submitted a formal application, which pertained to the proposed Sutherland plant, to the Ethanol Authority. The application identified Roles as "Owner, Director, CEO"; Shepherd as "President, Director, Chief Operating Officer"; and Corbet as "Marketing Manager, Director Public Affairs." The application included biographical information pertaining to each of the three individuals. It proposed a 14-million-gallon ethanol plant, larger than that described in the preliminary application due to the passage of the aforementioned legislation granting producers of ethanol a 20-cents-per-gallon credit. The application stated that the plant would involve an investment of $11.5 million, to be raised by the purchase of 5,865,000 shares of common stock at $1 par value by Roles and the purchase of 5,635,000 shares of preferred stock at $1 par value by the Ethanol Authority. The total anticipated cost of the plant subsequently increased to $12.5 million when Roles,

Shepherd, and Corbet determined that it would be necessary to construct a wastewater treatment facility at the Sutherland site.

The formal application submitted to the Ethanol Authority included pro forma financial and product yield projections for the plant. The pro forma projections indicated that the plant would produce ethanol, germ, corn gluten feed, gluten, torula yeast, and brewers' yeast. The projections for each product were prepared by Shepherd and his accountant, Richard Dodd, although Shepherd alone determined how much of each product the plant was capable of producing and the expected price of each product. Shepherd arrived at the projected prices for brewers' yeast, gluten, germ, and corn gluten in discussions with George Wright of Coors Bio-Tech, Inc., a subsidiary of the Adolph Coors Brewing Company. Shepherd determined the projected price for torula yeast by examining the value placed on such yeast by the U.S. Commerce Department on imports and by inquiring of a former marketer of torula yeast. He kept no records of his inquiries or the results thereof.

Shepherd also provided the data used in determining the anticipated operational costs for the plant. In doing so, he projected how much corn, natural gas, electricity, and other chemicals the plant would require and the cost thereof. Shepherd used his experience acquired at his Louisiana corn dry mill plant to estimate the cost of the foregoing items, as well as payroll, startup, and administrative expenses. He admitted that the Louisiana plant was a dry mill plant and so the product yields were different than the proposed wet mill. A dry mill plant breaks up the entire corn kernel in a grinding process. A wet mill, on the other hand, soaks or steeps the kernel so that the kernel can be easily divided into its component parts. Shepherd also admitted that the Louisiana plant operated as a corn mill for a period of only 90 days, which he noted was "probably not" a fair period of experience to judge the costs of production.

A report from R & R Resources of Golden, Colorado, was also included in the formal application. The report analyzed the expected product yields at each stage of the proposed corn processing operation at the plant and noted that the estimated yields were predicated on general corn wet mill yields. The report further noted that the yield projections might be slightly off

because of the plant's unique design (discussed below) but found that the extra products produced by the plant would make up for any discrepancy in the yield numbers. Similarly, Shepherd testified that the yield numbers were based upon a typical corn wet mill and that the extra products produced by the plant would make up for other losses.

Following submission of the formal application, the Ethanol Authority assembled a team to perform a due diligence review of the formal application submitted by Nebraska Nutrients. The review team consisted of Steve Sorum, an employee of the Ethanol Authority who was designated as the project manager, and five members of the Ethanol Authority's board of directors. The team was assisted by a law firm to review legal issues, an accounting firm to review the financial information contained in the application, an engineering firm to perform a technical review of the plant's design and process, and a consulting firm which was to perform an assessment of the proposed marketing of products to be manufactured by the plant. In a memorandum to the review team dated July 19, 1990, Sorum stated: "The initial task for the review team is to determine if this project merits funding. If so, we shall negotiate an agreement with the applicants and present the entire package to the full EADB for a vote to approve the investment."

On August 7, 1990, Roles, Shepherd, and Corbet formed Nebraska Nutrients, and on September 6, the three formed Tri-State. Tri-State was formed to actually build the plant which Nebraska Nutrients would eventually own in order to avoid possible liability problems associated with the construction. A formal groundbreaking ceremony was held at the plant site on September 21, although some preliminary work had been done prior to that date.

Although plans and preparations for the Sutherland plant had been continuing for nearly a year, a final agreement as to their respective roles in the venture was not signed by Roles, Shepherd, and Corbet until November 1, 1990. The agreement was drafted by Corbet and provided:

> 1. ROLES shall advance, as a loan to the venture, a mutually agreed upon sum of money and shall lend his business experience to the venture.

2. ROLES shall employ SHEPHERD and CORBET to act as consultants. SHEPHERD shall lend his expertise and ability to build and manage the plant. CORBET shall devote his time and efforts to obtain a favorable climate for financing the facility and to market the finished product.

3. All stock . . . shall be issued as follows:

One-third (1/3[)] to RAY ROLES

Further, the remaining stock shall be issued and shall be indentured as follows:

One-third (1/3) to WYMAN SHEPHERD

One-third (1/3) to LEO CORBET.

4. Stock issued (1/3 to SHEPHERD and 1/3 to CORBET) cannot be pledged or otherwise used in any manner by the said SHEPHERD and CORBET until such time as ROLES has been completely paid or until, in his sole discretion, he agrees to release said shares.

5. ROLES shall receive eighty-five percent (85%) of the net profits until such time as he has been repaid all sums advanced by him; at such time as he has been repaid all such sums, ROLES shall then revert to fifty percent (50%) of the net profits until such time as he has received twice his original investment.

6. SHEPHERD shall initially receive ten percent (10%) of the net profit of the venture.

7. CORBET shall initially receive five percent (5%) of the net profits of the venture.

. . . .

9. After such time as ROLES has been repaid his original investment, SHEPHERD and CORBET shall each receive twenty-five percent (25%) of the net profits.

10. At such time as ROLES has received double his original investment, ROLES, SHEPHERD and CORBET shall each be an equal partner and entitled to their shares of stock in one-third (1/3) ownership without further encumbrance from ROLES.

Meanwhile, in approximately September 1990, the Ethanol Authority's review team became concerned about Shepherd's prior bankruptcies and the "short steep" process that was to be used at the plant. In a normal corn wet mill, corn is "steeped" or

soaked for 24 to 48 hours in order to separate the component parts of the kernel to produce ethanol. The proposed Sutherland plant utilized wet mill technology, but also included a short steep process that was designed to reduce the amount of steeping time to under 8 hours, thereby dramatically increasing the pace of production while reducing costs. It is undisputed that this short steep process has never been used on a commercial basis anywhere in the world. Because the Ethanol Authority would not invest in the project until the short steep process was proved, a pilot plant was constructed and the short steep process was tested on or about November 5, 1990. Both Roles and Shepherd testified that visual observation indicated that the process worked, although later laboratory test results were inconclusive. Shepherd testified that after viewing the results of the pilot plant test, Roles said he was satisfied that the process would work and told Shepherd to continue with the project without further testing. Roles denied making such statements. No laboratory results of the pilot test were ever provided to the Ethanol Authority.

On November 8, 1990, Roles, Shepherd, and Corbet met with members of the review team to further discuss the details of the Ethanol Authority's proposed investment in the plant. At that time, the three were informed that the Ethanol Authority had additional concerns about investing in the project due to newspaper reports of a political scandal in Arizona involving Corbet. Thereafter, on December 4, 1990, Roles met with Sorum and another member of the review team. At that time, Roles was informed that the review team would recommend that the Ethanol Authority not invest in the project due to concerns about the plant's short steep design and Corbet's political troubles. To alleviate these concerns, Roles proposed funding the plant himself if the Ethanol Authority would commit to an investment after the plant was completed and fully operational. Roles intended to borrow money on the commitment of the Ethanol Authority and then repay the lender with the proceeds of the Ethanol Authority's investment after the plant was completed.

On December 5, 1990, Roles met with Shepherd and Corbet and informed them that the Ethanol Authority would not invest as originally planned. At that time, Roles informed Shepherd

and Corbet that he had agreed to fund the plant construction himself if the Ethanol Authority would commit to providing funds once the plant was built. According to Corbet, Roles assured him at that time that they would remain partners. All three men agreed to proceed on these terms.

On January 4, 1991, the Ethanol Authority's review team issued preliminary findings summarizing the due diligence process it had undertaken to determine whether the Ethanol Authority should fund the Nebraska Nutrients project as proposed. Noting that the plant would employ "a truncated version of the standard wet milling process used by many of the world's corn refiners" which was "unproven at pilot and commercial scales," the evaluation team stated that it had negotiated a proposed agreement whereby the Ethanol Authority would not invest any funds until the plant had reached 75 percent of anticipated production levels and an independent engineer certified that it was "capable of producing the quantity and quality of products" projected by Nebraska Nutrients. The review team noted that "the markets for torula yeast, gluten feed and germ can be penetrated with relatively low risk" and that while the market for brewers' yeast "will be more difficult," the proposed agreement between Nebraska Nutrients and Coors Bio-Tech "would effectively give [Nebraska Nutrients] an immediate entry into established markets and access to an established sales force with no direct costs." Referring to studies conducted by an accounting firm at the request of the review team, the team found that "[t]he cashflow analysis, based on [Nebraska Nutrients'] assumptions and projections shows the project can generate sufficient cashflow to provide the required return of the [Ethanol Authority's] investment. It is also clear that the project will provide jobs and a market for grain." The preliminary findings concluded that while the review was not yet completed, the review team members were "very positive" about the proposal and would probably recommend that the Ethanol Authority participate in the project.

Such a recommendation was, in fact, made on January 11, 1991. In its "Final Report and Recommendation" of that date, the review team noted that subsequent to the submission of the preliminary application, "[t]he proposed plant had been restructured

and re-designed to produce 14 million gallons of ethanol annually along with 12.5 thousand tons of corn germ, 53.5 thousand tons of corn gluten and corn gluten feed and 7.9 thousand tons of yeast products." The report noted that the Ethanol Authority had been asked to invest $6.125 million of the total projected cost of $12.5 million. The report further noted that because of concerns regarding the unproved short steep process to be utilized in the plant, this investment would not be triggered until construction had been completed and the plant had met certain "quantity and quality criteria" and thus demonstrated "it's [sic] technical viability." After discussing various strengths and weaknesses associated with the proposal, the report concluded:

> We, of course, cannot anticipate or mitigate all risks involved with a project of this magnitude. Operational problems after the first year of production are potential risks. The ethanol market price fluctuates with volatile crude oil prices and that represents significant risks and there are surely others. However, the Evaluation Team feels that the due diligence review, the work of the consultants and staff, and the resulting Agreements address, to a great extent, the major risks involved with this project.
>
> As a result, the Evaluation team finds that the applicant has demonstrated that a "reasonable possibility" exists that the [Ethanol Authority] will recoup it's [sic] investment. The Evaluation Team and the Project Manager recommend the [Ethanol Authority] make an investment of $6.125 million in this project subject to terms of the Agreement.

At Shepherd's suggestion, Roles had engaged an attorney to negotiate the agreement with the Ethanol Authority. On or about February 22, 1991, an "Agreement for Purchase of Limited Partnership Interest" was entered into by the Ethanol Authority, Nebraska Nutrients, and Nebraska Nutrients, Ltd., a Nebraska limited partnership formed on the same date. The agreement provided that the Ethanol Authority, as limited partner, would invest $6.125 million when certain conditions precedent were met. One of these conditions was that the plant be certified by an independent engineer as meeting technical specifications appended to the agreement which included operation at 75 percent capacity for 72 hours. Another condition was the submission of

> [w]ritten evidence satisfactory to the Authority that [Nebraska Nutrients] has made an equity investment in the Partnership as purchase price for its general partner's interest therein, to be used by the Partnership for capital purposes, in the amount of at least Six Million Three Hundred Seventy-five Thousand Dollars ($6,375,000) in cash, actual acquisition cost of property (increased at [Nebraska Nutrients'] option by an amount equal to the overhead and profit that could otherwise be paid to Tri-State Construction & Supply, Inc., as specified in Section 5.02(a) hereof, up to the fair market value of such property), or other allowable capital costs (as defined in [Neb. Rev. Stat.] § 66-1303(3) [(Reissue 1990)] of the [Ethanol Development] Act[, now codified at Neb. Rev. Stat. § 66-1333 (Reissue 1996)]), and that the allowable capital costs for the Project total at least Twelve Million Five Hundred Thousand Dollars ($12,500,000); provided, that if the allowable capital costs for the Project total less than the amount specified, the Authority's investment in the Units shall be reduced proportionately so that the Authority's investment in the Units totals not more than forty-nine percent (49%) of allowable capital costs[.]

The agreement with the Ethanol Authority further provided that Roles was the sole holder of stock in Nebraska Nutrients and that there were "no rights, warrants, or options for any other person or entity to purchase any stock or securities of [Nebraska Nutrients]." Also, the agreement permitted the Ethanol Authority to terminate its obligation to invest in the project if all conditions were not met and closing had not occurred by September 30, 1991. A "Joinder by Tri-State Construction & Supply, Inc.," signed on the same day by Roles, purported to join Tri-State with the rights and obligations of Nebraska Nutrients set forth in the agreement.

On February 25, 1991, Shepherd and Corbet signed separate but identical documents entitled "Agreement and Mutual Representation." These documents, which we refer to as "the disclaimers," purported to disclaim any interest in Nebraska Nutrients and terminate any agreement in existence granting any interest in that corporation, although they were silent as to Tri-

State. Shepherd testified that he did not discuss his disclaimer with Roles prior to the date it was signed. On that date, however, Shepherd had a telephone conversation with Roles in which Roles stated that he needed the disclaimer signed for the Ethanol Authority so Roles could obtain financing and that Shepherd had to sign so that Corbet would also sign. According to Shepherd, Roles told him that signing the disclaimer would not change the November 1, 1990, agreement of the parties. Roles denied making this statement and testified that at some point in time, he told Shepherd that he would continue in the project and would later share in an employee incentive plan. Corbet testified that he was told by Roles that the Ethanol Authority required the disclaimer and that things between them would remain the same. Roles denied making the statement and testified that he told Corbet he was no longer an owner at the time the disclaimer was signed. On cross-examination, Roles admitted that the Ethanol Authority never told him the disclaimers were required, but he maintained that they were necessary by the terms of the agreement with the Ethanol Authority which provided that he was the sole shareholder in Nebraska Nutrients. He further admitted that if he told Corbet the disclaimer was required by the Ethanol Authority, such statement was untrue and that he would have known at the time that the statement was untrue. Both Shepherd and Corbet testified that they knew that the agreement which Roles had reached with the Ethanol Authority required that Roles be the sole shareholder of Nebraska Nutrients.

After February 25, 1991, Shepherd continued to oversee construction of the project, working at the jobsite 6 or 7 days a week, 10 to 12 hours per day. Although Roles insisted that Shepherd stayed on only as a consultant and did not have a compensation agreement after February 25, Shepherd testified that Roles treated and referred to him as a co-owner both before and after that date. Other witnesses testified they heard Roles refer to Shepherd as an owner or partner after February 25, although there was also some testimony to the contrary. When seeking financing for the project just before and also after February 25, Roles represented to potential lenders that all three men were owners of the project.

Corbet continued his lobbying efforts and his efforts to secure financing after February 25, 1991. The evidence reveals that he contacted numerous persons and entities regarding financing after February 25, although he was unable to locate a lender for the project. In May or June 1991, Roles became angry with Corbet's lack of success in securing financing and precluded Corbet from involvement in the plant, ordering that he no longer be furnished with information. Shepherd admitted that he and Roles had agreed at about this time to terminate Corbet's interest and divide it among themselves, but further testified that he understood that Roles intended to compensate Corbet for his interest.

Beginning in late 1992, Roles moved to Nebraska and worked at the jobsite during the week, returning to Arizona on the weekends. Due to various construction delays, the Ethanol Authority had extended the contractual deadline for completion of the plant several times, with the final deadline established as June 30, 1993. Roles testified that by May 1993, he had lost faith in Shepherd and that he decided to discontinue funding for the project and to order the work stopped. At that point, Roles testified that he had invested approximately $13.6 million in the project. The Ethanol Authority did not fund any portion of the project because the plant was not completed by the contractual deadline. On July 7, 1993, Roles initiated a special meeting of Nebraska Nutrients "to fire Shepherd and eject him from the Project's business premises."

Additional facts will be set forth in our discussion and disposition of specific assignments of error.

2. Procedural Background

Roles and Nebraska Nutrients initiated this action by filing a pleading designated "Petition for Declaratory Judgment" on July 15, 1993. The petition alleged the existence of the November 1, 1990, agreement between Roles, Shepherd, and Corbet and execution of the disclaimers by Shepherd and Corbet on February 25, 1991. Roles and Nebraska Nutrients alleged that despite executing the disclaimers, Shepherd and Corbet had demanded an interest in Nebraska Nutrients and held corporate meetings at which corporate stock was issued to them. Roles and Nebraska Nutrients further alleged, on information and

belief, that Shepherd and Corbet "intend[ed] to repudiate the [disclaimers] and claim an interest in [Nebraska Nutrients]." Roles and Nebraska Nutrients alleged that "[t]he [disclaimers are] enforceable, and therefore Shepherd and Corbet have no legal interest in [Nebraska Nutrients]." Based upon these allegations, Roles and Nebraska Nutrients prayed for declaratory relief that "the [disclaimers are] enforceable; [that] Corbet and Shepherd are bound by [their] terms and conditions; [and t]hat Shepherd and Corbet have no right, stock, title or interest in [Nebraska Nutrients] or any profits it may earn." They also requested relief based upon the claim that "Roles is the sole Officer, Director and Shareholder of [Nebraska Nutrients] and [that] by virtue of this interest, Roles has full power and authority to negotiate on behalf of [Nebraska Nutrients] to sell a part or all of the Project to third parties." Roles and Nebraska Nutrients further sought "an order authorizing Nebraska Nutrients, Inc., to issue all outstanding shares of capital stock to Raymond C. Roles," as well as temporary and permanent injunctive relief to bar Shepherd and Corbet from the project premises and prevent them from taking any action on behalf of Nebraska Nutrients.

On the same day that the petition was filed, the district court entered a temporary restraining order upon the application of Roles and Nebraska Nutrients which barred Shepherd and Corbet from the Sutherland plant site and prohibited them from holding themselves out as owners or representatives of Nebraska Nutrients or purporting to take any action on its behalf. The court subsequently denied the motion of Shepherd and Corbet to vacate the restraining order but amended it to restrain and enjoin all parties "from transferring, mortgaging, selling or disposing of any of the property of Nebraska Nutrients, Inc." On September 3, 1993, an amended petition was filed which added Tri-State as a party plaintiff.

Shepherd and Corbet filed separate answers and counterclaims in which they admitted the existence of the November 1, 1990, agreement and alleged that it remained in effect and governed the rights of the parties. They alleged that they executed the disclaimers only after Roles represented that they were solely for the purpose of obtaining financing from the Ethanol

Authority and would not affect their interest in the venture as set forth in the November 1 agreement. They asserted various affirmative defenses including fraud, estoppel, and failure of consideration. Both counterclaimed against Roles for damages based upon allegations of breach of contract, breach of fiduciary duty, and fraud.

Roles, Nebraska Nutrients, and Tri-State moved to bifurcate the trial, requesting that issues pertaining to the ownership of the Sutherland plant and their request for injunctive relief be tried separately from the counterclaims. The district court granted the motion and scheduled a bench trial on all equitable issues. This trial was held from January 11 through 19, 1994. On February 4, the district court entered a "Journal Entry and Interlocutory Decision" in which it determined that Roles fraudulently induced Shepherd and Corbet to execute the disclaimers; that the disclaimers were therefore null and void; and that Roles, Shepherd, and Corbet were bound by the November 1, 1990, agreement with respect to their interest in Nebraska Nutrients and Tri-State. This determination was based upon detailed findings of fact set forth in the order. In reaching its findings, the district court noted that "[t]he credibility of the parties is . . . of crucial importance, as the testimony of Roles is diametrically opposed to that of Shepherd and Corbet" and set forth its reasons for resolving the conflicting testimony in favor of Shepherd and Corbet.

On February 11, 1994, Roles, Nebraska Nutrients, and Tri-State moved the district court "for an order withdrawing its interlocutory decision . . . and decide [sic] the same as a final ruling so that an appeal may be taken." The district court denied this motion and dissolved the temporary restraining order which had remained in effect through the time of trial pursuant to the stipulation of the parties. Notwithstanding the denial of their motion and the specific designation of the February 4, 1994, order as interlocutory, Roles and the two corporations filed a notice of appeal on March 4, 1994. This appeal was docketed as case No. A-94-242 and was eventually moved to the docket of this court which, on April 30, 1996, dismissed it as premature because of the absence of a final, appealable order. The mandate was spread upon the record of the district court on May 8, 1996.

On June 2, 1995, while case No. S-94-242 was pending, Roles filed a verified "Motion for Application to Appoint Receiver" in the district court pursuant to Neb. Rev. Stat. § 25-1081 (Reissue 1995). The motion alleged that during the pendency of the appeal, Roles, Shepherd, and Corbet had attempted to sell the Sutherland plant; that Roles had received an offer to purchase a 220-acre tract near the plant which he owned; and that a receiver should be appointed to oversee the sale because "[t]he parties have been unable to voluntarily arrange a sale . . . ." Roles further alleged:

> The equitable powers of this Court should be exercised in order to allow this structure to turn into a functioning ethanol plant despite the differences between the parties, not only for the benefit of the parties, but also to improve the economy in the Sutherland, Nebraska area due to the employment at the ethanol plant, to increase the demand for corn, and to respond to the increasing demand for ethanol products. The parties can then continue their dispute with regard to proceeds from the sale thereof and any remaining issues as part of the appeal.

The motion was signed by the attorneys then representing Roles, Nebraska Nutrients, and Tri-State and verified by Roles in the presence of a notary public.

In an order filed on June 8, 1995, the district court denied the motion on the ground that Roles had "'unclean hands'" by virtue of his "prior fraudulent conduct," as determined in its 1994 order, and therefore could not invoke the equitable jurisdiction of the court. Roles perfected an appeal from this order which was placed on the docket of this court as case No. S-95-624. On January 17, 1997, case No. S-95-624 was stayed by this court upon receipt of notice that involuntary bankruptcy proceedings involving Nebraska Nutrients had been commenced in the U.S. Bankruptcy Court for the District of Arizona. In response to a status inquiry from our clerk, counsel for Corbet advised on July 16, 1997, that the bankruptcy court had stayed all litigation involving the corporate entities but not any litigation between Roles, Shepherd, or Corbet. On July 5, 2000, Shepherd and Corbet filed a joint motion to dismiss case No. S-95-624 on the ground that the issues presented were moot.

Roles filed an objection to this motion. On September 8, 2000, counsel for Shepherd filed a "Notice of Bankruptcy Closing Pursuant to Rule 11G," attaching a copy of an "Order Approving Final Account, Closing Case and Discharging Trustee" filed in the bankruptcy proceeding on July 22, 2000. The motion to dismiss in case No. S-95-624 was pending at the time the present appeal was submitted, and is currently pending.

Notice of the aforementioned bankruptcy was filed in the district court on August 5, 1996. On the same day, Roles' current counsel entered his appearance. On May 1, 1997, Shepherd filed a "Motion to Set Case Progression," representing that "Plaintiff Raymond C. Roles is not in bankruptcy proceedings and the Bankruptcy Court has ruled that there is no stay with respect to Plaintiff Roles." The action then proceeded with respect to the previously bifurcated counterclaims of Shepherd and Corbet against Roles.

Following a jury trial held from February 6 through 19, 1998, the jury returned verdicts in favor of Shepherd and Corbet and the district court entered judgments thereon in the amount of $6,649,141 in favor of Shepherd and $5,571,945 in favor of Corbet, with postjudgment interest at 6.232 percent. On February 27, Roles moved alternatively for a new trial or judgment notwithstanding the verdict, asserting 50 separate grounds including "irregularity in the jury's conduct and deliberations." After conducting evidentiary hearings on the allegations of juror misconduct, the district court entered a "Memorandum Opinion and Judgment" on June 30, 1998, in which it denied the motion for new trial and judgment notwithstanding the verdict; awarded Shepherd and Corbet attorney fees and expenses totaling $1,395,754.34, plus postjudgment interest at 6.434 percent to be paid by Roles; and approved a supersedeas bond in the amount of $15,387,029.58. Roles perfected this timely appeal.

II. ASSIGNMENTS OF ERROR

Roles assigns, restated, that the district court erred (1) in conducting the 1998 jury trial while an appeal from the 1994 equity order was pending; (2) in failing to find in the 1998 jury trial that the November 1, 1990, agreement and the purported oral contract to lend money lacked the requisite specificity to consti-

tute enforceable contracts; (3) in allowing into evidence in the 1998 jury trial the financial data prepared by Dodd and Shepherd and the testimony of Michael Raasch and Fred Lockwood as to damages; (4) by instructing on the wrong measure of damages and failing to find the evidence of damages in the 1998 trial insufficient to warrant submission to the jury; (5) in proceeding in the 1998 jury trial on the basis of its finding in the 1994 equity trial that Roles had committed fraud; (6) in giving, in the 1998 trial, a pretrial instruction referring to its findings at the 1994 equity trial, particularly the finding of fraud, in giving instructions Nos. 8 and 17, in refusing Roles' offered instructions Nos. 2 and 3, and in failing to define for the jury the elements of a contract; (7) in overruling Roles' motions for directed verdict, judgment notwithstanding the verdict, and for new trial at the 1998 trial, including the claim of juror misconduct; (8) in awarding attorney fees to Shepherd and Corbet in the 1998 trial; and (9) in failing to find that the jury verdict was clearly erroneous.

III. ANALYSIS

1. JURISDICTION

(a) Error Assigned

In his first assignment of error, Roles contends that the district court lacked jurisdiction to conduct the 1998 trial which resulted in money judgments against him because of the pendency of the appeal from the order denying his motion for appointment of a receiver, docketed at case No. S-95-624.

(b) Standard of Review

[1] 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 of the decisions made by the lower courts. *In re Guardianship of Rebecca B. et al.*, 260 Neb. 922, 621 N.W.2d 289 (2000); *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999).

(c) Resolution

[2,3] It is well-settled law that after an appeal to an appellate court has been perfected in a civil case, a lower court is without

jurisdiction to hear a case involving the same matter between the same parties. *McLaughlin v. Hellbusch*, 251 Neb. 389, 557 N.W.2d 657 (1997). However, a party may appeal from a court's order only if the decision is a final, appealable order. *Airport Auth. of Village of Greeley v. Dugan*, 259 Neb. 860, 612 N.W.2d 913 (2000); *Raney v. Blecha*, 258 Neb. 731, 605 N.W.2d 449 (2000). A notice of appeal from a nonappealable order does not render void for lack of jurisdiction acts of the trial court taken in the interval between the filing of the notice and the dismissal of the appeal by the appellate court. *Holste v. Burlington Northern RR. Co., supra*. Thus, whether the district court had jurisdiction to conduct the 1998 trial in this case depends upon whether its June 8, 1995, order denying Roles' application for appointment of a receiver was a final, appealable order from which the appeal docketed at case No. S-95-624 was properly taken.

[4] The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right in an action, when such order in effect 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 (Reissue 1995); *Raney v. Blecha, supra*. The order denying Roles' application for appointment of a receiver clearly does not fall within the first or third categories, but Roles argues that the order was one affecting a substantial right and made in a special proceeding. He relies upon *Robertson v. Southwood*, 233 Neb. 685, 693, 447 N.W.2d 616, 621 (1989), in which we held pursuant to Neb. Rev. Stat. § 25-1090 (Reissue 1995) that "[t]he appointment of a receiver may be treated as a final order." This statement was simply a recognition of the fact that § 25-1090 specifically authorizes an appeal from "[a]ll orders appointing receivers, giving them further directions, and disposing of the property . . . ." The statute makes no mention of orders *denying* a request for appointment of a receiver, and *Robertson* is therefore inapposite.

[5] Special proceedings entail civil statutory remedies not encompassed in chapter 25 of the Nebraska Revised Statutes. *In re Estate of Peters*, 259 Neb. 154, 609 N.W.2d 23 (2000). The appointment of a receiver is a provisional remedy governed by

statutes found within chapter 25, article 10, specifically Neb. Rev. Stat. §§ 25-1081 to 25-1092 (Reissue 1995), and thus does not fall within the category of a special proceeding. See *Slaymaker v. Breyer*, 258 Neb. 942, 607 N.W.2d 506 (2000). Regardless of whether a substantial right was affected, the denial of Roles' application for the appointment of a receiver was not made in a special proceeding and cannot be considered a final order under the argument advanced by Roles or on any other basis. The pending motion of Shepherd and Corbet to dismiss case No. S-95-624 will be granted for the reason that there is no appellate jurisdiction.

Because the appeal docketed at case No. S-95-624 was from an order which was not final, the district court retained jurisdiction to conduct the 1998 jury trial. See *Holste v. Burlington Northern RR. Co.*, 256 Neb. 713, 592 N.W.2d 894 (1999). Accordingly, we proceed to the merits of Roles' appeal from the 1998 judgment, docketed as case No. S-98-782.

2. Finding of Fraud

(a) Error Assigned

In his fifth assignment of error, Roles contends that the district court erred as a matter of law in proceeding with the 1998 jury trial on the basis of its finding, following the 1994 trial, that Roles had fraudulently induced Shepherd and Corbet to sign documents purportedly disavowing any interest in Nebraska Nutrients. Roles argues, inter alia, that the evidence did not support this finding.

(b) Standard of Review

The challenged finding of fraudulent inducement was made during the first trial in this bifurcated proceeding. In moving for bifurcation, Roles requested that his claims for relief be tried separately from the counterclaims asserted by Shepherd and Corbet. In order to determine the appropriate standard of review with respect to findings of fact which the district court made in the first phase of the bifurcated trial, we must first determine whether that proceeding was one at law or equity.

[6] In Roles, Nebraska Nutrients, and Tri-State's operative amended petition, they sought a declaratory judgment determin-

ing that Roles was the sole shareholder of Nebraska Nutrients and Tri-State by virtue of the disclaimers executed by Shepherd and Corbet and sought injunctive relief preventing Shepherd and Corbet from acting on behalf of the corporations and barring them from the premises of the Sutherland plant. An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. *Lone Cedar Ranches v. Jandebeur*, 246 Neb. 769, 523 N.W.2d 364 (1994).

[7,8] An action for injunction sounds in equity. *Airport Auth. of Village of Greeley v. Dugan*, 259 Neb. 860, 612 N.W.2d 913 (2000); *Central States Found. v. Balka*, 256 Neb. 369, 590 N.W.2d 832 (1999). Shepherd and Corbet sought, in effect, to rescind the disclaimers based upon allegations that they executed them in reliance upon fraudulent representations by Roles. Rescission is equitable in nature. *Cao v. Nguyen*, 258 Neb. 1027, 607 N.W.2d 528 (2000).

[9] In its journal entry and interlocutory decision setting forth its findings following the 1994 trial, the district court noted that its "decision pertains only to the equitable issues of this proceeding which were bifurcated for trial to the Court." We agree that Roles' claims adjudicated in this initial phase of the bifurcated proceeding were equitable in nature. Resolution of these claims required the district court to adjudicate the defenses asserted by Shepherd and Corbet that the purported disclaimers were fraudulently procured by Roles. In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, reaching a conclusion independent of the findings of the trial court. Where credible evidence is in conflict on a material issue of fact, the appellate court will consider 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. *Cao v. Nguyen, supra*; *Dillon Tire, Inc. v. Fifer*, 256 Neb. 147, 589 N.W.2d 137 (1999).

(c) Resolution

[10,11] A party alleging fraudulent representation as the basis for rescission must prove all elements of fraudulent conduct by clear and convincing evidence. *Cao v. Nguyen, supra*; *Schuelke*

v. Wilson, 255 Neb. 726, 587 N.W.2d 369 (1998). The elements of proof are (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that the plaintiff should rely upon it; (5) that the plaintiff reasonably did so rely; and (6) that he or she suffered damage as a result. *Cao v. Nguyen, supra*; *Four R Cattle Co. v. Mullins*, 253 Neb. 133, 570 N.W.2d 813 (1997). Whether a party's reliance upon a misrepresentation was reasonable is a question of fact. *Cao v. Nguyen, supra.* While direct evidence in a fraud case is not essential, proof of fraud drawn from circumstantial evidence must not be guesswork or conjecture; such proof must be rational and logical deductions from the facts and circumstances from which they are inferred. *Four R Cattle Co. v. Mullins, supra.* See *Schuelke v. Wilson, supra.*

At trial, Shepherd and Corbet sought to prove that Roles induced them to sign the disclaimers by representing that the disclaimers were required by the Ethanol Authority as a condition of its financial commitment, but that signing the documents would not affect the November 1, 1990, agreement of the parties with respect to their equal interests in the Sutherland project. Corbet testified that Roles told him on December 5, 1990, that he had proposed to fund the construction of the plant himself in order to secure the Ethanol Authority's commitment to invest in the completed plant and that Roles assured him, " 'Don't worry, we'll still be partners, it will still be the same thing,' or words to that effect." Corbet further testified that he subsequently signed the disclaimer only after Roles assured him in a telephone conversation that " '[t]he authority requires it,' " and " '[y]ou don't have to worry, everything between us is still going to be the same.' " Shepherd testified that Roles told him that the disclaimer was required by the Ethanol Authority and that Corbet would not sign it unless Shepherd did. Shepherd testified that in the same conversation, Roles told him not to worry about their agreement because nothing would change. Two representatives of the Ethanol Authority who were personally involved in the negotiations which led to the Ethanol Authority's commitment to invest in the plant when it was completed testified that they

had never seen the disclaimers signed by Shepherd and Corbet or the November 1 agreement executed by Roles, Shepherd, and Corbet prior to the time of their testimony at the 1994 trial.

Testifying at the 1994 trial, Roles denied telling Corbet that the disclaimers were required by the Ethanol Authority. Roles was impeached with testimony from a pretrial deposition in which he admitted telling Corbet that the disclaimer was required by the Ethanol Authority. Roles then conceded that if he had made such statements, they would have been known by him to be untrue at the time.

After executing the disclaimers, Shepherd and Corbet continued their involvement in the project and performed their respective functions described in the November 1, 1990, agreement. Shepherd continued working full time without a salary, supervising construction at the Sutherland plant until June 1993, when Roles terminated funding for the project. Roles admitted that he needed Shepherd's continued involvement in order to protect his investment in the plant. With Roles' knowledge and approval, Shepherd signed documents in his capacity as president of Nebraska Nutrients both before and after executing the disclaimer. Roles, Shepherd, and several nonparty witnesses testified that during the period between November 1990 and May 1993, Roles publicly referred to Shepherd as his "partner" and as one of the "owners of the project" and took no exception when Shepherd was referred to by the media as an "owner."

After signing the disclaimer, Corbet continued his lobbying and marketing efforts on behalf of the project and assisted Roles in seeking additional financing for the project. At some point between February 25 and May 3, 1991, Roles and Corbet met with a potential financier at a restaurant in Scottsdale, Arizona. Prior to the meeting, Corbet sent the financier a packet of information about the project which he had previously sent to Roles for his review. The documents identified Roles, Shepherd, and Corbet as the eventual owners of Nebraska Nutrients. During the meeting, and in Roles' presence, Corbet stated that he, Roles, and Shepherd would be the stockholders of the company, and Roles did not take exception. During this period, Roles was paying Corbet's expenses but Corbet did not receive any compensation for his efforts on behalf of the project. Corbet testified that

in late June 1991, Roles discontinued communications with him concerning the project.

The fact that Shepherd and Corbet continued to devote their efforts to the project after signing the disclaimers and without any form of compensation agreements supports their contention that they relied upon Roles' statements that the disclaimers had no effect upon their status as co-owners. Roles argues that because both Shepherd and Corbet favored obtaining the commitment of the Ethanol Authority to invest in the completed plant and were aware of the Ethanol Authority's requirement that Roles be the sole owner of Nebraska Nutrients as a condition for its commitment, Shepherd and Corbet could not have reasonably relied upon any verbal statements by Roles that the execution of the disclaimers would not affect their relationship as co-owners. In this regard, the district court made the following finding:

> The sudden substitution of Roles as the sole owner of the project, when financing barriers were encountered, corroborates the fact that these three parties, including Roles, where [sic] willing to engage in deception or half-truths about the actual ownership of the ethanol project. The fact that no one from the Ethanol Authority ever saw [the November 1, 1990, agreement and the disclaimers] firmly convinces me that the parties, again including Mr. Roles, were willing to present to the public that Roles was the sole owner of the project when that representation was expedient to obtain financing, but that the three individuals after February 25, 1991, continued to treat themselves as partners relying upon the November 1, 1990, agreement . . . .

Our de novo review of the record of the 1994 trial leads us to precisely the same conclusion.

Roles' contention in this litigation is that Shepherd and Corbet released any rights or interest in Nebraska Nutrients when they executed the disclaimers on February 25, 1991. We conclude on the basis of our de novo review that this position is directly contrary to the representation which Roles made to Shepherd and Corbet to induce them to execute the disclaimers and upon which they reasonably relied. If Roles' current position were upheld, Shepherd and Corbet would be damaged by

the loss of the time and effort they expended on the project both prior and subsequent to their execution of the disclaimers.

We note, as did the district court, that there is conflicting evidence on the issue of fraud which requires the finder of fact to assess and weigh the credibility of the parties. The district court made a specific finding that "a sufficient number of disinterested witnesses have come forward . . . at critical junctures to enable me to accept the testimony of Shepherd over Roles." Our standard of review requires that we give deference to this finding, inasmuch as the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

Based upon our de novo review of the record of the 1994 trial and the deference we must give to the trial judge on issues of credibility, we conclude that the district court did not err in determining that the disclaimers were procured through Roles' fraud and are therefore void.

3. Existence of Enforceable Contract

(a) Errors Assigned

In his second, fourth, and seventh assignments of error, Roles contends that the trial court erred in overruling his motions for directed verdict, judgment notwithstanding the verdict, and new trial, and in submitting the damage claims to the jury in the 1998 trial because there was no enforceable contract between Shepherd, Corbet, and himself.

(b) Standard of Review

Although these assignments of error pertain to motions made during the 1998 trial, the issue of whether the parties had an enforceable contract relates back to the trial court's finding following the 1994 trial that because the disclaimers executed by Shepherd and Corbet were induced by fraud and therefore void, the parties were bound by their November 1, 1990, agreement. We treat this as a factual finding made by the trial court in the exercise of its equity jurisdiction and review it de novo on the record, bearing in mind that where credible evidence is in conflict on a material issue of fact, the appellate court will consider 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. *Airport Auth. of Village of Greeley v. Dugan*, 259 Neb. 860, 612 N.W.2d 913 (2000); *Cao v. Nguyen*, 258 Neb. 1027, 607 N.W.2d 528 (2000).

(c) Resolution

The core issue raised by these assignments of error is whether the agreement dated November 1, 1990, signed by Roles, Shepherd, and Corbet was initially or ever became an enforceable contract. Referring to the document in their original petition seeking declaratory relief, Roles and Nebraska Nutrients alleged:

> On November 1, 1990, Roles, Shepherd and Corbet entered into an agreement for the Project (the "Agreement"). Among other things, the Agreement provided that Roles, Shepherd and Corbet would each own one-third of all stock issued by [Nebraska Nutrients], with Shepherd's and Corbet's stock being indentured in certain respects.

Roles alleged that this agreement was subsequently altered by the execution of the disclaimers which he contends divested Shepherd and Corbet of any interest in Nebraska Nutrients so that he became the sole shareholder. The question of whether the November 1, 1990, agreement was itself enforceable was first raised by Roles, Nebraska Nutrients, and Tri-State in a proposed statement of issues filed before the 1994 trial and in their answer to an amended counterclaim filed by Shepherd.

We note that the November 1, 1990, document in question contains a provision that it shall be governed by the laws of the State of Arizona. With respect to the issue of whether the document is an enforceable contract, the parties have relied upon Nebraska case law in their briefs and Roles' counsel represented at oral argument that Nebraska and Arizona law were essentially the same on this point. We agree, and accordingly, we look to our precedent in resolving this assignment of error.

That precedent provides familiar and well-established rules governing the formation of a contract. To create a contract, there must be both an offer and an acceptance; there must also be a meeting of the minds or a binding mutual understanding between the parties to the contract. *Houghton v. Big Red Keno*, 254 Neb. 81, 574 N.W.2d 494 (1998); *Cimino v. FirsTier Bank*,

247 Neb. 797, 530 N.W.2d 606 (1995). An agreement to make a future contract is not binding upon either party unless all terms and conditions are agreed upon and nothing is left to future negotiation. *Cimino v. FirsTier Bank, supra.* A contract is not formed if the parties contemplate that something remains to be done to establish contractual arrangements or if elements are left for future arrangement. *Id.* An agreement to agree is not enforceable in Nebraska. *Id.* However, " 'a contract is not subject to the objection that it is indefinite so long as the parties can tell when it has been performed, and it is enough if, when that time arrives, there is in existence some standard by which performance can be tested.' " *Davco Realty Co. v. Picnic Foods, Inc.*, 198 Neb. 193, 198, 252 N.W.2d 142, 146 (1977), quoting 17 Am. Jur. 2d *Contracts* § 76 (1964). A binding mutual understanding or meeting of the minds sufficient to establish a contract requires no precise formality or express utterance from the parties themselves as to all the details of the proposed agreement; it may be implied from the parties' conduct and the surrounding circumstances. *Hoeft v. Five Points Bank*, 248 Neb. 772, 539 N.W.2d 637 (1995).

Roles' argument that the November 1, 1990, agreement did not constitute an enforceable contract focuses upon the language of paragraph 1, which states: "ROLES shall advance, as a loan to the venture, a mutually agreed upon sum of money and shall lend his business experience to the venture." Roles contends that this is merely an agreement to agree and that since the essential term regarding the amount of Roles' financial contribution to the project was left open for future agreement, no enforceable contract was formed. Shepherd and Corbet concede that the "mutually agreed upon sum of money" was a term to be agreed upon by the parties at a future time. However, they contend that such a future agreement occurred and caused the November 1 agreement to thereafter become an enforceable contract. Specifically, they contend that Roles' proposal on or about December 5, 1990, to fund the construction himself with a commitment for a contingent future investment by the Ethanol Authority became the mutually agreed upon sum referred to in the November 1 agreement. They argue that Roles agreed to fund the entire construction of the plant, at a time when the projected cost of doing

so was $12.5 million, thereby committing himself to a definite undertaking for which there was a meeting of the minds.

[12] In conducting our de novo review of this issue, we first determine that the document executed by the parties on November 1, 1990, does not contemplate, as Roles characterizes it in his brief, a contract to loan money, but, rather, an agreement by the parties to define their interests in a joint venture. A joint venture arises from

> " 'an agreement to enter into an undertaking in the objects of which the parties have a community of interest and a common purpose in performance, and each of the parties must have equal voice in the manner of its performance and control of the agencies used therein, though one may entrust performance to the other.' "

Evertson v. Cannon, 226 Neb. 370, 390, 411 N.W.2d 612, 624 (1987), quoting *Fangmeyer v. Reinwald*, 200 Neb. 120, 263 N.W.2d 428 (1978). The primary criterion of a joint venture is that "the parties enter into an agreement, express or implied, as owners or principals in the endeavor." *Id.* From our review of the record, it is clear that Roles, Shepherd, and Corbet conceived and planned the construction of the Sutherland plant as principals in a business enterprise. The November 1 document contemplated that Roles would contribute initial funding and general business experience, that Shepherd would contribute his "expertise and ability to build and manage the plant," and that Corbet would contribute his efforts "to obtain a favorable climate for financing the facility and to market the finished product." For his efforts, each was to receive an equal share of stock of Nebraska Nutrients, the corporation which would own and operate the plant. The document provided that Roles' equity interest in the enterprise would continue after all sums advanced by him had been repaid from the net profits of Nebraska Nutrients. Thus, when the parties signed the November 1 document, Roles was not to be a disinterested lender, but, rather, a principal in a joint venture in which he, Shepherd, and Corbet were to each have a one-third equity interest.

The record reflects that as of November 1, 1990, the parties did not know how much money Roles would need to advance to the venture because they were still negotiating with the Ethanol

Authority for partial construction financing. A reasonable inference can be drawn that the parties anticipated that Roles would advance the difference between the construction financing received from the Ethanol Authority and the cost of completing the plant. When the Ethanol Authority determined that it was not willing to invest in the project until after the plant was completed and operational, Roles, by his own admission, proposed to fund "the rest of the construction if the [Ethanol] Authority would give a commitment to fund $6.125 million through the formation of a limited partnership upon completion of the ethanol plant project and receipt of an engineering report finding compliance with applicable standards of the industry." Roles made this proposal on December 4, 1990, and communicated it to Shepherd and Corbet on December 5. The commitment given by the Ethanol Authority to purchase a 49-percent interest in the completed plant for $6.125 million was conditioned upon allowable capital costs for the project totaling at least $12.5 million. Roles executed this document on behalf of Nebraska Nutrients and Tri-State.

[13] In *T.V. Transmission v. City of Lincoln*, 220 Neb. 887, 891, 374 N.W.2d 49, 53 (1985), we cited the rule that

> "[a]n agreement to make a future contract is not binding upon either party unless all terms and conditions are agreed upon and nothing is left to future negotiation. *When an agreement stipulates that certain terms shall be settled later by the parties, such terms do not become binding unless and until they are settled by later agreement.*"

(Emphasis supplied.) Quoting *Alward v. United Mineral Products Co.*, 197 Neb. 658, 250 N.W.2d 623 (1977). We concluded in *T.V. Transmission* that a contractual provision which permitted the parties to agree upon an adjustment of certain charges during the term of the contract did not create specific contractual rights. We stated that the modification provision constituted "nothing more than an agreement to agree in the future" and concluded that "[i]n the absence of such a future agreement, the provision is of no effect and is therefore unenforceable." 220 Neb. at 892, 374 N.W.2d at 53-54.

[14] The language of *T.V. Transmission* suggests that an indefinite and therefore unenforceable "agreement to agree"

may become enforceable when the missing term is subsequently supplied by the parties. As a respected commentator notes, "[e]ven though the parties have expressed an agreement in terms so vague and indefinite as to be incapable of interpretation with a reasonable degree of certainty, they may cure this defect by later verbal clarification or their subsequent conduct that indicates their own practical interpretation." 1 Arthur L. Corbin, Corbin on Contracts § 4.7 at 606 (rev. ed. 1993). Although the November 1, 1990, agreement did not contain the essential term of the amount of funds which Roles would advance for the construction of the plant, that term was supplied by Roles' agreement approximately 35 days later to fund "the rest of the construction" if the Ethanol Authority would give its commitment to invest in the completed plant once it became operational. This promise by Roles defined with reasonable certainty the nature and extent of his obligation under the November 1 agreement so as to provide a standard by which his performance could subsequently be measured.

[15] Thereafter, Roles advanced funds which were utilized to construct the plant for a period of approximately 2½ years, while Shepherd and Corbet performed the tasks and functions relating to the venture which were undertaken by them in the November 1, 1990, agreement, as discussed in detail above. In determining whether an agreement is sufficiently definite to be enforceable as a contract, "[t]he fact that one [party], with the knowledge and approval of the other, has begun performance is nearly always evidence that they regard the contract as consummated and intend to be bound thereby." Corbin, *supra*, § 4.1 at 542. See, also, Restatement (Second) of Contracts § 34(2) at 97 (1981) (providing "[p]art performance under an agreement may remove uncertainty and establish that a contract enforceable as a bargain has been formed").

Based upon our de novo review of the record, we conclude that the agreement signed by Roles, Shepherd, and Corbet on November 1, 1990, defining the terms of their joint venture became an enforceable contract when Roles subsequently agreed to fund the rest of the construction and the Ethanol Authority gave a commitment to invest in the completed plant if it proved to be operational. We have considered Roles' arguments that the

agreement was otherwise ambiguous and that it is unenforceable under the Arizona statute of frauds, Ariz. Rev. Stat. Ann. § 44-101(8) (West 1994), and find them to be without merit.

4. Damages

(a) Additional Factual Background

The testimony of certain witnesses during the 1998 trial is pertinent to Roles' assignments of error with respect to damages, and we therefore summarize that testimony here.

(i) Dr. Stanley Watson

Dr. Stanley Watson, who has a doctorate in agronomy, testified that he had developed a short steep system for corn wet milling and had obtained a patent on the process in 1969. He viewed the Sutherland plant in November 1997 and observed that the equipment and short steep process at the plant were similar to that which he had designed. In his opinion, the short steep process at the Sutherland plant would work, but he acknowledged that the only way to determine this with absolute certainty would be to commence operation of the plant. On cross-examination, Watson admitted that the short steep process has never been used in a commercial operation. He acknowledged a statement in a pretrial deposition that the short steep process would be speculative on a commercial scale, but insisted that this meant only that one could not be absolutely certain that the process would work at the Sutherland plant without attempting operation.

(ii) Dr. Raphael Katzen

Dr. Raphael Katzen, who holds a doctorate in chemical engineering, is a consulting engineer in the chemical industry. He has been involved in the design of approximately 20 grain-based ethanol plants, two of which were wet mill plants. Based upon his visit to the Sutherland plant on January 4 and 5, 1994, Katzen testified that the workmanship at the plant was in accord with industry standards. In his opinion, the plant was 90 to 95 percent complete in January 1994, and he questioned why the expenditure necessary to complete the plant was not made. Katzen specifically disagreed with a report written by Roles' expert, Boyd Ruppelt of PSI, Process Systems, Inc., which recommended various changes

to the plant in order to make it operational. It was Katzen's general opinion that the plant would operate as designed and built. On cross-examination, Katzen testified that he observed Occupational Safety and Health Administration compliance at the plant and assumed compliance with fire and building codes. He also stated that although the plant was designed to use a torula yeast reactor, he had never seen this device used as part of the wastewater treatment at a corn wet mill plant, although he opined that it would work as designed. Katzen further testified on cross-examination that it would cost between $1.7 and $2 million to convert the plant to a conventional steep wet mill, if necessary. He admitted it was possible the plant would not work in a commercially efficient manner. He acknowledged stating in his pretrial deposition that he would not recommend a short steep process without a more comprehensive pilot system.

(iii) Michael Raasch

Michael Raasch is a certified general real estate appraiser licensed by the State of Nebraska since 1986. He has a degree in finance from the University of Nebraska. Raasch is certified to appraise commercial and residential properties.

Raasch testified that he had experience in the valuation of ethanol plants in Iowa and Nebraska, including the Chief Ethanol Plant, a dry mill ethanol plant in Hastings, Nebraska. Raasch performed an appraisal of the Sutherland plant as of December 18, 1997. He was asked on behalf of Shepherd and Corbet to value the plant on that date and to develop an annual net income for the years 1993 to 1997, based upon the assumptions that the plant was producing 15 million gallons of ethanol each of those years and that there was no debt on the plant. Raasch stated that ethanol plants typically operate at 110 to 115 percent of rated maximum capacity. Raasch testified that he used the income approach in valuing the plant. In doing so, he used historical data for the price of corn, gluten, germ, and ethanol for the years 1993 through 1997 and used the pro forma numbers to determine the price of brewers' and torula yeast during that time period. He testified that he used the pro forma price numbers because they were very close to the verbal information he was able to gather regarding the prices of the yeast products.

Due to the fact that the plant never became operational, he did not have information about the plant's actual operating expenses. To determine expenses, he relied upon the 10 years of appraisal experience he had with the Chief Ethanol Plant and his discussions with other plant owners to arrive at an average, which he testified was a "worse case scenario." Based on such information, he determined that the operating expenses for a dry mill were approximately 76 to 82 percent of gross sales. He further testified that although he did not receive information from any wet mill operators regarding expenses, trade publications indicated that wet mills are more expensive to run but have higher profit margins. He therefore determined that the Sutherland plant would have expenses between 80 and 85 percent of gross sales, based upon the fact that it was a wet mill and utilized some used equipment. Raasch opined that based upon these numbers and the income approach to valuation, the plant's value on December 18, 1997, had it been operating since 1993, would have been $30 million. Figures from the summary page of his report, which was admitted into evidence and submitted to the jury, revealed net income produced by the plant during the years 1993 to 1997 would have been at least $4 million per year.

On cross-examination, Raasch admitted that he was not permitted by the Chief Ethanol Plant to reveal the specifics of his appraisals done for that company, particularly its operating expenses. He stated that similar restrictions applied to any appraisal he did for ethanol plants. He further stated that because of such limitations, he was unable to divulge specific information that would allow a comparison of the Chief Ethanol Plant expenses with those anticipated by the Sutherland plant. He also stated that the plant, as it existed at the time of trial, was not worth $30 million because it was not finished. Raasch admitted that he relied upon the yields for each byproduct as listed on the pro forma projections prepared by Shepherd and that if any of those yield numbers were wrong, his final numbers would be affected.

(iv) Fred Lockwood

Fred Lockwood, a certified public accountant, testified on behalf of Shepherd and Corbet. Lockwood was given yield num-

bers for the yeast byproducts that were to be produced by the plant and asked to project future revenues. His trial testimony, however, was limited to testimony regarding average yeast prices during the years 1994 to 1997. On cross-examination, Lockwood admitted that he obtained the price numbers he testified to simply by calling individuals suggested by his attorney. In particular, Lockwood telephoned Wright, of Coors Bio-Tech, to investigate the price of brewers' yeast from 1994 to 1997, and concluded the average price was 37 cents per pound. The price listed on the pro forma projections and used by Raasch in his appraisal was 20 cents per pound. He also telephoned the manager of quality assurance at Burns-Phillips Ingredients, one of two manufacturers of torula yeast in the United States, and concluded that the average price per pound of torula yeast during the years 1994 to 1997 was $1, an amount greater than that used by Raasch in his appraisal. On cross-examination, Lockwood insisted he relied upon the yield numbers in the pro forma projections in making his calculations. Additionally, Lockwood testified on cross-examination that the cost basis of the capital assets in the project was approximately $14 million. On redirect, he testified that in a subchapter S corporation, any deductions for loss should be taken by the owners in proportion to their ownership interest. He testified that in the tax returns he saw, Roles alone took all of the losses for the corporation, which amounted to approximately $6 million. On recross, he clarified that an individual with no tax basis cannot presently take a loss, but it can be carried over into the next tax year.

(v) Boyd Ruppelt

Boyd Ruppelt, a senior project manager for PSI, Process Systems in Memphis, Tennessee, testified on behalf of Roles. Ruppelt testified that PSI, Process Systems specializes in processing corn into ethanol. In September 1997 and again in November 1997, he and a professional engineer viewed the Sutherland plant. After viewing the plant, he prepared a report detailing the work necessary to complete the plant and the cost of such work. Ruppelt's report found that significant work still needed to be done to complete the original scope of the plant, that Occupational Safety and Health Administration and

Environmental Protection Agency standards were not met, and that some of the equipment used at the plant was not properly installed and/or was not proper for the industry and needed to be replaced or changed. After detailing all of the specific wrongs he found at the plant, Ruppelt opined that $3.975 million in alterations were necessary before the plant could produce salable products and that another $1.74 million would be necessary if the short steep process did not work. On cross-examination, he admitted that in a 1993 report done for a potential buyer of the plant, his company recommended that the short steep process be tried. He also stated that he was not a licensed mechanical engineer and that at the time he viewed the plant, he could tell that some of the uncompleted tasks had been planned. He also testified that if the plant capacity was 18,000 bushels of corn per day and if it operated for 340 days per year, it would produce 17 million gallons of ethanol. He further admitted on cross-examination that the professional engineer who had accompanied him on his observation of the plant told him what items at the plant had not been done and that he was not completely familiar with all of the items. On redirect, he generally disagreed that a plant built as was the Sutherland plant could have a value of $30 million.

(vi) Dr. Joseph Ruocco

Portions of Dr. Joseph Ruocco's deposition were read into evidence on behalf of Roles. Ruocco has a doctorate in microbiology and is a consultant for biological processes, primarily in wastewater treatment. Ruocco was previously employed by the Adolph Coors Brewing Company, where he worked for 2 years developing a system to grow torula yeast from waste beer. Torula yeast is commercially sold as an additive that makes the flavor in food stand out. Coors Brewing Company never commercially tested the yeast system he developed. Ruocco testified that he met with Roles, Shepherd, and Wright in the winter of 1989-90 and told them that torula yeast would be a suitable byproduct for an alcohol plant. He then had a series of approximately six other meetings to discuss the technical requirements of such a system with Shepherd. Ruocco testified that he understood the plant would produce 13 to 16 million gallons of ethanol per year. He testified that he told Shepherd it would be

several years before they would produce food-grade torula yeast. Ruocco testified that Shepherd thought the plant could initially produce animal-grade yeast and eventually produce a food-grade product. Ruocco viewed the plant in 1992 and had concerns about the design of the torula yeast system, but he did not voice his concerns at that time. He also testified that he thought the system was adequate to handle the plant's waste.

(vii) Damage Instructions

On the issue of damages, the jury was instructed as follows:

> If you find in favor of one or both of the defendants on his or their claim for breach of contract, then you must determine the proper amount of damages.
>
> One who is injured by a breach of contract is entitled to recover all of his damages, including gains prevented as well as losses sustained, provided they are reasonably certain and such as might naturally be expected to follow the breach.
>
> In arriving at the amount of the award, if any, you should include any damages suffered by the defendants because of lost profits; that is to say, profits which the defendants would have made, but for the unlawful conduct of plaintiff.
>
> If you should find, from the greater weight of the evidence in this case, that damage to defendants' business or property, such as a loss in the profits, was proximately caused by the plaintiff's breach of contract complained of, then the circumstances that the precise amount of defendants' damages may be difficult to ascertain should not affect the defendants' recovery, particularly if the plaintiff's wrongdoings have caused the difficulty in determining the precise amount.
>
> On the other hand, the defendants are not to be awarded purely speculative damages. An allowance for lost profits may be included in the damages awarded, only when there is some reasonable basis in the evidence in the case for determining that defendants have in fact suffered a loss of profits, even though the amount of such loss is difficult of ascertainment.

> If you find in favor of one or both of the defendants, but do not find any actual damage, then you may award no more than a nominal sum.

Roles objected to the giving of this instruction.

(b) Errors Assigned

In his third assignment of error, Roles contends that the district court erred as a matter of law in receiving in evidence, over his objection, "speculative financial data prepared by Richard Dodd and Shepherd and the testimony of Michael Raasch and Fred Lockwood as to damages."

In his fourth assignment of error, Roles contends that the district court erred as a matter of law "by instructing on the wrong measure of damages and in failing to find the evidence of damages in the 1998 jury trial insufficient to warrant submission of the case to the jury."

In his ninth assignment of error, Roles contends that the "amount of the jury's verdict for damages in the 1998 jury trial was clearly erroneous."

(c) Standard of Review

[16] A civil jury verdict will not be disturbed on appeal unless clearly wrong. *Streeks v. Diamond Hill Farms*, 258 Neb. 581, 605 N.W.2d 110 (2000).

[17] 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. *Franksen v. Crossroads Joint Venture*, 257 Neb. 597, 599 N.W.2d 603 (1999).

[18] The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved. *Phipps v. Skyview Farms*, 259 Neb. 492, 610 N.W.2d 723 (2000); *Holden v. Wal-Mart Stores*, 259 Neb. 78, 608 N.W.2d 187 (2000).

(d) Resolution

(i) Measure of Damages

Roles argues that the jury should have been instructed regarding the measure of damages in an action for failure to loan

money, as set forth in *Rubin v. Pioneer Fed. S. & L. Assn.*, 214 Neb. 364, 334 N.W.2d 424 (1983). However, as noted above, the November 1, 1990, agreement of the parties is not a contract to loan money, but, rather, is an agreement to enter into a joint business venture whereby Roles, Shepherd, and Corbet were to acquire an equity interest in Nebraska Nutrients, the corporate owner of the Sutherland plant. Thus, Roles' argument that the district court instructed on the wrong measure of damages is without merit.

(ii) Qualifications of Raasch and Lockwood as Experts

[19] Roles argues that Raasch and Lockwood "should not have been allowed to masquerade before the jury as 'experts' at all." Brief for appellant in case No. S-98-782 at 33. The requirements for admission of expert opinion testimony are found in Neb. Rev. Stat. § 27-702 (Reissue 1995). Section 27-702 provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Four factors govern the admissibility of expert testimony: (1) whether the witness is qualified as an expert, (2) whether the testimony is relevant, (3) whether the testimony will assist the trier of fact, and (4) whether the probative value of the testimony, even if relevant, is outweighed by the danger of unfair prejudice or other considerations. *Snyder v. EMCASCO Ins. Co.*, 259 Neb. 621, 611 N.W.2d 409 (2000); *Franksen v. Crossroads Joint Venture, supra.*

At trial, Roles did not challenge the qualifications of Raasch as a real estate appraiser or those of Lockwood as a certified public accountant. The record reflects that both were clearly qualified as experts in their fields. Raasch clearly possessed the knowledge, skill, experience, training, and education to express an expert opinion as to the value of an ethanol plant. He was a licensed and certified real estate appraiser with experience in the valuation of commercial property in general and ethanol plants in particular. Lockwood was a certified public accountant with experience in economic forecasting. Both were properly qualified as experts in their respective fields.

(iii) Sufficiency of Evidence of Damages

[20,21] In a breach of contract case, the ultimate objective of a damages award is to put the injured party in the same position the injured party would have occupied if the contract had been performed, that is, to make the injured party whole. *Ruble v. Reich*, 259 Neb. 658, 611 N.W.2d 844 (2000); *Phipps v. Skyview Farms, supra*. One injured by a breach of contract is entitled to recover all damages, including the gains prevented as well as the losses sustained, provided the damages are reasonably certain and such as might be expected to follow the breach. *Gagne v. Severa*, 259 Neb. 884, 612 N.W.2d 500 (2000); *Lone Cedar Ranches v. Jandebeur*, 246 Neb. 769, 523 N.W.2d 364 (1994).

The evidence which Shepherd and Corbet presented in support of their claim for damages consisted primarily of the opinion of Raasch that had it been completed, the Sutherland plant would have had a market value of $30 million as of December 18, 1997. In arriving at this opinion, Raasch utilized an income capitalization method which was based upon Raasch's projections of the plant's income, expenses, and net profits if it had been operating from September 1, 1993, through August 31, 1997. Roles argues that the trial court erred in receiving Raasch's opinions and those of Lockwood because they were based upon an inadequate factual foundation. Roles also contends that there was insufficient evidence of damages to warrant submission to the jury. As Roles notes in his brief, these contentions are "inextricably interwoven." Brief for appellant in case No. S-98-782 at 29.

We begin our analysis of these issues by reviewing the general rules applicable to opinion testimony by expert witnesses. Neb. Rev. Stat. § 27-703 (Reissue 1995) states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

[22] This court has stated that expert testimony should not be received if it appears that the witness is not in possession of such facts as will enable the expert to express a reasonably accurate

conclusion, and where the opinion is based on facts shown not to be true, the opinion lacks probative value. *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996). The opinion must have a sufficient factual basis so that the opinion is not mere conjecture or guess. *Id.*

Our cases distinguish between the circumstance in which an expert's opinion on damages is based either upon a misconception of the applicable law or upon factual assumptions shown to be untrue or wholly unsupported by the record and the circumstance where there is a factual weakness in the underpinnings of an opinion. In the former, the opinion is inadmissible, whereas in the latter, the opinion is admissible and the factual weakness goes to the weight and credibility as determined by the trier of fact. For example, in *Sorensen v. Lower Niobrara Nat. Resources Dist.*, 221 Neb. 180, 376 N.W.2d 539 (1985) (superseded by statute on other grounds), we held that an appraiser's opinion with respect to damages in a condemnation case should not have been admitted because it was formulated on a misinterpretation of Nebraska law regarding a natural resource district's rights acquired in eminent domain and maximum exercise of such acquired rights. Similarly, in *Latek v. K Mart Corp.*, 224 Neb. 807, 401 N.W.2d 503 (1987), an economist's testimony concerning a plaintiff's decreased earning capacity was properly excluded because it was based upon an assumed permanent 10-percent disability and therefore in direct conflict with uncontroverted medical evidence that the disability was not permanent.

In contrast, in *Little v. Gillette*, 225 Neb. 70, 402 N.W.2d 852 (1987), two expert appraisers testified as to the value of a business, both basing their opinion in part upon expected duration of profits. Rejecting a contention that such opinions were speculative and not based upon facts in evidence, we noted that unlike the circumstance in *Latek v. K Mart Corp., supra*, the assumptions used by the experts were not proved untrue or to be without any basis in fact and that whether the stated grounds for the assumption were credible was a jury question. Similarly, in *Iske v. Metropolitan Utilities Dist.*, 183 Neb. 34, 157 N.W.2d 887 (1968), we rejected a contention that an expert's opinion regarding the value of real property was inadmissible because he had failed to consider various costs and expenses in his analysis. We noted:

> The essence of the defendant's complaint is that there were more and other costs reasonably attributable and that they were not taken into consideration as the defendant developed on cross-examination. The difficulty of this argument is almost apparent. It would require the upsetting of every case in which it could be developed that there were some of the multiple and various elements in the cost of developing a subdivision that were not taken into consideration by the expert witness. Our rule, and the sensible rule, is that such matters go to the weight and credibility of an expert's testimony and not to its admissibility.

Id. at 45, 157 N.W.2d at 895.

[23] Roles' contention that the expert testimony on damages was speculative and therefore inadmissible rests upon two basic arguments: (1) There was an insufficient factual basis to assume that the Sutherland plant would ever have become operational at all because it utilized unproven "short steep" technology which had never been employed on a commercial scale and (2) Raasch's profit projections were based upon faulty assumptions with respect to production quantities, income, and expenses. Both of these arguments pertain to the fact that the Sutherland plant was a new business which was never completed and operational. We have noted that

> although in many . . . instances lost profits from a new business are too speculative and conjectural to permit recovery of damages, "where the evidence is available to furnish a reasonable certain factual basis for computation of probable losses, recovery of lost profits cannot be denied, even though a new business venture is involved."

El Fredo Pizza, Inc. v. Roto-Flex Oven Co., 199 Neb. 697, 706, 261 N.W.2d 358, 364 (1978), quoting *Earle M. Jorgensen Co. v. Tesmer Manufacturing Co.*, 10 Ariz. App. 445, 459 P.2d 533 (1969). Because Arizona and Nebraska law agree on this key principle, we utilize Nebraska case law in our analysis, as did the parties in their briefs. We therefore examine whether the record contains an adequate factual basis to provide foundation for Raasch's expert opinion that the Sutherland plant, if completed in 1993, would have been operational and profitable.

a. If Completed, Would Sutherland Plant Have Operated as Designed?

There was undisputed evidence at trial that the short steep and torula yeast reactor technology which the Sutherland plant was designed to utilize had not previously been employed in the commercial production of ethanol and related byproducts. It is also true, however, that there was no evidence categorically establishing that the technology would not work. Watson, who developed and holds a patent on the short steep process, testified that it is a variation of the general wet milling process which is utilized to produce ethanol from corn. Based upon his knowledge of the process and his inspection of the partially completed Sutherland plant in November 1997, Watson expressed his opinion that the plant would operate as designed, utilizing the short steep process. Katzen, a consulting engineer with experience in the construction of ethanol plants, testified that in his opinion, the Sutherland plant, including its short steep components, was constructed in accordance with industry standards and that the torula yeast reactor incorporated in the design would work.

The record also contains evidence that Roles was aware that the plant would utilize the novel technology but was nevertheless confident it would operate as designed. In late 1990, when the Ethanol Authority questioned whether the short steep technology would work, Roles observed the operation of a pilot plant constructed by Shepherd and expressed satisfaction that the process would work. At that point, Roles had invested less than $1 million in the project. When the Ethanol Authority decided that it would not fund the construction of the plant, in part because of its continuing concern about the untested technology, Roles proposed to fund the entire cost of construction himself if the Ethanol Authority would agree to invest in the completed plant upon receipt of evidence that it would operate as designed. Thereafter, Roles invested more than $12 million in the project before discontinuing the funding in 1993, prior to completion of the plant. When Roles attempted to sell the uncompleted plant to an interested party in late 1993 and early 1994 for a price exceeding $18 million, he produced data reflecting the plant's anticipated production and expressed no reservations about its ability to function as designed.

We conclude that this evidence formed a sufficient basis for Raasch's assumption that if completed, the plant would have functioned as designed. We acknowledge that there is other evidence in the record which could lead to a contrary inference. However, such evidence goes to the weight and credibility of the expert opinion which is to be determined by the jury.

b. If Completed, Would Sutherland Plant Have Operated at Profit?

Roles argues that Raasch's projections regarding the profitability of the Sutherland plant were speculative and lacked foundation, and therefore should have been excluded. He relies upon *World Radio Labs. v. Coopers & Lybrand*, 251 Neb. 261, 557 N.W.2d 1 (1996), a professional negligence action brought by a retailer against its former accountants alleging that because of negligently performed audits, the retailer lost profits and market value. The retailer sought to prove its loss of profits through an expert witness who compared the company's profits during the time period in question to a subsequent period when the effects of the alleged malpractice had been corrected. This court concluded that because the expert failed to take into consideration substantial differences in the operations of the company during the two periods, including number of stores and differences in markets, products, and management, the profit projections were speculative and conjectural as a matter of law and that the issues of lost profits and decreased value of the business therefore should not have been submitted to the jury.

World Radio Labs. v. Coopers & Lybrand, supra, involved an attempt to quantify the damage to an existing business caused by a third-party tort-feasor. The relationship of the parties and the nature of the claim in the present case are substantially different. Roles, Shepherd, and Corbet entered into a new business venture with the obvious objective of making a profit. They began with certain shared plans and expectations which did not come to fruition, allegedly because of a breach of their agreement by Roles. As noted above, the measure of damages in an action for breach of contract includes the gains prevented as well as the losses sustained by the breach. Therefore, a logical starting

point in this analysis is the reasonable expectation of the parties prior to the breach.

In arriving at his projections regarding the profitability of the plant if it had been completed, Raasch utilized the pro forma financial and product yield projections for the plant developed by Shepherd and Dodd. He supplemented these by determining and using actual historical price data, where available, for corn to be purchased by the plant and for the ethanol and byproducts which it would have produced. Although Roles testified at trial that he did not claim that Shepherd did anything wrong in developing the pro forma projections, in his brief, Roles challenges them as the product of a " 'by guess and by golly' " methodology. Brief for appellant in case No. S-98-782 at 30. This argument ignores the fact that the pro forma projections were included in the application for funding which Nebraska Nutrients submitted to the Ethanol Authority with the knowledge and approval of Shepherd, Corbet, *and Roles*. In the final report of its due diligence review, the Ethanol Authority's evaluation team reported that "[t]he pro formas submitted by the applicant and reviewed by the Evaluation Team (with the assistance of the accounting consultant) indicate the project meets the profitability test." The report also notes that Nebraska Nutrients had "identified markets for the production and made realistic price assumptions." It concluded that Nebraska Nutrients had demonstrated a "reasonable possibility" that the Ethanol Authority would be able to recoup its anticipated investment in the Sutherland plant. Given these facts, it was reasonable and permissible for Raasch to utilize the pro forma projections in arriving at his opinion of the anticipated profitability of the Sutherland plant if it had been funded to completion.

Roles also contends that Raasch's opinion with respect to anticipated operating expenses of the plant was speculative and flawed. In this portion of Raasch's analysis, he utilized his knowledge of the operating expenses incurred by other Nebraska ethanol plants for which he had done appraisals, as well as information he obtained from other ethanol plant owners. Based upon a 10-year average of operating expenses as a percentage of gross sales, he arrived at a range of 76 to 82 percent. Using a "worse case" approach, he calculated projected

profits at both an 80-percent and an 85-percent expense factor and based his opinion of value on the lower resulting profit projection.

[24] Roles argues that Raasch's expense assumptions used in arriving at his profit projections were flawed because he failed to consider items such as payment of debt, taxes, sales commissions, and management inexperience or startup problems. While recognizing the principle that an expert's opinion must have a sound and reasonable basis such that an expert is able to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture, we have stated that an appellate court is not a superexpert and will not lay down categorically which factors and principles an expert may or may not consider. Such matters go to the weight and credibility of the opinion itself and not to its admissibility. *Lange v. Crouse Cartage Co.*, 253 Neb. 718, 572 N.W.2d 351 (1998); *Holman v. Papio-Missouri River Nat. Resources Dist.*, 246 Neb. 787, 523 N.W.2d 510 (1994). Based upon our review of this record, we conclude that there was an adequate factual basis upon which Raasch could opine, based upon his experience and training, that if completed in 1993, the Sutherland plant would have operated at a profit for the next 4 years. Accordingly, the district court did not abuse its discretion in overruling Roles' foundational objection and permitting Raasch to express his opinion with respect to lost profits and value. The weaknesses in the factual underpinnings of Raasch's opinion go to its weight and credibility, not its admissibility.

[25] Uncertainty as to the fact of whether damages were sustained at all is fatal to recovery, but uncertainty as to amount is not if the evidence furnishes a reasonably certain factual basis for computation of the probable loss. *Sack Bros. v. Tri-Valley Co-op*, 260 Neb. 312, 616 N.W.2d 786 (2000); *Lone Cedar Ranches v. Jandebeur*, 246 Neb. 769, 523 N.W.2d 364 (1994). The testimony of Raasch and other evidence in this record, if believed by the trier of fact, would support a reasonable inference that if it had been funded to completion, the Sutherland plant would have had market value and operated at a profit as Roles, Shepherd, and Corbet originally intended. It is undisputed that Shepherd and Corbet have not realized any share in such profits or value pursuant to the operative November 1,

1990, agreement. Therefore, it is clear that Shepherd and Corbet sustained damage as a result of what they alleged to be Roles' breach of the agreement in discontinuing funding for construction, in that they were deprived of the gain which would have inured to them from the successful completion and operation of the plant. For the reasons discussed, we conclude that the record contains a reasonably certain factual basis for computing the amount of damages, and the district court therefore did not err in submitting the issue to the jury.

5. Jury Instructions

(a) Error Assigned

In his sixth assignment of error, Roles contends that in the 1998 trial, the district court erred in (1) informing the jury, in a pretrial instruction and in instruction No. 8 given at the close of trial, of its findings from the 1994 bench trial, including the finding of fraud; (2) giving instruction No. 17 pertaining to damages; and (3) refusing to give his proposed instructions Nos. 2 and 3 pertaining to contracts to loan money.

(b) Standard of Review

[26] Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court. *Pleiss v. Barnes*, 260 Neb. 770, 619 N.W.2d 825 (2000).

[27] In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Smith v. Paoli Popcorn Co.*, 260 Neb. 460, 618 N.W.2d 452 (2000).

[28] 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. *Pleiss v. Barnes, supra*; *Streeks v. Diamond Hill Farms*, 258 Neb. 581, 605 N.W.2d 110 (2000).

(c) Resolution

(i) Instructions Regarding 1994 Findings

The trial was bifurcated on Roles, Nebraska Nutrients, and Tri-State's motion, in which they contended that the counterclaims involved a substantial amount of expert discovery and testimony which were not germane to the issues raised in their petition. Prior to the 1998 jury trial, and after discussion with counsel at a status conference, the court entered an order, setting forth those findings of fact which it had made following the 1994 trial as well as specific issues which would be submitted to the jury for determination following the 1998 trial. Following entry of this order, Roles filed a motion in limine seeking to exclude all references to the court's findings of fraud following the 1994 trial. In overruling this motion, the district court specifically stated that it would instruct the jury at the commencement of trial that it was bound to accept the findings which the court had made following the 1994 trial, including the findings that Roles had induced Shepherd and Corbet to execute the disclaimers based upon fraudulent representations. Roles did not object when the court gave this preliminary instruction. Roles subsequently offered the disclaimers as evidence during the 1998 trial.

[29,30] When a motion in limine to exclude evidence is overruled, the movant must object when the particular evidence which was sought to be excluded by the motion is offered during trial in order to preserve error for appeal. *Allphin v. Ward*, 253 Neb. 302, 570 N.W.2d 360 (1997). Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error. *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 605 N.W.2d 136 (2000). Because Roles had notice that the court intended to give a preliminary instruction regarding its previous findings and did not object at the time the instruction was given, he has not preserved any alleged error with respect to the giving of the preliminary instruction.

The trial court's 1994 findings were also included in a "Statement of the Case" instruction, designated instruction No. 8, given at the close of the evidence. Roles objected generally to

the giving of this instruction and made specific objections to certain portions of the instruction, but not to that portion which set forth the court's previous findings. Assuming without deciding that this objection preserved the error which Roles argues on appeal, the record does not establish that the inclusion of the 1994 findings in instruction No. 8 was prejudicial. The same instruction specifically informed the jury that it could not award any damages by virtue of the fraudulent misrepresentations by Roles. In addition, the jury was instructed that the trial judge was not permitted to comment on the evidence and that if it appeared that he had so commented during either the trial or the giving of the instructions, the apparent comment should be disregarded. The jury was also instructed not to interpret the judge's statements or rulings as an opinion as to how the case should be decided. We therefore conclude that there was no reversible error in giving instruction No. 8.

(ii) Instructions Pertaining to Damages

Roles argues that the trial court erred in refusing to give his proposed instructions Nos. 2 and 3, which generally defined the elements of a contract to loan money. As previously noted, the 1990 agreement of the parties was not a contract to loan money, but, rather, was an agreement defining the terms of a joint business venture involving Roles, Shepherd, and Corbet. The district court did not err in refusing to give the instructions proposed by Roles because the tendered instructions were not warranted by the evidence.

Roles also argues that the giving of instructions Nos. 8 and 17 with respect to damages was error on several grounds. Roles argues that the two instructions, read in conjunction, improperly permitted the jury to award lost profits in the event that it determined that Roles breached the parties' agreement by utilizing the tax benefits of Nebraska Nutrients and Tri-State for the tax years after 1990. We disagree. Instruction No. 17 provides that "[o]ne who is injured by a breach of contract is entitled to recover all of his damages, including gains prevented as well as losses sustained, provided they are reasonably certain *and such as might naturally be expected to follow the breach.*" (Emphasis supplied.) Instruction No. 17 also instructs that damages must

be "proximately caused by the . . . breach of contract complained of." Proximate cause is defined in instruction No. 11. Therefore, because the instructions clearly provided that the jury award only those damages proximately caused by the breach complained of, they were not prejudicially erroneous in this regard.

[31,32] Roles also argues that instruction No. 8 is inconsistent. The instruction initially informs the jury that it is not to determine if Roles is a creditor in the bankruptcy action involving Nebraska Nutrients. However, it then goes on to provide as a possible breach of contract by Roles that he took Nebraska Nutrients and Tri-State into bankruptcy in Arizona. A close examination of the evidence and the instruction, however, resolves any facial inconsistency. The evidence at trial revealed that Roles filed a number of claims in the bankruptcy action which have yet to be examined by the bankruptcy judge. Instruction No. 8 simply informed the jury that it need not decide the validity of Roles' bankruptcy claims, while not precluding them from considering the fact that he was a petitioning creditor in the bankruptcy action in determining the breach claims. It is an instruction's meaning, not its phraseology, that is the crucial consideration, and a claim of prejudice will not lie when the instruction's meaning is reasonably clear. *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 605 N.W.2d 136 (2000). In addition, Roles does not allege how any inconsistency in these instructions prejudiced him. It is the burden of the complaining party to establish that judicial prejudice has occurred. *Everts v. Hardcopf-Bickley*, 257 Neb. 151, 595 N.W.2d 911 (1999); *Bunnell v. Burlington Northern RR. Co.*, 247 Neb. 743, 530 N.W.2d 230 (1995).

Roles also argues that instructions Nos. 8 and 17 are incorrect because they allow the jury to find that Roles breached the contract by attempting to terminate Shepherd and Corbet's interest in the plant and the corporations. He contends that this instruction allows the jury to award to Shepherd and Corbet damages for Roles' actions in seeking to have the disclaimers enforced. Roles argues that the instructions therefore allow Shepherd and Corbet to both rescind the disclaimers and recover damages on the disclaimers, violating the election of remedies doctrine.

There was evidence at trial indicating that Roles and Shepherd discussed eliminating Corbet from participating in the project in 1991 and that Roles barred Shepherd and Corbet from the premises in 1993. In addition, there was evidence that Roles held corporate meetings to elect himself as the officer and director of both corporations and to terminate Shepherd as an employee. From the record, it appears that there was sufficient evidence at trial, wholly unrelated to the disclaimer issue, regarding Roles' efforts to terminate the interests of Shepherd and Corbet in the project. Furthermore, the jury was specifically instructed that it was not to award any damages by virtue of any fraudulent misrepresentation performed by Roles in obtaining the disclaimers. Therefore, because the evidence supports this instruction and because the jury instructions, taken as a whole, indicate that the instruction was correct and not prejudicial, there is no reversible error.

6. Motions for Directed Verdict, New Trial, and Judgment Notwithstanding the Verdict

(a) Additional Background

During the 1998 trial, Roles moved for a directed verdict after Shepherd and Roles had rested and after all parties had rested. Both motions were overruled. Following the jury verdict, Roles filed a motion seeking a new trial or, alternatively, judgment notwithstanding the verdict, asserting 50 separate grounds and supported in part by an affidavit from a juror, K.R. In the affidavit, K.R. averred that the jurors discussed the evidence prior to deliberations, and in particular, she accused another juror, B.F., of stating after opening arguments that B.F. did not need 2 weeks to decide the case because B.F. knew Roles was a " 'slime' " and had let the community down by not finishing the plant.

The court held an evidentiary hearing on the allegations of juror misconduct, at which hearing each individual juror was questioned. K.R. testified regarding the allegations in her affidavit and stated that they were all true. She said she was upset because she thought the jury talked too much and that on one occasion, she talked to the bailiff about her concerns, and the bailiff told her what was going on was wrong. K.R. also testified that she realized after she was selected for the jury that her

brother had worked at the Sutherland plant. K.R. specifically testified that she never had any problem with the verdict.

B.F. testified that she did not make any of the statements which had been attributed to her by K.R. prior to deliberations. B.F. admitted that her son had worked at the plant for Shepherd and that she was aware of that fact before deliberations, but denied discussing the case with her son. B.F. testified that she felt sorry for K.R. because K.R. had difficulty understanding the trial issues and looked to B.F. for explanation. B.F. testified that on one occasion, the bailiff told the jurors they needed to be quiet because someone had overheard them laughing.

None of the other jurors remembered B.F.'s making the comments attributed to her by K.R., and no other juror shared K.R.'s concern that improper discussions were had prior to deliberations. All of the jurors testified that the bailiff did on one occasion tell them to quiet down because they were laughing. Some of the jurors testified that they saw a young man in the hallway after the first day of deliberations whom they later found out was a reporter but that none of the jurors spoke to the reporter or had any other contact with him.

The district court's bailiff testified that this had been her first trial in that capacity. About one-third of the way through the trial, she talked to the jury because the court reporter heard them laughing in the hallway and thought she heard them mention a topic of that day's testimony. The bailiff further testified that during the trial, K.R. approached her and said she thought the jurors had made up their minds. According to the bailiff, K.R. did not give her reasons for reaching this conclusion. The bailiff did not tell the judge about her conversation with K.R. She testified, however, that she spent considerable time going in and out of the jury room prior to deliberations and that she did not hear the jury talking about the trial. The bailiff was also present when the reporter wandered into the jury room after deliberations on the first day and inquired if there had been a verdict. She informed the reporter there was no verdict and told him to leave, and he apologized and left.

Based upon its review of the evidence, the district court determined that the allegations of juror misconduct made by K.R.

were untrue and denied Roles' motion seeking a new trial or judgment notwithstanding the verdict.

(b) Error Assigned

In his seventh assignment of error, Roles contends that the district court erred as a matter of law, following the 1998 trial, in overruling his motions for directed verdict, new trial, and judgment notwithstanding the verdict for reasons including, but not limited to, alleged juror misconduct.

(c) Standard of Review

[33] 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. *Smith v. Paoli Popcorn Co.*, 260 Neb. 460, 618 N.W.2d 452 (2000); *Gestring v. Mary Lanning Memorial Hosp.*, 259 Neb. 905, 613 N.W.2d 440 (2000).

[34] 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. *Genetti v. Caterpillar, Inc.*, *ante* p. 98, 621 N.W.2d 529 (2001); *O'Connor v. Kaufman*, 260 Neb. 219, 616 N.W.2d 301 (2000).

[35] On a motion for judgment non obstante veredicto, or notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence. *McLain v. Ortmeier*, 259 Neb. 750, 612 N.W.2d 217 (2000).

[36] In order to sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Id.*

[37] The trial court's ruling on a question involving jury misconduct will not be disturbed on appeal absent an abuse of discretion. *Smith v. Papio-Missouri River NRD*, 254 Neb. 405, 576 N.W.2d 797 (1998).

(d) Resolution

[38] Based upon the allegations set forth in the affidavit of K.R., the district court properly conducted an evidentiary hearing pursuant to the rule that

> when an allegation of jury misconduct is made and is supported by a showing which tends to prove that serious misconduct occurred, the trial court should conduct an evidentiary hearing to determine whether the alleged misconduct actually occurred. If it occurred, the trial court must then determine whether it was prejudicial to the extent that the defendant was denied a fair trial. If the trial court determines that the misconduct did not occur or that it was not prejudicial, adequate findings are to be made so that the determination may be reviewed.

State v. Arnold, 253 Neb. 789, 796, 572 N.W.2d 74, 80 (1998); *Hunt v. Methodist Hosp.*, 240 Neb. 838, 485 N.W.2d 737 (1992).

[39] In order for a new trial to be granted due to juror misconduct, the party claiming the misconduct has the burden to show by clear and convincing evidence that prejudice has occurred. *Hartley v. Guthmann*, 248 Neb. 131, 532 N.W.2d 331 (1995). We conclude that the trial court did not abuse its discretion in determining that Roles did not meet this burden. While it is true that both K.R. and the bailiff testified that K.R. did indeed voice her concerns during the trial about improper jury deliberations, every other juror denied discussing the case prior to submission. Because this evidence is decidedly in conflict, we cannot say the district court abused its discretion in reaching its determination that there was no juror misconduct.

For this reason, as well as for the reasons articulated in our discussion of Roles' other assignments of error, we conclude that the district court did not err in overruling Roles' motions for a directed verdict, new trial, or judgment notwithstanding the verdict.

7. Attorney Fees

(a) Additional Background

Prior to the 1998 trial, the district court ruled that Arizona law would control the proceedings because of the choice-of-law provision in the November 1, 1990, agreement. In response to

Roles' pretrial motion to strike the claim for attorney fees, the court specifically stated that the statutes of Arizona allowed the court to award attorney fees to the successful party in a contract action. Although it refused to submit a claim for punitive damages under Arizona law, the district court reasoned that the "public policy of the State of Nebraska with reference to attorneys fees does not rival the express public policy of this State so far as the same pertains to punitive damages." At the conclusion of the trial, the court calculated the attorney fees to be awarded by determining that $100 was a reasonable hourly fee in Lincoln County during 1993 to 1998. It then determined that a multiplier of 2.0 should be applied to the rate to compensate the attorneys for taking the risk of a contingency fee and then multiplied the number of hours each attorney worked on the case in order to determine the amount of fees awarded. Total attorney fees and expenses awarded exceeded $1.3 million.

(b) Error Assigned

In his eighth assignment of error, Roles contends that the district court erred as a matter of law in awarding attorney fees to counsel for Shepherd and Corbet.

(c) Standard of Review

[40] Whether the law of Nebraska or that of another state controls the disposition of an issue by a Nebraska court is an issue of law, for which an appellate court is obligated to reach a conclusion independent of that reached by the trial court. See *Powell v. American Charter Fed. Sav. & Loan Assn.*, 245 Neb. 551, 514 N.W.2d 326 (1994).

(d) Resolution

Our analysis of this issue begins with two provisions of the November 1, 1990, agreement between Roles, Shepherd, and Corbet. Paragraph 16 of the agreement provides: "In the event it becomes necessary for any party hereto to employ counsel to enforce any of the terms or provisions of the Agreement, then the non-prevailing party shall pay to the prevailing party all reasonable attorney's fees incurred in connection therewith." Paragraph 18 of the agreement provides that it "shall be governed by the laws of the State of Arizona."

In a pretrial order, the district court denied Roles' motion to strike the claims for attorney fees, reasoning that Arizona law was applicable and that "the statutes of the State of Arizona clearly allow the Court if the Defendants are successful in a contract action to award attorneys fees." At the time of the court's order, the applicable Arizona statute provided in relevant part: "In any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney's fees. This section shall in no manner be construed as altering, prohibiting or restricting present or future contracts or statutes that may provide for attorney's fees." Ariz. Rev. Stat. Ann. § 12-341.01 (West 1992). Notably, however, Arizona case law holds that the statute is not applicable if it conflicts with an express contractual provision governing the recovery of attorney fees. *Jordan v. Burgbacher*, 180 Ariz. 221, 883 P.2d 458 (Ariz. App. 1994); *Sweis v. Chatwin*, 120 Ariz. 249, 585 P.2d 269 (Ariz. App. 1978). The court of appeals in *Sweis* reasoned:

> If § 12-341.01 were to be held applicable to this litigation, it would in effect cancel the unqualified contractual right to recover attorney's fees given to the successful party by their agreement, and substitute in its place the purely discretionary or permissive right given by the statute. This would clearly be an alteration of the agreement of the parties . . . .

Sweis v. Chatwin, 120 Ariz. at 252, 585 P.2d at 272. Assuming that the contract provision for attorney fees would be enforceable under Arizona law, the dispositive question in this case is whether a Nebraska court must apply Arizona law in resolving this issue.

[41,42] Although substantive rights of parties to an action are governed by the state where the cause of action arose, procedural matters are dictated by the law of the forum. *Whitten v. Whitten*, 250 Neb. 210, 548 N.W.2d 338 (1996). We must initially determine, therefore, whether a claim for recovery of attorney fees in the action in which they were incurred is a substantive or procedural matter. Under Nebraska law, attorney fees and expenses may be recovered only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees. *In re*

Application of SID No. 384, 259 Neb. 351, 609 N.W.2d 679 (2000). See *Zimmerman v. FirsTier Bank*, 255 Neb. 410, 585 N.W.2d 445 (1998). There is no Nebraska statute authorizing the award of attorney fees in an action on a contract, and no uniform course of procedure has been followed in this regard. However, this court has addressed the choice-of-law issue presented in this case and refused to award attorney fees under similar circumstances, reasoning that the recovery of attorney fees is procedural in nature and therefore governed by the law of the forum. In *Security Co. v. Eyer*, 36 Neb. 507, 54 N.W. 838 (1893), a mortgage contained a provision providing that if an action was brought to foreclose it, the plaintiff was entitled to an attorney fee. This court held that such stipulations are invalid and will not be enforced by a Nebraska court. The plaintiff in that case had argued that the mortgage contained a clause providing that it was to be construed by the laws of the State of Iowa, under which an award of attorney fees was authorized when contracted for by the parties. Even assuming that to be so, we held:

> But it by no means follows, because the clause in the note and mortgage in regard to attorneys' fees is valid in Iowa, that the stipulation can be enforced in this state. Attorneys' fees, in states where they are allowed by the court to the successful party, are in the nature of costs, and are taxed and treated as such. They are no part of the judgment proper. . . .
>
> In general, costs are recoverable only by force of some statutory provisions, and the law of the place of the forum in respect to costs is applied. The law in force at the place the contract is made does not govern costs.

(Citations omitted.) *Id.* at 513, 54 N.W. at 840. We thus concluded that the clause in the mortgage relating to attorney fees was invalid.

Similar facts were presented and a similar rationale applied in *Hallam v. Telleren*, 55 Neb. 255, 75 N.W. 560 (1898). In *Hallam*, a note provided " 'should suit be commenced to enforce the collection of this note a reasonable sum shall be allowed as attorneys' fees and taxed with the costs on the cause.' " 55 Neb. at 257, 75 N.W. at 560. Although the evidence demonstrated that the notes were made and payable in Iowa and that the provision

for payment of attorney fees was valid and enforceable in that state, we cited *Eyer* and held: "But such a provision is a stipulation for costs and refers to the remedy. It is not a substantive part of the contract itself and cannot be enforced in another jurisdiction." *Id.* at 257, 75 N.W. at 561.

While more than a century old, the holdings of *Security Co. v. Eyer, supra*, and *Hallam v. Telleren, supra*, that attorney fees are elements of court costs and therefore affect only a remedy have never been abrogated. Indeed, we have followed this principle in other contexts. See, e.g., *Brodersen v. Traders Ins. Co.*, 246 Neb. 688, 523 N.W.2d 24 (1994) (finding attorney fees are costs, not damages); *Smith v. Fremont Contract Carriers*, 218 Neb. 652, 358 N.W.2d 211 (1984) (holding statutory amendment allowing recovery of attorney fees in workers' compensation cases was procedural in nature); *Nye-Schneider-Fowler Co. v. Bridges, Hoye & Co.*, 98 Neb. 863, 155 N.W. 235 (1915) (holding attorney fees are costs and relate only to remedy). Because Nebraska law deems the recovery of attorney fees in the action in which they are incurred to be a procedural issue governed by the law of the forum, the district court erred in applying the substantive law of Arizona in awarding attorney fees to Shepherd and Corbet. We therefore vacate the award of attorney fees and expenses.

IV. CONCLUSION

The appeal docketed as case No. S-95-624 is dismissed because it was not perfected from a final, appealable order. With respect to the appeal docketed as case No. S-98-782, for the reasons stated in this opinion, we reverse and vacate that portion of the judgment of the district court requiring Roles to pay attorney fees and expenses to Shepherd and Corbet in the total amount of $1,395,754.34. In all other respects, the judgment is affirmed.

APPEAL IN NO. S-95-624 DISMISSED.
JUDGMENT IN NO. S-98-782 AFFIRMED IN PART, AND IN PART REVERSED AND VACATED.

WRIGHT, J., not participating.

CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT, V. NEBRASKA LIQUOR CONTROL COMMISSION AND KABREDLO'S, INC., DOING BUSINESS AS KABREDLO'S, APPELLEES.

626 N.W.2d 518

Filed May 18, 2001. No. S-99-574.

1. **Statutes: Administrative Law: Liquor Licenses: Appeal and Error.** Prior to the amendment to Neb. Rev. Stat. § 53-1,116 (Cum. Supp. 2000), an appeal of a Nebraska Liquor Control Commission decision from the district court to the Nebraska Court of Appeals or the Nebraska Supreme Court was reviewed de novo on the record.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
3. ___: ___. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
4. **Statutes.** A court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme.
5. **Statutes: Administrative Law: Liquor Licenses.** In order to issue a retail liquor license, the Nebraska Liquor Control Commission must find that each of the conditions specified in Neb. Rev. Stat. § 53-132(2)(a) through (d) (Reissue 1984) are satisfied, and in making its determination whether such conditions are satisfied, the commission must consider each of the factors listed in § 53-132(3)(a) through (j).
6. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and SIEVERS and MOORE, Judges, on appeal thereto from the District Court for Lancaster County, DONALD E. ENDACOTT, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Dana W. Roper, Lincoln City Attorney, and Joel D. Pedersen for appellant.

Mark J. Krieger and Jennifer S. Liliedahl, of Bowman & Krieger, for appellees.

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

MILLER-LERMAN, J.

NATURE OF CASE

The Nebraska Liquor Control Commission (Commission) issued a liquor license to Kabredlo's, Inc. The City of Lincoln (City) appealed the decision to the district court for Lancaster County. The City argued, inter alia, that the license should not have been granted because Kabredlo's was not able to sell liquor at the proposed location due to the fact that under the controlling zoning ordinance, the sale of alcoholic beverages for consumption off premises is prohibited at that location in the absence of a special use permit. The record before the Commission showed that the City had denied Kabredlo's application for a special use permit. The district court affirmed the Commission's decision to issue a liquor license. The City appealed to the Nebraska Court of Appeals, which affirmed the district court's decision. *City of Lincoln v. Nebraska Liquor Control Comm.*, 9 Neb. App. 390, 612 N.W.2d 252 (2000). This court granted the City's petition for further review.

For the reasons stated below, we reverse the decision of the Court of Appeals and remand the cause with directions to the Court of Appeals to instruct the district court to reverse its order affirming the Commission's decision and to direct the district court to remand the cause to the Commission with directions to deny Kabredlo's application for a retail liquor license.

STATEMENT OF FACTS

Kabredlo's owns and operates a convenience store located at 338 North 27th Street in Lincoln, Nebraska, which lies within a B-3 zoning district. Under Lincoln Municipal Code § 27.63.685 (1995), businesses located in a B-3 zoning district are prohibited from selling alcoholic beverages for consumption off the premises in the absence of a special use permit. Kabredlo's applied to the City for a special use permit.

The granting of a special use permit under § 27.63.685 is subject to the condition, inter alia, that the license premises be located no closer than 100 feet from a residential district or residential use, or, if a lesser distance, any adverse effects of the reduction in distance be mitigated by landscaping or other methods approved by the Lincoln/Lancaster County Planning

Commission. The 100-foot separation requirement may be waived by the Lincoln City Council.

A public hearing on Kabredlo's application for a special use permit was held on September 30, 1996. In connection with the hearing, a report was prepared by the staff of the planning commission and provided to the city council. The report indicates that the North 27th Street location is bounded on three sides by residential areas; that the premises lack the required 100-foot separation on those three sides, being within 11 feet on one side, within 41 feet on another, and within 8 feet on the third; and that mitigation would be impossible due to public alleys on two sides and an employee parking lot on the third. The city council voted to deny Kabredlo's application for a special use permit on September 30. Kabredlo's did not appeal the city council's decision to the district court pursuant to Neb. Rev. Stat. § 15-1201 (Reissue 1997).

Kabredlo's applied to the Commission for a retail class B liquor license for the North 27th Street location on July 31, 1997. The "service proposed" by Kabredlo's in its application was the sale of beer. The city council conducted a public hearing on August 25 to determine whether it would recommend issuance or denial of the license. The city council recommended to the Commission that the application be denied. The city council gave various reasons for its recommendation of denial, including the fact that the special permit under § 27.63.685 for the location had not been granted, and, therefore, the services proposed in the application would violate the zoning restriction of the city.

The city council's recommendation for denial triggered the requirement in Neb. Rev. Stat. § 53-133 (Reissue 1984) for a hearing before the Commission. Section 53-133 required the Commission to set for hearing any application recommended for denial by the city, village, or county.

The Commission conducted a hearing on November 6, 1997, during which it considered the application pursuant to Neb. Rev. Stat. § 53-132 (Reissue 1984). Section 53-132 sets forth the qualifications required for issuance of a license to an applicant and the considerations relevant to the Commission's determination of whether an applicant meets such qualifications. The

Commission issued an order approving Kabredlo's application on November 26. The order stated in part that pursuant to § 53-132(2)(a), the Commission found that Kabredlo's was "fit, willing and able to provide the proposed services," and that "all of the factors set forth in 53-132(3) have been considered and the issuance of this license is required by the present or future public convenience and necessity." The Commission overruled the City's motion for rehearing.

The City appealed the action of the Commission to the district court for Lancaster County, contending, inter alia, that the Commission had disregarded zoning restrictions in its decision to grant the liquor license. Kabredlo's cross-petitioned, requesting that the district court declare § 27.63.685 of the Lincoln Municipal Code unconstitutional on the bases that the issuance of special use permits under § 27.63.685 was an unconstitutional exercise of power by the city council and that the conditions set forth in § 27.63.685 were arbitrary, vague, and unreasonable. The City moved to strike Kabredlo's cross-petition, and the district court granted the motion to strike on the basis that the constitutionality of § 27.63.685 of the Lincoln Municipal Code was not raised on the record before the Commission.

After receiving evidence on December 11, 1998, the district court affirmed the decision of the Commission in an order entered March 29, 1999. The district court found that because of the potential grant of a special use permit, "the zoning law does not entirely prohibit alcohol sales in these [B-3] zoning districts." The district court concluded that the criteria in § 53-132(3) were not controlling on the Commission's decision, but were only required to be considered by the Commission, and that the Commission had done so. The district court found that the record supported the Commission's finding that the conditions set forth in § 53-132(2) had been met. The district court concluded that the Commission's decision was not arbitrary or unreasonable and affirmed the decision of the Commission to grant the license.

The City appealed the order of the district court affirming the decision of the Commission to grant the liquor license. The Court of Appeals reviewed the appeal de novo on the record, citing to *Grand Island Latin Club v. Nebraska Liq. Cont. Comm.*,

251 Neb. 61, 554 N.W.2d 778 (1996); *Marting v. Nebraska Liquor Control Comm.*, 250 Neb. 134, 548 N.W.2d 326 (1996); and *No Frills Supermarket v. Nebraska Liq. Control Comm.*, 246 Neb. 822, 523 N.W.2d 528 (1994). The Court of Appeals affirmed the decision of the district court. *City of Lincoln v. Nebraska Liquor Control Comm.*, 9 Neb. App. 390, 612 N.W.2d 252 (2000).

In its opinion, the Court of Appeals determined that Kabredlo's lack of a special use permit was not determinative and that the Commission must only "consider" zoning restrictions under § 53-132(3)(h). The Court of Appeals found that the record as a whole showed that considerable evidence had been submitted to the Commission regarding the zoning ordinance prohibiting off-premises liquor sales without a special use permit in B-3 zoning locations and that the Commission had therefore "considered" the zoning restriction. The Court of Appeals concluded that despite the evidence regarding the zoning restriction, "the record did not indicate a legitimate reason for denying the license." 9 Neb. App. at 401, 612 N.W.2d at 259. The City petitioned this court for further review. We granted the City's petition.

ASSIGNMENTS OF ERROR

On further review, the City asserts that the Court of Appeals erred (1) in concluding that the Commission properly considered the factors required under § 53-132 and (2) in failing to find that the Commission improperly issued the license prior to entry of its final order granting the license. Because we reverse the Court of Appeals' decision on the basis of the first assigned error, we do not discuss the second assigned error.

ANALYSIS

Controlling Standard of Review.

The district court's hearing on this case was conducted on December 11, 1998. The district court decided the case on March 29, 1999. On both these dates, the district court's standard of review was that the district court may not disturb the decision of the Commission unless it was arbitrary and unreasonable. See, *Grand Island Latin Club, supra*; *Marting, supra*. The district court applied the correct standard of review.

After the district court entered its order, the Legislature revised Neb. Rev. Stat. § 53-1,116 (Reissue 1998), effective May 25, 1999. As revised, § 53-1,116 (Cum. Supp. 2000) provides as follows:

> Any order or decision of the commission granting, denying, suspending, canceling, revoking, or renewing or refusing to suspend, cancel, revoke, or renew a license, special designated permit, or permit for the sale of alcoholic liquor, including beer, may be appealed, and the appeal shall be in accordance with the Administrative Procedure Act.

Under the Administrative Procedure Act (APA), the district court reviews an appeal without a jury de novo on the record of the agency. Neb. Rev. Stat. § 84-917(5)(a) (Reissue 1999). As noted above, because the district court entered its order prior to May 25, 1999, the APA standard did not yet apply to the district court in the instant case.

[1] Prior to the amendment to § 53-1,116, an appeal of a Commission decision to this court or the Court of Appeals from the district court was reviewed de novo on the record. *Grand Island Latin Club, supra*; *Marting, supra*. Under the APA, however, this court or the Court of Appeals reviews the appeal from the judgment or final order of the district court for errors appearing on the record. Neb. Rev. Stat. § 84-918(3) (Reissue 1999). The amendment to § 53-1,116, providing that appeals "shall be in accordance with the Administrative Procedure Act," was procedural in nature, and therefore, this court and the Court of Appeals are to apply the standard of review found in the APA for any appeals decided by this court or the Court of Appeals on or after May 25, 1999, the effective date of the amendment. See *Jackson v. Branick Indus.*, 254 Neb. 950, 581 N.W.2d 53 (1998). The Court of Appeals decided this case on June 20, 2000. For this court or the Court of Appeals to decide the appeal from the district court for errors appearing on the record, however, would deny the parties any de novo review of the Commission's decision, thus depriving the parties of their due process rights. See, generally, *Rose Equip., Inc. v. Ford Motor Co.*, 248 Neb. 344, 535 N.W.2d 404 (1995); *In re Interest of M.W. and R.W.*, 1 Neb. App. 378, 497 N.W.2d 396 (1992). Accordingly, appellate

review of the district court's order in this transitional case is de novo on the record. We note that although it relied on authority which was superseded by legislative amendment, the Court of Appeals reviewed the decision of the district court de novo on the record and, accordingly, applied the correct standard of review in this case.

Analysis of Merits.

During the times relevant herein, the 1984 version of § 53-132 governed the Commission's issuance or denial of retail liquor licenses. Subsequent to 1984 and prior to the proceedings herein, the Legislature made various attempts to amend § 53-132, but such amendments have been ruled unconstitutional or unenforceable. Specific cases include *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226 (1988) (declaring 1986 Neb. Laws, L.B. 911, unconstitutional); *Kwik Shop v. City of Lincoln*, 243 Neb. 178, 498 N.W.2d 102 (1993) (declaring 1989 Neb. Laws, L.B. 781, unconstitutional); and *Marting v. Nebraska Liquor Control Comm.*, 250 Neb. 134, 548 N.W.2d 326 (1996) (finding 1993 Neb. Laws, L.B. 183, unenforceable). We note that in 1999, the Legislature rewrote the Nebraska Liquor Control Act pertaining to issuance or denial of retail liquor licenses. See 1999 Neb. Laws, L.B. 267. However, because the proceedings before the Commission herein occurred in 1997, the 1984 version of § 53-132 controlled the Commission's decision. See *Marting*, *supra*.

The 1984 version of § 53-132(2) states:

> A retail license . . . shall be issued to any qualified applicant if it is found by the commission that (a) the applicant is fit, willing, and able to properly provide the service proposed within the city, village, or county where the premises described in the application are located, (b) the applicant can conform to all provisions, requirements, rules and regulations provided for in the Nebraska Liquor Control Act, (c) the applicant has demonstrated that the type of management and control exercised over the licensed premises will be sufficient to insure [sic] that the licensed business can conform to all provisions, requirements, rules, and regulations provided for in the Nebraska

> Liquor Control Act, and (d) the issuance of the license is or will be required by the present or future public convenience and necessity.

The statute further provides at § 53-132(3) that in making its determination pursuant to § 53-132(2), the Commission shall consider:

> (a) The recommendation of the local governing body;
>
> (b) The existence of a citizens' protest made in accordance with section 53-133;
>
> (c) The existing population of the city, village, or county, as the case may be, and its projected growth;
>
> (d) The nature of the neighborhood or community of the location of the proposed licensed premises;
>
> (e) The existence or absence of other retail licenses or bottle club licenses with similar privileges within the neighborhood or community of the location of the proposed licensed premises;
>
> (f) The existing motor vehicle and pedestrian traffic flow in the vicinity of the proposed licensed premises;
>
> (g) The adequacy of existing law enforcement;
>
> (h) Zoning restrictions;
>
> (i) The sanitation or sanitary conditions on or about the proposed licensed premises; and
>
> (j) Whether the type of business or activity proposed to be operated in conjunction with the proposed license is and will be consistent with the public interest.

[2-4] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below. *In re Estate of Dickie, ante* p. 533, 623 N.W.2d 666 (2001). In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Gibbons v. Don Williams Roofing, ante* p. 470, 623 N.W.2d 662 (2001). A court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme. *Gottsch Feeding Corp. v. State, ante* p. 19, 621 N.W.2d 109 (2001).

[5] Giving § 53-132(2) and (3) a plain and ordinary reading and construing them consistently, it is clear that in order to issue a retail liquor license, the Commission must find that each of the conditions specified in § 53-132(2)(a) through (d) are satisfied and that in making its determination whether such conditions are satisfied, the Commission must consider each of the factors listed in § 53-132(3)(a) through (j).

In its order dated November 26, 1997, as to § 53-132(2), the Commission found that the conditions enumerated in § 53-132(2)(a) through (d) were satisfied. The Commission specifically found that with respect to § 53-132(2)(a), Kabredlo's was "fit, willing and able to provide the proposed services." As to § 53-132(3), the order further stated that the Commission found that "all the factors set forth in 53-132(3) have been considered." Based on such findings, the Commission ordered that Kabredlo's application be approved and that a license be issued.

The City objects to the Commission's decision, which was affirmed by the district court and Court of Appeals, in which the Commission found that pursuant to § 53-132(2)(a), Kabredlo's was "fit, willing, and able to provide the proposed services" notwithstanding the fact that the record before the Commission showed that "zoning restrictions" prohibited the sale of alcoholic beverages at the subject location and that Kabredlo's had in fact been denied the special use permit which would permit it to sell alcohol in a B-3 zoning district. The City argues, and we agree, that in determining whether an applicant satisfies the condition in § 53-132(2)(a) of being "fit, willing, and able to properly provide the service proposed within the city, village, or county where the premises described in the application are located," the Commission is required to "consider" the factors listed in § 53-132(3), including "[z]oning restrictions," § 53-132(3)(h). The record before the Commission showed that Kabredlo's had not complied with the local zoning regulations because it had not been issued a special use permit. Therefore, in the instant case, a de novo review of the record shows that Kabredlo's was not "able" to provide the proposed service because the proposed service was located in a zoning district which prohibited the proposed service and that Kabredlo's had

not been granted relief from such restriction. The Commission erred in approving Kabredlo's application for a liquor license, and the district court and Court of Appeals erred in affirming the Commission's decision.

The record in this case indicates that under Lincoln zoning ordinances, the sale of alcohol is prohibited in B-3 zoning districts in the absence of a special use permit. The record further shows that a special use permit may be obtained from the city and such permit would allow the sale of alcohol in a B-3 zoning district, the type of zoning district in which Kabredlo's North 27th Street location is situated. The record clearly indicates that Kabredlo's had been denied a special use permit to sell alcohol at its North 27th Street location and therefore had not complied with zoning regulations. In the instant case, "[z]oning restrictions," § 53-132(3)(h), prohibit Kabredlo's from legally selling beer at the North 27th Street location. Accordingly, Kabredlo's failed to satisfy the condition of § 53-132(2)(a) of being "able to properly provide the service proposed . . . where the premises described in the application are located." Because the existence of "[z]oning restrictions," § 53-132(3)(h), is one of the factors to be considered in determining whether the conditions enumerated in § 53-132(2) are satisfied, § 53-132(2) and (3) taken together, *Gottsch Feeding Corp., supra*, clearly anticipate that in certain situations, an applicant will be unable to provide the "service proposed" in the "premises described" due to zoning restrictions. This is such a case.

[6] We note that in its order, the district court stated that § 53-132 "does not make the criteria in subsection 3 controlling on the Commission's decision." We further note that the Court of Appeals in its opinion stated that "the criteria in subsection (3) of 53-132 do not control the Commission's decision, but must simply be considered by the Commission." *City of Lincoln v. Nebraska Liquor Control Comm.*, 9 Neb. App. 390, 401, 612 N.W.2d 252, 259 (2000). The Court of Appeals also stated that "the record did not indicate a legitimate reason for denying the license." *Id.* While we do not hold that any one of the factors listed in § 53-132(3) invariably "controls" the decision to grant or deny an application for a liquor license, § 53-132(3) states that the Commission "shall consider" the listed factors, and we

read the statute to require a consideration of each of the listed factors in determining whether the conditions of § 53-132(2) have been satisfied. A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless. *Nebraska Dept. of Health & Human Servs. v. Struss, ante* p. 435, 623 N.W.2d 308 (2001). The inclusion of "[z]oning restrictions" in § 53-132(3)(h) is neither superfluous nor meaningless. It is one of the factors to be considered and indicates that the Legislature contemplated that in certain instances, zoning restrictions could prevent an applicant from satisfying the conditions listed in § 53-132(2). In the present case, we determine that a consideration of the controlling zoning restrictions, § 53-132(3)(h), as they relate to the conditions listed in § 53-132(2)(a) through (d), leads to the conclusion that Kabredlo's had not complied with the zoning regulations and therefore did not satisfy the condition found at § 53-132(2)(a) of being "able to properly provide the service proposed" in its application for a retail liquor license at the North 27th Street location. In our de novo review, we determine that the Commission erred when it ignored the zoning restrictions which, on this record, prevent Kabredlo's from being "able to properly provide the service proposed . . . where the premises described in the application are located." § 53-132(2)(a). The Court of Appeals erred when it affirmed the decision of the district court which had affirmed the issuance of the liquor license to Kabredlo's. Accordingly, we reverse the decision of the Court of Appeals.

CONCLUSION

Pursuant to Lincoln's zoning ordinances, Kabredlo's was prohibited from selling alcohol at its North 27th Street location. We therefore conclude that Kabredlo's was not "able to properly provide the service proposed . . . where the premises described in the application [were] located" as required by § 53-132(2)(a) and that a retail liquor license for the North 27th Street location should not have been issued by the Commission to Kabredlo's. We therefore reverse the decision of the Court of Appeals and remand the cause with directions to the Court of Appeals to

instruct the district court to reverse its order affirming the Commission's decision and to direct the district court to remand the cause to the Commission with directions to deny Kabredlo's application for a retail liquor license.

REVERSED AND REMANDED WITH DIRECTIONS.

JAYNE STEELE, SUCCESSOR PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLES E. STEELE II, DECEASED, APPELLANT, V. RITA C. SEDLACEK, PERSONAL REPRESENTATIVE OF THE ESTATE OF LISA M. SEDLACEK, DECEASED, APPELLEE.

626 N.W.2d 224

Filed May 18, 2001. No. S-99-760.

1. **Directed Verdict: Evidence: Appeal and Error.** When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law.
2. **Directed Verdict.** The party against whom a verdict is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence.
3. **Appeal and Error.** The Nebraska Supreme Court will not consider errors which are not properly assigned in a petition for further review and discussed in the supporting memorandum brief.

Petition for further review from the Nebraska Court of Appeals, HANNON, INBODY, and MOORE, Judges, on appeal thereto from the District Court for Douglas County, SANDRA L. DOUGHERTY, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Vincent Valentino and Charles W. Campbell, of Angle, Murphy, Valentino & Campbell, P.C., for appellant.

Michael F. Coyle and Andrea Friedlander Scioli, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

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

WRIGHT, J.

NATURE OF CASE

Charles E. Steele II and Lisa M. Sedlacek were killed in a one-car accident near Rapid City, South Dakota. Charles' estate filed a wrongful death action under South Dakota law in the district court for Douglas County, Nebraska. A jury returned a verdict for Lisa's estate, and Charles' estate appealed. The Nebraska Court of Appeals affirmed. See *Steele v. Sedlacek*, No. A-99-760, 2000 WL 1207150 (Neb. App. Aug. 22, 2000) (not designated for permanent publication). We granted a petition for further review filed by Charles' estate.

SCOPE OF REVIEW

[1] When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law. *McLain v. Ortmeier*, 259 Neb. 750, 612 N.W.2d 217 (2000).

FACTS

Between the late evening hours of September 24 and the early morning hours of September 25, 1995, Charles and Lisa were killed while traveling eastbound on U.S. Highway 44 in Lisa's 1990 Chevrolet Camaro. This stretch of two-lane highway between Deadwood and Rapid City, South Dakota, is an unlit, winding road in a mountainous and wooded area. On a curve in the highway, the Camaro left the road, traveled approximately 30 feet, and struck a tree. There were no eyewitnesses to the accident.

On March 28, 1996, Charles' estate filed a wrongful death action under South Dakota law against Lisa's estate. The petition alleged that Lisa was negligent in failing to keep her vehicle under reasonable control, in operating her vehicle at a speed greater than was reasonable, in failing to keep a proper lookout, and in operating her vehicle in such a manner that the vehicle could not stop or turn aside without colliding with an object or obstruction. Lisa's estate alleged that Charles was negligent,

contributorily negligent, and assumed the risk by continuing to occupy an automobile with someone that he knew or should have known was so intoxicated as to be impaired.

At trial, Charles' estate introduced the deposition testimony of Lisa's personal representative, Rita C. Sedlacek. Portions of this deposition were read into the record and established that Lisa owned the Camaro involved in the accident.

South Dakota State Trooper Jeff Twite testified via video deposition that he had investigated the accident. Twite stated that the area in which the accident occurred consisted of many curves winding up through the hills. Twite noted that although the highway was not lit, there were reflective markers along it.

Twite determined that the Camaro was heading east, approaching a left curve, when it left the highway and struck a tree. At impact, the vehicle was torn into two pieces. Charles' body was found lying on the ground on the passenger's side of the Camaro. Part of his left leg was pinned inside the vehicle on the passenger's side. Lisa was also thrown from the vehicle, and her body was found 49 feet from the wreckage.

Twite opined that skid marks near the scene of the accident indicated that the Camaro's brakes had been applied just before the vehicle reached the curve, which caused the Camaro to slide sideways. Twite stated that the speed limit through the entire distance of the hills was 50 m.p.h., and he estimated that the Camaro was traveling at a minimum of 65 m.p.h. Twite opined that Lisa was driving the vehicle and that the curve in the highway could have been negotiated if the vehicle had been under control and a proper lookout had been maintained.

Former South Dakota State Trooper Russell Sprague testified that he assisted Twite in the accident investigation. Sprague stated that the Camaro had slid into a large pine tree, colliding near the firewall on the passenger's side. The vehicle split at the firewall and wrapped itself around the tree.

Sprague opined that the Camaro was traveling at least 65 m.p.h. when it left the highway and that Lisa was driving when the accident occurred. Sprague concluded that the tire marks on the highway were not caused by braking. According to Sprague, if Lisa had been applying the brakes, a solid black mark would have been created rather than the striated type found at the

scene. He opined that the tire marks were caused by the vehicle's sliding sideways as it was trying to negotiate the left curve. Sprague was able to trace the striated marks all the way until they reached the shoulder of the highway, off the shoulder into the gravel, and up to the point where the vehicle impacted the tree. He stated that a warning sign indicating a curve ahead and recommending a speed of 45 m.p.h. was located approximately 150 yards from the curve where the accident occurred.

Over the objection of counsel for Charles' estate, counsel for Lisa's estate read the cross-examination of Twite into the record, which included testimony regarding the blood-alcohol levels of both Charles and Lisa. At the close of its case, Charles' estate renewed its request that testimony regarding the blood-alcohol levels be stricken from the record. The trial court granted the request and ordered the jury to disregard this evidence on the basis that it was not relevant, was highly prejudicial, and lacked foundation.

Lisa's estate then presented its case. The evidence offered included deposition testimony by a member of the Pennington County, South Dakota, sheriff's office and by Lisa's personal representative.

At the close of all the evidence, both parties moved for directed verdicts on liability, which motions were overruled. The trial court then submitted the issue of negligence to the jury, and the jury returned a verdict for Lisa's estate. Charles' estate subsequently moved for a judgment notwithstanding the verdict. Fifteen days later, Charles' estate filed South Dakota statutes with the trial court and requested that the court take judicial notice of these statutes. In refusing to take such notice, the trial court stated:

> For the first time ever in this case, following a full trial and an adverse jury verdict, the Plaintiff now raises the issue of negligence per se. The Plaintiff did not plead negligence per se, nor offer the relevant South Dakota statutes and jury instructions at trial, nor object on this basis to the jury instructions that were given at trial.

The trial court concluded that the attempt to inject this issue into the case came too late and overruled the motion for judgment notwithstanding the verdict.

Charles' estate appealed to the Court of Appeals, which affirmed. We granted the petition of Charles' estate for further review.

ASSIGNMENTS OF ERROR

Charles' estate assigns as error that the Court of Appeals erred in failing to hold (1) that it was entitled to judgment as a matter of law; (2) that the substantive law of South Dakota applied and, pursuant to such law, Lisa was negligent per se; and (3) that the trial court committed prejudicial error by the admission of certain evidence.

ANALYSIS

Charles' estate argues that the Court of Appeals erred in failing to hold that it was entitled to judgment as a matter of law. The Court of Appeals concluded that the question of Lisa's negligence was a question of fact for the jury.

When a motion for directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law. *McLain v. Ortmeier*, 259 Neb. 750, 612 N.W.2d 217 (2000). We therefore review the evidence to determine whether reasonable minds could differ as to whether Lisa was negligent and whether her negligence was the proximate cause of the accident.

There were no eyewitnesses to this accident. The evidence regarding the accident was testified to by two South Dakota state troopers who investigated the accident scene. Each of these troopers opined that Lisa was the driver of the vehicle. The opinion of the troopers was based upon the physical evidence at the scene. The main factor was the position of Charles' body in relation to the passenger's side of the vehicle. A portion of Charles' left leg was pinned in the passenger's side after the accident.

It was undisputed that the speed limit on this particular stretch of highway was 50 m.p.h. A curve sign recommending a speed of 45 m.p.h. stood 150 yards from the curve where the accident occurred. Both troopers were of the opinion that Lisa's vehicle

left the highway at a minimum of 65 m.p.h. Twite opined that skid marks located at the point where the vehicle left the highway were made by the driver attempting to brake the vehicle. Sprague stated that the striation of the black marks indicated that the tires were still rotating as the vehicle was sliding sideways. According to Sprague, if the brakes had been applied, a solid black mark would have been left rather than the striated type that Sprague observed. The vehicle struck a tree approximately 30 feet from the edge of the highway with such force that the vehicle was cut in half at the firewall. Lisa's body was found 49 feet from the wreckage. The impact severed part of Charles' left leg.

We conclude that reasonable minds could not differ and could draw but one conclusion—the cause of the accident was Lisa's failing to maintain a proper lookout, failing to maintain proper control of her vehicle, and driving at an excessive speed for the conditions then and there existing. The two-lane highway is an unlit, winding road in a mountainous and wooded area. Lisa may have applied the brakes as the vehicle left the highway, or the tires may have been rotating as the vehicle slid sideways to the point of impact. Neither scenario creates a favorable inference for Lisa.

[2] A directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence. See *McLain v. Ortmeier, supra.* Here, reasonable minds could draw but one conclusion—that Lisa, while driving at a minimum of 65 m.p.h., was unable to keep her vehicle on the highway as it approached a left curve with a recommended speed of 45 m.p.h. and that, as a result, the vehicle left the highway and struck a tree with such impact that the vehicle was torn in two and both occupants were killed. The party against whom a verdict is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence. See *McLain v. Ortmeier, supra.* There are no inferences deducible from the relevant evidence that would prevent a judgment of liability. The facts are such that reasonable minds could draw but one conclusion—Lisa was negligent, and her negligence was the proximate cause of the death of the parties. Therefore, the trial court erred in failing to sustain the motion for directed verdict by Charles' estate on the issue of liability, and the Court of Appeals erred in affirming the decision of the trial court.

Because we reverse the decision of the Court of Appeals and remand the cause for a new trial, we choose not to address the other errors assigned by Charles' estate. However, we do take note of a purported cross-appeal by Lisa's estate.

In its supplemental brief on petition for further review, Lisa's estate purported to raise a cross-appeal in which it assigned four errors alleged to have been committed by the trial court. Lisa's estate did not file a cross-appeal with the Court of Appeals and, therefore, did not assign such errors for review by the Court of Appeals.

[3] A petition for further review and supporting memorandum brief shall set forth specifically and in detail the errors alleged to have been made by the Court of Appeals. Neb. Ct. R. of Prac. 2F(3) (rev. 2000). The Nebraska Supreme Court will not consider errors which are not properly assigned in a petition for further review and discussed in the supporting memorandum brief. *Lackman v. Rousselle*, 257 Neb. 87, 596 N.W.2d 15 (1999). Thus, Lisa's estate cannot allege errors on the part of the trial court that were not raised on appeal or addressed by the Court of Appeals.

CONCLUSION

For the reasons set forth herein, we reverse the decision of the Court of Appeals, and we remand the cause to the Court of Appeals with directions to further remand the cause to the trial court for a new trial.

REVERSED AND REMANDED WITH DIRECTIONS.

PATRICIA A. MULINIX, APPELLANT, V. PAIGE J. ROBERTS, PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLES V. WEBER, DECEASED, APPELLEE.

626 N.W.2d 220

Filed May 18, 2001. No. S-99-1436.

1. **Demurrer: Pleadings: Appeal and Error.** In 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 the conclusions of the pleader.

2. **Statutes.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question 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.

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

Kile W. Johnson, of Johnson, Flodman, Guenzel & Widger, for appellant.

Stephanie F. Stacy, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

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

MCCORMACK, J.

NATURE OF CASE AND BACKGROUND

On August 8, 1997, appellant Patricia A. Mulinix filed this action against appellee Paige J. Roberts, personal representative of the estate of Charles V. Weber, deceased. On April 17, 1993, Mulinix was injured in a truck-car accident, in which Weber died. Roberts was appointed personal representative of Weber's estate in April 1997. On April 16, Mulinix filed a claim in Weber's estate proceedings seeking monetary damages for injuries suffered in the accident. Roberts denied the claim and mailed a notice of disallowance to Mulinix on June 9. On August 8, within 60 days of this notice, Mulinix filed her petition against Roberts. Roberts filed a demurrer, alleging that Mulinix's petition failed to state a cause of action because the applicable statute of limitations barred the action. The trial court sustained the demurrer and ordered a dismissal. We removed this case to our docket under our power to regulate the caseloads of this court and the Nebraska Court of Appeals.

The trial court based its order of dismissal on Neb. Rev. Stat. §§ 25-207 and 30-2486 (Reissue 1995). The trial court stated § 25-207 requires that actions grounded in tort must be commenced within 4 years of the occurrence of the event giving rise to the cause of action. In addition, the trial court's order stated

that § 30-2486 of the Nebraska Probate Code offers two options for presenting a claim:

> "(1) The claimant may file a written statement of the claim . . . with the clerk of the court. . . .
>
> "(2) The claimant may commence a proceeding against the personal representative in any court which has subject matter jurisdiction . . . **but the commencement of the proceeding must occur within the time limited for presenting the claim**."

The trial court determined the following:

> Though the language in [Neb. Rev. Stat.] § 30-2484 [(Reissue 1995)] states that ". . . For purposes of any statute of limitations, the proper presentation of a claim under section 30-2486 is equivalent to commencement of a proceeding on the claim", the language in § 30-2486, along with the comments cited by [Roberts] offers a more definite statement of the law. The Nebraska Probate Code offers two options for presenting a claim under § 30-2486: (1) the claimant may file a written statement of the claim with the clerk of court, or (2) the claimant may commence a proceeding against the personal representative in any court which has subject matter jurisdiction. Since these two options are separate in the statute, the filing of a claim against the estate does not equal the commencement of a proceeding. Additionally, § 30-2486(2) states that "the commencement of the proceeding must occur within the time limited for presenting the claim," specifically, the four year statute of limitations that began running on April 17, 1993 and expired on April 17, 1997. [Mulinix] did not commence a proceeding until August 8, 1997 and, therefore, did not come within the applicable statute of limitations.

ASSIGNMENT OF ERROR

Mulinix assigns that the trial court erred in sustaining Roberts' demurrer and dismissing Mulinix's action on the basis of the statutes of limitations, §§ 25-207 and 30-2486 and Neb. Rev. Stat. §§ 30-2484 and 30-2488 (Reissue 1995).

STANDARD OF REVIEW

[1-3] In 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 the conclusions of the pleader. *Tilt-Up Concrete v. Star City/Federal, ante* p. 64, 621 N.W.2d 502 (2001); *Freeman v. Hoffman-La Roche, Inc.*, 260 Neb. 552, 618 N.W.2d 827 (2000); *Wilkinson v. Methodist, Richard Young Hosp.*, 259 Neb. 745, 612 N.W.2d 213 (2000). If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *Vopalka v. Abraham*, 260 Neb. 737, 619 N.W.2d 594 (2000); *Big John's Billiards v. Balka*, 260 Neb. 702, 619 N.W.2d 444 (2000). Statutory interpretation presents a question 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. *Daniels v. Allstate Indemnity Co., ante* p. 671, 624 N.W.2d 636 (2001); *Brandon v. County of Richardson, ante* p. 636, 624 N.W.2d 604 (2001).

ANALYSIS

Mulinix argues that the filing of a claim with the estate is equivalent to commencement of a proceeding on the claim under § 30-2486(1). Mulinix supports this argument by citing § 30-2484 which states in part, "For purposes of any statute of limitations, the proper presentation of a claim under section 30-2486 is equivalent to commencement of a proceeding on the claim." Mulinix argues that the plain language of the relevant statutes, §§ 30-2484 and 30-2486, support her argument. Mulinix maintains that her filing of a claim against Weber's estate on April 16, 1997, is "equivalent to commencement of a proceeding on the claim." Mulinix concludes that she commenced a proceeding within the 4-year statute of limitations. Therefore, because her petition against Roberts was filed within 60 days of the notice of disallowance, as required by §§ 30-2486(3) and 30-2488(a), the trial court erred in sustaining Roberts' demurrer.

Roberts argues that Uniform Probate Code comments to § 30-2486 support her argument that Mulinix filed her action well beyond the 4-year statute of limitations.

The issue is whether presenting a claim by filing it against an estate commences a proceeding on that claim for the purpose of the running of the 4-year statute of limitations. The Nebraska Probate Code, specifically § 30-2484, states:

> Unless an estate is insolvent the personal representative, with the consent of all successors, may waive any defense of limitations available to the estate. If the defense is not waived, no claim which was barred by any statute of limitations at the time of the decedent's death shall be allowed or paid. The running of any statute of limitations measured from some other event than death and advertisement for claims against a decedent is suspended during the two months following the decedent's death but resumes thereafter as to claims not barred pursuant to the sections which follow. For purposes of any statute of limitations, the proper presentation of a claim under section 30-2486 is equivalent to commencement of a proceeding on the claim.

The pertinent part of § 30-2486 states, "Claims against a decedent's estate may be presented as follows: (1) The claimant may file a written statement of the claim, in the form prescribed by rule, with the clerk of the court."

Section 30-2484 states that "[f]or purposes of *any* statute of limitations, the proper presentation of a claim under section 30-2486 is equivalent to commencement of a proceeding on the claim." (Emphasis supplied.) If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *Vopalka v. Abraham*, 260 Neb. 737, 619 N.W.2d 594 (2000); *Big John's Billiards v. Balka*, 260 Neb. 702, 619 N.W.2d 444 (2000). This language is clear and unambiguous and therefore not open to statutory construction. As such, this court will not rely on the comment from § 30-2486 to interpret the meaning of § 30-2484. Filing a claim against the estate with the clerk of the court is equivalent to commencement of a proceeding on the claim.

Mulinix filed a claim in Weber's estate on April 16, 1997, under § 30-2486(1). This claim, which was properly presented

under § 30-2486(1), is equivalent to the commencement of a proceeding on this claim under § 30-2484. Therefore, Mulinix commenced a proceeding on her claim before the applicable 4-year statute of limitations under § 25-207 ran.

Roberts then denied the claim and mailed the notice of disallowance on June 9, 1997. Sections 30-2486(3) and 30-2488(a) allow the claimant to commence a proceeding against the personal representative after mailing of the notice of disallowance. Section 30-2486(3) states in pertinent part, "If a claim is presented under subsection (1), no proceeding thereon may be commenced more than sixty days after the personal representative has mailed a notice of disallowance . . . ." Section 30-2488(a) states in pertinent part:

> Every claim which is disallowed in whole or in part by the personal representative is barred so far as not allowed unless the claimant files a petition for allowance in the court or commences a proceeding against the personal representative not later than sixty days after the mailing of the notice of disallowance or partial allowance if the notice warns the claimant of the impending bar.

Mulinix, under authority of §§ 30-2486(3) and 30-2488(a) then, within 60 days, proceeded to file this action against Roberts on August 8, 1997. The trial court ruled that Mulinix commenced this proceeding on that date and therefore missed the 4-year statute of limitations. The trial court erred in determining that the filing of a claim against Weber's estate by Mulinix on April 16, 1997, was not the commencement of a proceeding on this claim.

By filing a claim with the clerk of the court against Weber's estate on April 16, 1997, Mulinix actually did commence a proceeding 1 day before the 4-year statute of limitations ran. Then under the authority of §§ 30-2486(3) and 30-2488(a), Mulinix had 60 days after Roberts mailed notice of disallowance to commence a proceeding against the personal representative. Mulinix's petition dated August 8, 1997, was within 60 days of the notice of disallowance.

CONCLUSION

Having determined that Mulinix commenced a proceeding within the 4-year statute of limitations, we hold that the trial court

erred in sustaining Roberts' demurrer and erred in dismissing the case. Therefore, the ruling of the trial court is reversed.

REVERSED.

JOYCE M. BENITEZ, APPELLANT, V. JESSIE K. RASMUSSEN, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE STATE OF NEBRASKA, DEPARTMENT OF HEALTH AND HUMAN SERVICES, REGULATION AND LICENSURE, ET AL., APPELLEES.

626 N.W.2d 209

Filed May 18, 2001. No. S-00-079.

1. **Administrative Law: Final Orders: Appeal and Error.** A judgment or 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.
2. **Administrative Law: Judgments: Appeal and Error.** 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.
3. ___: ___: ___. An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.
4. **Judgments: Appeal and Error.** To the extent that dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion regardless of the decision below.
5. **Statutes: Appeal and Error.** Statutory interpretation presents a question 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.
6. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
7. **Administrative Law: Minors: Negligence: Proof.** The Department of Health and Human Services Regulation and Licensure must prove the accuracy and consistency of a central registry report of child abuse or neglect by a preponderance of the evidence in a hearing to expunge, amend, or remove a report under Neb. Rev. Stat. § 28-723 (Reissue 1995).
8. **Administrative Law: Minors: Negligence: Convictions: Proof.** The Department of Health and Human Services Regulation and Licensure has met its burden of demonstrating that a central registry report of substantiated child abuse or neglect is accurate when there is evidence of a conviction stemming from the same actions which are the subject of the report.

9. **Administrative Law: Words and Phrases.** A decision is arbitrary when it fails to consider facts or circumstances and when there is no basis for a reasonable person to reach the same conclusion.
10. **Administrative Law: Evidence: Presumptions: Appeal and Error.** Unless there is affirmative evidence to the contrary, a reviewing court will presume that an agency has duly considered all the evidence before it.
11. **Administrative Law: Minors: Negligence.** Under Neb. Rev. Stat. § 28-721 (Reissue 1995), the Department of Health and Human Services Regulation and Licensure has broad discretion to grant or deny a request for expunction of a record.
12. ___: ___: ___. When a person who is the subject of a central registry report has been convicted of intentional or negligent child abuse, the Department of Health and Human Services Regulation and Licensure has valid justification for refusing to expunge a record except in rare instances.
13. **Administrative Law: Minors: Negligence: Licenses and Permits.** Neb. Rev. Stat. § 71-1911(9) (Cum. Supp. 2000) directs that the Department of Health and Human Services Regulation and Licensure shall deny or revoke a child-care license "if an applicant or licensee has been found guilty of a crime involving the neglect, physical abuse, or sexual abuse of a child or an adult."
14. **Due Process: Notice.** Procedural due process limits the ability of the government to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard.
15. **Constitutional Law: Due Process.** When an individual claims he or she is being deprived of a liberty interest without due process, the claim is examined in three stages. First, a determination must be made that there is a liberty interest at stake. In the second stage, the court must determine what procedural safeguards are required. Finally, the facts of the case are examined to ascertain whether there was a denial of that process which was due.
16. **Constitutional Law.** An injury to reputation alone is not enough to create a liberty interest apart from some more tangible interests such as employment.
17. **Constitutional Law: Property: Claims.** In order to have a protected property interest, one must have a legitimate claim of entitlement.
18. **Constitutional Law: Due Process: Property.** Property interests for purposes of procedural due process are created, and their dimensions are defined, by existing rules or understandings that stem from an independent source such as state law.
19. **Minors: Negligence: Convictions: Licenses and Permits.** A plaintiff who has been convicted of neglect, physical abuse, or sexual abuse of a child or an adult does not have a legitimate claim of entitlement to a licensed child-care business.
20. **Equal Protection: Proof.** The initial inquiry in an equal protection analysis focuses on whether the challenger is similarly situated to another group for purposes of the challenged governmental action. Absent this threshold showing, one lacks a viable equal protection claim.
21. ___: ___. Persons who are the subjects of inconclusive reports differ from persons who are the subjects of court-substantiated reports for purposes of equal protection analysis.

22. ___: ___. The application of good cause criteria on an unequal basis to persons who are the subjects of inconclusive reports does not violate the equal protection rights of a person who is the subject of a court-substantiated report.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Brent M. Kuhn, of Harris, Feldman Law Offices, for appellant.

Don Stenberg, Attorney General, and Royce N. Harper for appellees.

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

CONNOLLY, J.

The appellant, Joyce M. Benitez, a child-care provider, was convicted of negligent child abuse. After conviction, the Department of Health and Human Services Regulation and Licensure (Department) placed her name in the Abused or Neglected Child Registry (Registry). Benitez then requested that her name be expunged from the Registry. The request was denied. The denial was upheld by the director of the Department in a hearing under Neb. Rev. Stat. § 28-723 (Reissue 1995). Benitez then filed a petition for review in the district court, which affirmed the Department's decision to deny expunction.

Benitez appeals, contending that the district court erred in various respects. We hold that the order denying expunction was supported by competent evidence and was not arbitrary or capricious and that Benitez was not denied due process or equal protection. Accordingly, we affirm.

I. ASSIGNMENTS OF ERROR

Benitez assigns, restated, that the district court erred in affirming the Department's finding and order because (1) the order was arbitrary and capricious and not supported by competent evidence and (2) the agency failed to follow and/or properly establish its own rules and regulations and violated Benitez' rights to equal protection and due process.

II. BACKGROUND

Before proceeding, it might be helpful to give some background information on the Registry. The Registry is a centralized database of child maltreatment reports that the Department maintains pursuant to Neb. Rev. Stat. § 28-718 (Reissue 1995). The reports identify the perpetrator as well as the child who was harmed. By statute, the Department is required to enter all reports of suspected abuse or neglect into the Registry. See Neb. Rev. Stat. §§ 28-713(1) and (4) and 28-715 (Reissue 1995). Once an investigation is completed, the Department must make a case status determination based on one of the following classifications: "(1) Court substantiated; (2) petition to be filed; (3) investigation inconclusive; or (4) unfounded report . . . ." Neb. Rev. Stat. § 28-720 (Reissue 1995).

A court-substantiated status determination is defined as a "finding of child maltreatment [that] has been validated by a court of competent jurisdiction." 390 Neb. Admin. Code, ch. 4, § 008.01 (1998). Once a status determination is made, the Department must give the person who is the subject of the report notice of its determination. See Neb. Rev. Stat. § 28-713.01 (Cum. Supp. 2000). Section 28-720 requires that the information identifying only persons in unfounded reports is to be expunged from the record.

A person may request that the Department "amend, expunge identifying information from, or remove the record of the report from the register." § 28-723. If the Department refuses to do so, the person is entitled to a fair hearing within the department. *Id.* The inquiry in such a hearing, however, is limited to determining whether the record is accurate and maintained in a manner consistent with Neb. Rev. Stat. §§ 28-710 (Cum. Supp. 2000) and 28-711 (Reissue 1995); §§ 28-713, 28-715, and 28-718; and Neb. Rev. Stat. §§ 28-719 to 28-727 (Reissue 1995 & Cum. Supp. 2000). See § 28-723. The burden of showing the report's accuracy and consistency with these statutes is on the Department. *Id.* With this background, we turn to the facts.

On November 8, 1995, a child was injured while in the childcare home of Benitez. Benitez was charged with felony child abuse, and on April 19, 1996, a jury found her guilty of negligent child abuse, a misdemeanor. She was placed on probation

for 2 years and ordered not to provide or engage in child care in any form during her probation. The Department subsequently placed her name in the Registry. The investigative status finding was court-substantiated abuse.

On June 24, 1998, Benitez requested that her name be expunged from the Registry. That request was denied by Suzanne Schied, a child welfare program specialist with the Department. Benitez then requested a hearing with the Department. At the hearing, Schied was the sole witness. She testified that under § 28-721, the Department applies a different criteria for determining if good cause for expunction exists in cases classified as inconclusive and cases classified as court substantiated.

For cases classified as inconclusive, she stated that the criteria for determining if there was good cause for expunction included: "the seriousness of the incident, the length of time since the incident had occurred, whether or not the person accepted responsibility, whether there's been any type of action taken to correct the problem, the recommendation of the worker that was involved and their supervisor, possibly." She stated that she did not apply this criteria to Benitez' case because she based her decision to deny Benitez' expunction request solely on the fact that Benitez' conviction of negligent child abuse supported the entry on the Registry of court-substantiated abuse.

Schied stated that good cause for expunction criteria was rarely applied to court-substantiated cases and that a period of approximately 5 years would have to pass before she would consider the criteria in a court-substantiated case. She also stated that she did not investigate the accuracy of any of the information entered into the Registry and that she did not find any extenuating circumstances in Benitez' case which would constitute good cause for expunction.

After the hearing, the director of the Department affirmed the denial of expunction, finding that the Registry report was accurate and that there were no mitigating circumstances or good cause to remove Benitez' name. Benitez sought judicial review in the district court. The district court found that Benitez had been allowed an opportunity to present mitigating circumstances at the hearing and affirmed the Department's decision denying expunction.

III. STANDARD OF REVIEW

[1-3] A judgment or 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. *Gottsch Feeding Corp. v. State, ante* p. 19, 621 N.W.2d 109 (2001). 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. *Id.* An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Id.*

[4] However, to the extent that dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion regardless of the decision of the court below. *Shearer v. Leuenberger*, 256 Neb. 566, 591 N.W.2d 762 (1999).

[5] Statutory interpretation presents a question 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. *In re Estate of Dickie, ante* p. 533, 623 N.W.2d 666 (2001); *Glantz v. Hopkins, ante* p. 495, 624 N.W.2d 9 (2001).

[6] Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Gottsch Feeding Corp. v. State, supra.*

IV. ANALYSIS

Benitez contends that the Department's order was not supported by competent evidence and violated her rights to equal protection and due process because the order was arbitrary and capricious and that the Department failed to follow and/or properly establish its own rules and regulations.

1. Accuracy of Report

Benitez does not contest her placement in the Registry or the court-substantiated status determination. Nonetheless, she

argues that the Department's denial of her request for expunction was not supported by competent evidence. This was, Benitez argues, because Schied testified at the hearing that she did not personally investigate the circumstances concerning the incident of abuse and that she relied solely upon Benitez' conviction of negligent child abuse to deny expunction of the Registry report.

The Legislature has not specified what the legal standard is for the Department's burden of proof in a hearing to expunge, amend, or remove a report under § 28-723. Other jurisdictions have concluded that state agencies must show that a report is substantiated by a preponderance of the evidence. See, e.g., *Lee TT. v. Dowling*, 87 N.Y.2d 699, 664 N.E.2d 1243, 642 N.Y.S.2d 181 (1996); *Cavarretta v. DCFS*, 277 Ill. App. 3d 16, 660 N.E.2d 250, 214 Ill. Dec. 59 (1996).

[7] Moreover, § 28-723 specifies that "[a] juvenile court finding of child abuse or child neglect shall be presumptive evidence that the report was not unfounded." The State's burden of proof in a juvenile hearing to establish child abuse or child neglect is a preponderance of the evidence. See Neb. Rev. Stat. § 43-279.01(3) (Reissue 1998). We conclude that the Department must prove the accuracy and consistency of a Registry report of child abuse or neglect by a preponderance of the evidence in a hearing to expunge, amend, or remove a report under § 28-723.

[8] Benitez was convicted of negligent child abuse by a jury. In a criminal case, due process requires the prosecution to prove, beyond a reasonable doubt, every factual element necessary to constitute the crime charged. See, e.g., *State v. Parks*, 253 Neb. 939, 573 N.W.2d 453 (1998). If a juvenile court's finding, by a preponderance of the evidence, that child maltreatment has occurred is presumptive evidence that a report is not unfounded, then certainly a criminal conviction of maltreatment is conclusive evidence that a Registry report is substantiated. See, e.g., *State ex rel. NSBA v. Brown*, 251 Neb. 815, 560 N.W.2d 123 (1997). The Department has met its burden of demonstrating that a Registry report of substantiated child abuse or neglect is accurate when there is evidence of a conviction stemming from the same actions which are the subject of the report.

2. GOOD CAUSE SHOWN

Section 28-721 permits the Department to amend, expunge, or remove from the Registry any record upon good cause shown. Benitez argues that the Department's discretion under § 28-721 was exercised in a manner that was arbitrary and capricious and that it violated her substantive and procedural due process rights and equal protection rights under both the federal and the state Constitutions.

(a) Arbitrary and Capricious

Benitez contends that the Department's denial of her request for expunction was arbitrary and capricious because it was based upon subjective and vacillating standards and a lack of information. At the hearing, Schied stated that the good cause criteria was applied to very few court-substantiated cases. She added that a period of approximately 5 years would have to pass before she would consider the criteria in such a case.

[9] A decision is arbitrary when it fails to consider the facts or circumstances and when there is no basis for a reasonable person to reach the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb. 810, 606 N.W.2d 736 (2000); *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb. 390, 603 N.W.2d 447 (1999).

[10] There is no merit to Benitez' contention that the Department failed to consider mitigating facts such as the early completion of her probation or the modification of her probation to allow her to provide nanny services to one family in Nebraska. Unless there is affirmative evidence to the contrary, a reviewing court will presume that an agency has duly considered all the evidence before it. *White v. State*, 248 Neb. 977, 540 N.W.2d 354 (1995), citing *Central Platte NRD v. State of Wyoming*, 245 Neb. 439, 513 N.W.2d 847 (1994). The district court correctly determined that the Department considered all the evidence presented at the hearing.

[11] Concerning the denial as being arbitrary and capricious, the Department has broad discretion to grant or deny a request for expunction: "At any time, the department *may* amend, expunge, or remove from the central register any record upon good cause shown and upon notice to the subjects of the report and the division." § 28-721. See, also, *In re Interest of Amber G.*

et al., 250 Neb. 973, 554 N.W.2d 142 (1996) (concluding that legislative use of "may" in Neb. Rev. Stat. § 43-247 (Reissue 1998) authorizes juvenile court to exercise broad discretion in its disposition of children).

[12,13] When a person who is the subject of a Registry report has been convicted of intentional or negligent child abuse, the Department has valid justification for refusing to expunge a record except in rare instances. Neb. Rev. Stat. § 71-1911(9) (Cum. Supp. 2000) directs that the Department shall deny or revoke a child-care license "if an applicant or licensee has been found guilty of a crime involving the neglect, physical abuse, or sexual abuse of a child or an adult." Because Benitez had operated a child-care business at the time of this incident, the Department had particular incentive to ensure that its actions were in compliance with § 71-1911(9). The district court was correct in its determination that the Department's order of denial was not arbitrary or capricious.

(b) Due Process Claims

Although Benitez contends that the Department's decision violated her substantive and procedural due process rights, she does not assert any substantive due process claims. Rather, her arguments are centered around her procedural due process.

[14] Procedural due process limits the ability of the government to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard. *In re Interest of Natasha H. & Sierra H.*, 258 Neb. 131, 602 N.W.2d 439 (1999).

Benitez does not state the protected interest of which she was deprived in her petition for review with the district court. In her brief, however, she states that "the criteria utilized by Ms. Schied in conclusive versus inconclusive cases and the arbitrary period of five (5) years when evaluating the cases for expungement involve private rights of privacy, and it affects the property interest in having a licensed daycare business." Brief for appellant at 12. We construe her argument to be that the Department deprived her of a liberty interest in privacy and a property

interest in her child-care business by failing to consider a complete record, failing to follow its own regulations by adopting de facto rules and regulations, and failing to consider extenuating or mitigating circumstances for good cause shown.

(i) Protected Liberty Interest

[15] When an individual claims he or she is being deprived of a liberty interest without due process, the claim is examined in three stages. First, a determination must be made that there is a liberty interest at stake. In the second stage, the court must determine what procedural safeguards are required. Finally, the facts of the case are examined to ascertain whether there was a denial of that process which was due. *State v. Baker*, 245 Neb. 153, 511 N.W.2d 757 (1994).

[16] In *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976), the Supreme Court set out what has come to be known as the "stigma plus" test. See *Valmonte v. Bane*, 18 F.3d 992 (2d Cir. 1994). In *Paul*, the Court held that an injury to reputation alone is not enough to create a liberty interest "apart from some more tangible interests such as employment." 424 U.S. at 701.

Other jurisdictions have found that the inclusion of a person's name in state child abuse registries results in an injury to reputation rising to the level of stigma even when the dissemination of that information is limited. See *Matter of East Park High School*, 314 N.J. Super. 149, 714 A.2d 339 (1998) (concluding that injury to teacher's good reputation resulted in stigma when private child-care agencies could obtain licensure only through clearance with central registry even though agencies did not have access to reports). See, *Watso v. Dept. of Social Services*, 841 P.2d 299 (Colo. 1992); *Cavarretta v. DCFS*, 277 Ill. App. 3d 16, 660 N.E.2d 250, 214 Ill. Dec. 59 (1996); *Doyle v. Camelot Care Centers, Inc.*, No. 00 C 2450, 2001 WL 315206 (N.D. Ill. Mar. 30, 2001).

When that stigma is coupled with the claimant's allegation that his or her inclusion in a central registry has placed a "tangible burden on . . . employment prospects," see *Valmonte v. Bane*, 18 F.3d at 1001, courts have found that the claimant has stated a cognizable legal claim for a procedural due process violation.

Likewise, when familial relations are eroded by an individual's inclusion in the registry, courts have found the "plus" requirement satisfied. See, e.g., *Bohn v. County of Dakota*, 772 F.2d 1433 (8th Cir. 1985); *Watso v. Dept. of Social Services, supra.*

Unlike those cases, however, no familial rights have been implicated in this case. Furthermore, Benitez does not contend that she has been denied employment opportunities because of the inclusion of her name in the registry. Rather, the tangible interest that Benitez contends she has lost as a result of being placed on the registry is her property interest in having a licensed child-care business. This requires an analysis to determine whether she has asserted a valid protected property interest.

(ii) Protected Property Interest

[17] In order to have a protected property interest, one must have a legitimate claim of entitlement. *Prime Realty Dev. v. City of Omaha*, 258 Neb. 72, 602 N.W.2d 13 (1999), citing *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).

[18] Property interests for purposes of procedural due process are created, and their dimensions are defined, by existing rules or understandings that stem from an independent source such as state law. *Id.*

[19] Benitez, who has been convicted of negligent child abuse, does not have a legitimate claim of entitlement to a licensed child-care business. The Department is responsible for regulating the licensing of child-care facilities. See Neb. Rev. Stat. § 71-1912 (Cum. Supp. 2000) ("the department shall adopt and promulgate rules and regulations establishing standards for the physical well-being, safety, and protection of children pursuant to the licensing of providers"). The Legislature has specifically made the renewal of licenses subject to the Department's rules and regulations. See § 71-1911(8). Under those regulations, the Department's staff is required to check the background of any applicant against the Registry and may deny or revoke a license for any applicant listed in the Registry as a perpetrator. See 391 Neb. Admin. Code, ch. 3, § 001.04 (1998).

More crucial to Benitez' claim of entitlement, however, is the fact that she would have been denied a renewal of her license

even if her name had not been included in the registry. As noted, the Department is required by statute to deny or revoke a license "if an applicant or licensee has been found guilty of a crime involving the neglect, physical abuse, or sexual abuse of a child or an adult." See § 71-1911(9). Therefore, the primary reason for denying her licensure was her conviction, not the Registry report.

We hold that under Nebraska law, Benitez does not have a legitimate claim of entitlement to a licensed child-care business and has failed to state a valid protected property interest for purposes of procedural due process. Because this is the only tangible interest she has asserted that would satisfy the stigma plus test set out in *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976), she does not have a protected liberty interest as well. We conclude that her due process claim must fail.

(c) Equal Protection

Benitez argues that the decision violated her equal protection rights because the Department's good cause criteria was applied to inconclusive reports but rarely to cases involving court-substantiated reports, and never before a period of approximately 5 years had passed.

[20] The initial inquiry in an equal protection analysis focuses on whether the challenger is similarly situated to another group for purposes of the challenged governmental action. *State v. Atkins*, 250 Neb. 315, 549 N.W.2d 159 (1996). Absent this threshold showing, one lacks a viable equal protection claim. *Gramercy Hill Enters. v. State*, 255 Neb. 717, 587 N.W.2d 378 (1998).

The challenged governmental action in this case is the department's unequal consideration of extenuating circumstances constituting good cause. The relevant inquiry is whether persons who are the subjects of court-substantiated reports are similarly situated to those who are the subjects of reports not substantiated by a court finding.

Both the subjects of court-substantiated reports and the subjects of inconclusive reports have been accused of child maltreatment. Every report of suspected abuse or neglect is filed in the Registry if there is some credible evidence of maltreatment, even if an investigation later casts some doubt on the accuracy

of the report. Only unfounded reports are expunged. Obviously, however, there are real differences between the classifications of inconclusive and court-substantiated reports.

In a court-substantiated report, the evidence is strong enough to convict the accused of abuse or neglect beyond a reasonable doubt or to allow a juvenile court to find by a preponderance of the evidence that the maltreatment had occurred. In contrast, inconclusive reports are only based upon some credible evidence, meaning they are more likely to be inaccurate. See, e.g., *Cavarretta v. DCFS*, 277 Ill. App. 3d 16, 660 N.E.2d 250, 214 Ill. Dec. 59 (1996). Therefore, when no further incidents have occurred after a period of time, applying the good cause criteria to inconclusive reports could indicate that there is valid reason to expunge, amend, or remove the record from the Registry.

[21,22] Thus, persons who are the subjects of inconclusive reports differ from persons who are the subjects of court-substantiated reports. For this reason, we conclude that the application of good cause criteria on an unequal basis to persons who are the subjects of inconclusive reports does not violate Benitez' equal protection rights.

V. CONCLUSION

We conclude the district court correctly affirmed the Department's order refusing to remove Benitez' name from the Registry.

AFFIRMED.

DOROTHY CLAYPOOL, PERSONAL REPRESENTATIVE OF THE ESTATE OF CARLOS OLIVO, DECEASED, APPELLANT, V. TERRY HIBBERD ET AL., APPELLEES.

626 N.W.2d 539

Filed May 25, 2001. No. S-99-1223.

1. **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.

2. **Judgments: Appeal and Error.** When an appellate court is deciding questions of law, the court has an obligation to resolve the questions independently of the conclusions reached by the trial court.
3. **Political Subdivisions Tort Claims Act: Negligence.** A negligence action brought under the Political Subdivisions Tort Claims Act has the same elements as a negligence action against an individual, i.e., duty, breach of duty, causation, and damages.
4. **Negligence.** The threshold inquiry in any negligence action is whether the defendant owed the plaintiff a duty.
5. ___. Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
6. **Statutes: Legislature: Intent: Torts: Liability.** A court may determine that a statute gives rise to a tort duty to act in the manner required by the statute where the statute is enacted to protect a class of persons which includes the plaintiff, the statute is intended to prevent the particular injury that has been suffered, and the statute is intended by the Legislature to create a private liability as distinguished from one of a public character.
7. **Statutes: Legislature: Intent: Torts.** Consideration of the Legislature's purpose in enacting a statute is central to the analysis of whether the statute defines a duty in tort.
8. **Due Process: Parent and Child: Notice.** The Due Process Clause of the U.S. Constitution requires that a juvenile's parents be notified prior to proceedings that may result in the curtailment of the juvenile's freedom.
9. ___: ___: ___. Parental notification statutes, generally, are intended to furnish an additional safeguard to ensure that a juvenile's basic right to due process, as set forth in *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), is not violated.
10. **Courts: Statutes: Legislature: Torts: Actions.** Principles of judicial restraint preclude us from creating a new statutory cause of action that does not exist at common law where the Legislature has not either by the statute's express terms or by implication provided for civil tort liability.
11. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.
12. **Constitutional Law: Actions.** In order to state a cause of action under 42 U.S.C. § 1983 (Supp. IV 1998), a plaintiff must allege facts establishing conduct by a person acting under color of state law which deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States.
13. **Negligence: Liability: Public Officers and Employees.** A local government cannot be held liable under 42 U.S.C. § 1983 (Supp. IV 1998) solely because of injury inflicted by its employees or agents; rather, it can be liable only when the execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury.

Appeal from the District Court for Furnas County: JOHN J. BATTERSHELL, Judge. Affirmed.

Larry W. Beucke, of Parker, Grossart, Bahensky & Beucke, for appellant.

William T. Wright, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellees.

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

MCCORMACK, J.

NATURE OF CASE

Appellant, Dorothy Claypool, as personal representative of the estate of her son, Carlos Olivo, seeks damages for the wrongful death of Carlos against appellees Furnas County, Nebraska, and two of its law enforcement officers, Deputies Terry Hibberd and William Hoyt. Claypool seeks damages for Carlos' death under the Political Subdivisions Tort Claims Act and for damages for an alleged violation of Carlos' federal rights under 42 U.S.C. § 1983 (Supp. IV 1998). Appellees moved for summary judgment. The trial court found that the facts established by the evidence did not give rise to any cause of action against appellees and that appellees were entitled to judgment as a matter of law. This court removed this case from the Nebraska Court of Appeals under our power to regulate the caseloads of this court and the Court of Appeals.

BACKGROUND

On the weekend of November 21 through 23, 1997, Claypool was going out of town to visit her husband who was working in Salina, Kansas. Claypool had three children: Melissa Olivo, age 13; Carlos, age 14; and Jesse Olivo, age 15, all of whom lived with their parents in Arapahoe, Nebraska. Claypool did not permit any of the three children to stay at home alone, but as long as two of the children were at home together, they could stay at home without an adult present. Claypool also left the children information on where she was staying, the telephone number to the motel, the telephone number to her cellular telephone, and various other contact and emergency telephone numbers.

Jesse already had plans to stay with a friend for the weekend. On Saturday, Carlos and Melissa called Claypool and asked her if they could each spend the night at a friend's house. Claypool gave permission for them to spend the night at their friends'

houses. After Carlos had obtained this permission, his friend was not able to have Carlos spend the night on Saturday night.

On Sunday, November 23, 1997, Hoyt, who was employed by the Furnas County Sheriff's Department, was on patrol in Arapahoe. At about 1:20 a.m., Hoyt observed two persons walk into an alley from between two buildings. When these two people saw Hoyt, one of them ran, and the other hid behind a tree. Hoyt told the person behind the tree to come out, and he was identified as Carlos.

Carlos told Hoyt he had taken some stereo equipment from a car. Carlos said the equipment that he had taken actually belonged to him. Carlos had given J.R. Utterback two speakers with the assumption that he was going to get paid by Utterback. Hoyt radioed for assistance, and Hibberd responded. After some investigation, members of the Utterback family identified the stereo equipment taken from the car. Utterback said that if Carlos would have asked for the speakers, he would have given them back. Thereafter, Hibberd, Hoyt, and Carlos went to Arapahoe's fire station where the sheriff's department had a satellite office. The deputies held Carlos under "temporary custody" and obtained a written statement from Carlos. They also inquired as to where they could find Carlos' companion who had fled. While at the fire station, Hibberd called Sheriff Hank Pulley and advised him of what had occurred. Pulley told Hibberd to cite Carlos for theft and release him. Pulley believed it to be a relatively minor crime.

Carlos told Hoyt that his companion, David Wendland, may have gone back to Carlos' house. Hoyt asked Carlos where his parents were, and Carlos said that his parents were out of state. Hoyt then asked Carlos if he had a telephone number or a way to contact his parents. Carlos responded that he did not, but that his parents were going to call him the next day. Hoyt and Hibberd took Carlos home to determine if Wendland might be there and to verify that Carlos' parents were not home. Neither Carlos' parents nor Wendland was at Carlos' home.

At this point, the deputies gave Carlos a citation, explained that his parents would have to appear on the designated court date, and then left Carlos at the residence. Both Hibberd, who has lived in rural Nebraska for 34 years, and Hoyt, who has lived

in western rural Nebraska his entire life, did not find it unusual or unreasonable in 1997 for the parents of a 14-year-old boy to leave the boy at home overnight without supervision.

Hoyt noted in his police report that Carlos "appeared slightly depressed with the situation." Both Hoyt and Hibberd stated in their affidavits that Carlos' slight depression was comparable to a person who had just received a traffic violation or a minor violation and had to inform his or her parents about the violation. The deputies stated that at all times Carlos was in their presence, he made no statement and demonstrated no action or demeanor which in any way indicated he was a danger to himself or others. Neither Claypool nor her husband was contacted by the Furnas County Sheriff's Department regarding Carlos, and they did not have any notice of these events until after Carlos' death.

Later in the morning on Sunday, November 23, 1997, an explosion and fire occurred at the Claypool residence where Carlos was living. After an investigation at the scene, it was determined that Carlos had died as the result of a self-inflicted gunshot wound to the chest. The State Fire Marshal investigator concluded: (1) Carlos was playing with a propane lantern in the garage and possibly was unable to get it lit at first; (2) Carlos left the valve open, allowing propane to escape, which eventually ignited and caused a flash which singed his face; (3) the gasoline vapors from a tipped-over can of gasoline ignited, causing other combustibles to ignite in the garage, or Carlos may have dropped the lantern or a candle which was burning, igniting the gasoline vapors; and (4) Carlos then went into the house, closing the garage door behind him, which allowed the fire to continue to build until the heat impinged upon the lantern tank, causing a large explosion of the compressed propane.

Carlos' body was found inside the house in the basement. Pulley concluded that all investigators involved in the case agreed that the gunshot wound was self-inflicted.

ASSIGNMENTS OF ERROR

Claypool assigns that the trial court erred in finding (1) that there were no genuine issues of material fact as to whether appellees were liable for Claypool's damages under the Political Subdivisions Tort Claims Act and (2) that there were no genuine

issues of material fact as to whether appellees were liable for Claypool's damages under § 1983.

STANDARD OF REVIEW

[1] 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. *Casey v. Levine, ante* p. 1, 621 N.W.2d 482 (2001); *McDonald v. DeCamp Legal Servs.*, 260 Neb. 729, 619 N.W.2d 583 (2000).

[2] When an appellate court is deciding questions of law, the court has an obligation to resolve the questions independently of the conclusions reached by the trial court. *Ruble v. Reich*, 259 Neb. 658, 611 N.W.2d 844 (2000).

ANALYSIS

Claypool argues that the deputies were under a duty to immediately contact Carlos' parents and to release Carlos to his parents. Claypool asserts that this duty was created by Neb. Rev. Stat. § 43-250 (Cum. Supp. 1997) and the Furnas County Sheriff's Department's policy and procedure manual. Appellees contend that as a matter of law, the most appropriate option Hoyt and Hibberd had was the immediate release of Carlos under § 43-250(1) and (2) after conducting such "'reasonable efforts'" to contact Carlos' parents as circumstances allowed. Brief for appellees at 23. The deputies were thus required to balance what constituted "'reasonable efforts to contact'" under the circumstances against the mandate of "'immediate release.'" *Id.* Appellees assert that under the circumstances of this case, the extended custody of Carlos solely to contact his parents before he was released was not authorized by law.

[3-5] A negligence action brought under the Political Subdivisions Tort Claims Act has the same elements as a negligence action against an individual, i.e., duty, breach of duty, causation, and damages. *Drake v. Drake*, 260 Neb. 530, 618 N.W.2d 650 (2000); *Brandon v. County of Richardson*, 252 Neb. 839, 566 N.W.2d 776 (1997). The threshold inquiry in any negligence action is whether the defendant owed the plaintiff a duty. *Drake v. Drake, supra.* Whether a legal duty exists for actionable

negligence is a question of law dependent on the facts in a particular situation. *Id.*

Claypool assigns as error the trial court's finding that there was no genuine issue of material fact under her first cause of action. The first cause of action in the second amended petition alleged that appellees were negligent in failing to follow the requirements of § 43-250, in releasing Carlos from their custody without making efforts to contact his parents, and in releasing Carlos from their custody without an adult present.

The pertinent part of § 43-250, entitled "Temporary custody; disposition," states in part:

> An officer who takes a juvenile into temporary custody under section 43-248 shall immediately take reasonable measures to notify the juvenile's parent, guardian, custodian, or relative and shall proceed as follows:
>
> (1) The officer shall release such juvenile;
>
> (2) The officer shall prepare in triplicate a written notice requiring the juvenile to appear before the juvenile court or probation officer of the county in which such juvenile was taken into custody at a time and place specified in the notice or at the call of the court. The notice shall also contain a concise statement of the reasons such juvenile was taken into custody. The officer shall deliver one copy of the notice to such juvenile and require such juvenile or his or her parent, guardian, other custodian, or relative, or both, to sign a written promise that such signer will appear at the time and place designated in the notice. Upon the execution of the promise to appear, the officer shall immediately release such juvenile.

Neb. Rev. Stat. § 43-248 (Reissue 1998) provides:

> A juvenile may be taken into temporary custody by any peace officer without a warrant or order of the court when:
>
> (1) A juvenile has violated a state law or municipal ordinance in the presence of the officer;
>
> . . . .
>
> (3) A juvenile is seriously endangered in his or her surroundings and immediate removal appears to be necessary for the juvenile's protection;

> (4) The officer believes the juvenile to be mentally ill and dangerous as defined in section 83-1009 and that the harm described in that section is likely to occur before proceedings may be instituted before the juvenile court[.]

Claypool's argument that appellees had a duty to contact Carlos' parents and release Carlos to his parents is premised entirely on § 43-250, the Furnas County Sheriff's Department's policy and procedure manual, and a "special relationship" pursuant to this court's decision in *Brandon v. County of Richardson*, 252 Neb. 839, 566 N.W.2d 776 (1997). In other words, Claypool does not argue that appellees are liable at common law, pursuant to the risk-utility balancing test this court has employed to determine the existence of a duty. See, *Knoll v. Board of Regents*, 258 Neb. 1, 601 N.W.2d 757 (1999); *Popple v. Rose*, 254 Neb. 1, 573 N.W.2d 765 (1998). We consider, in turn, each of Claypool's asserted bases for the creation of the alleged duty.

We note that because of our resolution of these issues, we do not reach the question of whether Carlos' apparent suicide was a new and independent agency that broke the line of causation between his death and any negligence on the part of appellees. See *Long v. Omaha & C. B. Street R. Co.*, 108 Neb. 342, 187 N.W. 930 (1922) (holding that action for wrongful death may generally not be maintained where death was self-inflicted). See, generally, *Logarta v. Gustafson*, 998 F. Supp. 998 (E.D. Wis. 1998) (discussing history and scope of rule against tort liability for suicide).

§ 43-250

[6] Claypool first argues that the parental notification provision of § 43-250 gave rise to a duty on the part of appellees to notify Carlos' parents that Carlos had been detained. A court may determine that a statute gives rise to a tort duty to act in the manner required by the statute where the statute is enacted to protect a class of persons which includes the plaintiff, the statute is intended to prevent the particular injury that has been suffered, and the statute is intended by the Legislature to create a private liability as distinguished from one of a public character. See, generally, Restatement (Second) of Torts §§ 286 to 288 (1965); 57A Am. Jur. 2d *Negligence* § 765 (1989); W. Page Keeton et al.,

Prosser and Keeton on the Law of Torts § 36 (5th ed. 1984). See, also, *Fimple v. Archer Ballroom Co.*, 150 Neb. 681, 35 N.W.2d 680 (1949) (adopting Restatement, *supra*, view).

[7] Consideration of the Legislature's purpose in enacting a statute is central to the analysis of whether the statute defines a duty in tort. See, e.g., *Holmes v. Circo*, 196 Neb. 496, 244 N.W.2d 65 (1976) (Legislature did not intend dram shop act to create private cause of action); *Strauel v. Peterson*, 155 Neb. 448, 52 N.W.2d 307 (1952) (violation of act relating to livestock disease not intended by Legislature to create civil liability); *Frontier Steam Laundry Co. v. Connolly*, 72 Neb. 767, 101 N.W. 995 (1904) (ordinance requiring fireproof shutters not intended to create tort liability). Consequently, in order to determine whether the Legislature intended for § 43-250 to create civil liability or to guard against an injury such as that in the instant case, we consider the statutory purpose.

[8,9] The U.S. Supreme Court has held that the Due Process Clause of the U.S. Constitution requires that a juvenile's parents be notified prior to proceedings that may result in the curtailment of the juvenile's freedom. See *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967). Parental notification statutes, generally, are intended to furnish an additional safeguard to ensure that a juvenile's basic right to due process, as set forth in *In re Gault, supra*, is not violated. See *State v. Taylor*, 234 Neb. 18, 448 N.W.2d 920 (1989). See, also, *McDonald v. Black*, 820 F.2d 260 (8th Cir. 1987); *Rone v. Wyrick*, 764 F.2d 532 (8th Cir. 1985); *United States v. Doe*, 701 F.2d 819 (9th Cir. 1983); *United States v. White Bear*, 668 F.2d 409 (8th Cir. 1982); *United States v. Watts*, 513 F.2d 5 (10th Cir. 1975).

The history of Nebraska's parental notification requirement reflects consistency with this general purpose. When § 43-250 was enacted in 1981, it was a recodification of a previously enacted parental notification requirement. See, 1981 Neb. Laws, L.B. 346; Neb. Rev. Stat. § 29-401 (Reissue 1975). The previous statute, § 29-401, was enacted by 1972 Neb. Laws, L.B. 1403. The legislative history of L.B. 1403 reflects that the intent of Nebraska's parental notification requirement was not to create new rights or duties, but to institute a prophylactic measure to ensure that reasonable efforts were made to notify parents

before juveniles would be permitted to plead to any charges against them. See Minutes of Committee on Judiciary, L.B. 1403, 82d Leg., 2d Sess. (January 31, 1972); Floor Debate, 82d Leg., 2d Sess. 4775-76 (March 1, 1972).

In short, the intent of the statute was and is to ensure that a juvenile's due process rights are not violated by providing that parents will be notified after the juvenile is taken into custody. The potential injury contemplated by the statute is the violation of the juvenile's due process right to have his or her parents notified prior to a dispositional proceeding. The intent of the statute was not to protect juveniles from harming themselves after being released by law enforcement, nor is there any indication that the statute was intended by the Legislature to create a civil remedy for its violation.

[10] Section 43-250 does not satisfy either of the final two criteria used to determine if a statute gives rise to a tort duty. The legislative history of the statute affirmatively demonstrates that the injury the statute was intended to prevent was not suffered by Carlos, and there is no indication in the statute or the legislative history that the statute was intended to create a private liability. As stated by the Supreme Court of Minnesota, "[p]rinciples of judicial restraint preclude us from creating a new statutory cause of action that does not exist at common law where the legislature has not either by the statute's express terms or by implication provided for civil tort liability." *Bruegger v. Faribault County Sher. Dept.*, 497 N.W.2d 260, 262 (Minn. 1993). See, also, e.g., *Letlow v. Evans*, 857 F. Supp. 676 (W.D. Mo. 1994); *Perry v. S.N.*, 973 S.W.2d 301 (Tex. 1998); *Freehauf v. School Bd. of Seminole Cty.*, 623 So. 2d 761 (Fla. App. 1993). We conclude that under the circumstances of the instant case, § 43-250 does not give rise to the duty alleged by Claypool.

No Duty to Release Juvenile to Parents Under Sheriff's Department's Policy and Procedure Manual

Claypool argues that the Furnas County Sheriff's Department's policy and procedure manual created a duty requiring law enforcement officers to release persons under 18 years of age to their parents. Therefore, Claypool asserts that the deputies violated their own policy and, in doing so, breached their duty.

Appellees maintain that if a juvenile has been incarcerated and is released, the juvenile is to be released to his or her parents, but if a juvenile is taken into "temporary custody," cited, and released, the juvenile need not be released to his or her parents.

The relevant procedure is contained on page 64A of the Furnas County Sheriff's Department's policy and procedure manual, entitled "Release Prisoners on Bond." It states in pertinent part:

> Any bailable defendant arrested for a misdemeanor on a charge other than felony, shall be released from custody pending a judgement on his personal recognizance, and any person under 18 years of age, shall be released to his/her parents to appear in court on a certain date unless the following circumstances exist:
>
> 1. The defendant may endanger himself or others if released.
>
> 2. Evidence exists that the defendant is likely to flee the jurisdiction or not appear in court as ordered.

Pulley interpreted this section to apply to someone under the age of 18 that has been arrested or incarcerated. If a juvenile has been incarcerated, then that juvenile is to be released to his or her parents. This would apply in circumstances such as a bonding-out situation. However, if a juvenile is taken into temporary custody and is cited and released, then that juvenile need not be released to his or her parents.

Pulley's interpretation of this policy is consistent with the language of the policy and with the situations to which the policy is to be applied. Carlos was taken into temporary custody under § 43-248(1). This statute states that "[a] juvenile may be taken into temporary custody by any peace officer without a warrant or order of the court when: (1) A juvenile has violated a state law or municipal ordinance in the presence of the officer." Neb. Rev. Stat. § 43-249 (Reissue 1998) states that "[n]o juvenile taken into temporary custody under section 43-248 shall be considered to have been arrested . . . ."

Given that the title of the policy is "Release Prisoners on Bond," it clearly does not apply to the situation regarding Carlos' temporary custody. According to § 43-249, Carlos was not under arrest and therefore was not subjected to any bonding-out procedures. Claypool's argument is without merit. No duty

was created by the department's policy and procedure manual to detain Carlos until he could be released to his parents.

Claypool failed to establish the existence of a duty to contact Carlos' parents and to detain Carlos until he could be released to them under either § 43-250 or the department's policies and procedures. Therefore, we conclude that Claypool has failed to establish the first element of a negligence case.

Protection From Harm

In her brief under her first assignment of error, Claypool argues that the cases of *Brandon v. County of Richardson*, 252 Neb. 839, 566 N.W.2d 776 (1997), and *Hamilton v. City of Omaha*, 243 Neb. 253, 498 N.W.2d 555 (1993), establish that a duty to protect Carlos from harm was created by the special relationship imposed on the deputies when Carlos was taken into temporary custody. Claypool asserts that this duty to protect was "magnified" because the deputies knew Carlos was depressed.

[11] Claypool's first assignment of error states that the trial court erred in finding there were no genuine issues of material fact under Claypool's first and second causes of action. Claypool's third cause of action was the § 1983 action. Claypool's first and second causes of action alleged that appellees were negligent in failing to contact Carlos' parents, in failing to release Carlos to an adult, and in failing to follow the requirements of § 43-250. Claypool did not plead in her first or second cause of action that appellees were negligent in failing to protect Carlos from harm. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *Turney v. Werner Enters.*, 260 Neb. 440, 618 N.W.2d 437 (2000).

§ 1983 Claim

Claypool also brought a claim under § 1983, alleging that Carlos was deprived of his liberty as secured by the Due Process Clause of the U.S. Constitution. Specifically, Claypool argues that the Due Process Clause imposed a duty on state actors to protect or care for citizens when the state affirmatively placed a particular individual in a position of danger which the individual would not otherwise have faced.

[12,13] In order to state a cause of action under § 1983, a plaintiff must allege facts establishing conduct by a person acting under color of state law which deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States. *Gordon v. Community First State Bank*, 255 Neb. 637, 587 N.W.2d 343 (1998). A local government cannot be held liable under § 1983 solely because of injury inflicted by its employees or agents; rather, it can be liable only when the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). See *DeCoste v. City of Wahoo*, 255 Neb. 266, 583 N.W.2d 595 (1998).

In *DeShaney v. Winnebago Cty. Soc. Servs. Dept.*, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989), the Supreme Court held that the Due Process Clause does not impose an affirmative obligation on a state entity to ensure the safety of individuals. However, Claypool asserts the deputies did have a duty to protect Carlos from harm under the "creation of danger" exception recognized by the Court in *DeShaney*.

Under this exception, state actors may be liable if they affirmatively created the plaintiff's peril or acted to render him or her more vulnerable to danger. We understand Claypool's argument relating to this "creation of danger" exception to be that the deputies caused harm to Carlos by leaving him in a worse position than he was in before his temporary custody in that the deputies issued Carlos a ticket and then knowingly released a depressed youth alone in his parents' residence. Claypool concludes that any harm, including suicide, was foreseeable and that this harm was caused by the deputies. Therefore, Claypool asserts that this type of "creation of danger" situation applies in the present case to impose a duty on the individual deputies to protect Carlos.

Claypool cites the case of *Kneipp v. Tedder*, 95 F.3d 1199, 1208 (3d Cir. 1996), where the Court of Appeals for the Third Circuit suggested a test for applying the state-created danger theory. The four elements are as follows:

> "(1) [T]he harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; [and] (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur."

The record reflects that Carlos' own friend, Wendland, who had known Carlos for many years, was not put on notice that Carlos might hurt himself. Wendland and his father spoke with Carlos approximately 2 hours after the deputies had left. In speaking with Carlos, Wendland stated that Carlos said he was scared and upset about being caught and getting a ticket because he knew he would get into trouble when his parents returned home. The trial court found, and the record supports, that Wendland and his father were not, as a result of their conversations with Carlos, put on any notice that Carlos was contemplating suicide or any other action that would be harmful to himself.

Both Hoyt and Hibberd stated in their affidavits that Carlos appeared to be only slightly depressed and of a demeanor comparable to a person who had just received a traffic violation or other minor violation who would then have to inform his parents of what had occurred and that Carlos, at all times while in their presence, made no statement and demonstrated no action or demeanor which in any way indicated he was a danger to himself or others.

We find that the deputies were not on any notice that Carlos was likely to commit suicide. As such, we conclude that his suicide was not a foreseeable harm caused by the deputies' actions. The facts are undisputed. Giving Claypool the benefit of every inference that could be drawn from the facts, we determine that the fact that the deputies talked with Carlos and issued him a citation was not an event of sufficient magnitude to place the deputies on notice that Carlos was likely to commit suicide. The deputies also did not place Carlos in any situation different than he was already in prior to his temporary custody.

Because the record establishes as a matter of law that Carlos' liberty rights under the Due Process Clause were not violated, we need not address whether the individual appellees were entitled to a qualified good faith immunity defense or whether there is

evidence of an official policy to support a § 1983 claim against Furnas County under *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). See *DeShaney v. Winnebago Cty. Soc. Servs. Dept., supra.*

CONCLUSION

For the reasons set forth in this opinion, we affirm the trial court's order sustaining appellees' motion for summary judgment.

AFFIRMED.

NORMA STRUEMPLER, APPELLANT, V. ESTATE OF WILBUR F. KLOEPPING, DECEASED, ET AL., APPELLEES.

626 N.W.2d 564

Filed May 25, 2001. No. S-99-1245.

1. **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.
2. **Negligence.** Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court.
4. **Negligence.** In determining whether a duty exists, an appellate court employs a risk-utility test, considering (1) the magnitude of the risk, (2) the relationship of the parties, (3) the nature of the attendant risk, (4) the opportunity and ability to exercise care, (5) the foreseeability of the harm, and (6) the policy interest in the proposed solution.

Appeal from the District Court for Dawson County: JOHN P. MURPHY, Judge. Affirmed.

Gregory J. Beal, of Gregory J. Beal & Associates, P.C., for appellant.

Todd R. McWha, of Murphy, Pederson, Waite & McWha, for appellees.

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

McCORMACK, J.

NATURE OF CASE

This is a negligence action filed by appellant, Norma Struempler, against appellees, the estate of Wilbur F. Kloepping, deceased; Bruce J. Nelsen, personal representative; and Marguerite Kloepping. Struempler alleges in her petition that Wilbur negligently and carelessly placed himself in a position of immediate peril by remaining in his residence without qualified medical personnel to assist him when he fell from his wheelchair. In addition, Struempler alleges that Marguerite, Wilbur's wife, was negligent in requesting assistance from Struempler to help lift Wilbur back into his wheelchair and that this negligence was the proximate cause of alleged injuries to her back when she assisted Marguerite in lifting Wilbur. Appellees filed an answer generally denying these allegations and alleged that Struempler failed to state a cause of action. Appellees also alleged the affirmative defenses of contributory and comparative negligence and assumption of the risk. Appellees filed a motion for summary judgment, which the trial court sustained. Struempler appeals. We removed this case from the docket of the Nebraska Court of Appeals under our power to regulate the caseloads of this court and the Court of Appeals.

BACKGROUND

Struempler, Wilbur and Marguerite's neighbor, had been called on several occasions to assist Marguerite in getting Wilbur up after he had fallen out of his wheelchair. Wilbur was 80 years old and was virtually confined to a wheelchair at that time. He wanted to stay in his home because he knew he was dying. On November 18, 1997, Struempler was again asked to assist Marguerite in lifting Wilbur back into his wheelchair. He was on the floor, face forward, somewhat on his hands and knees. It appeared he had fallen forward out of his wheelchair. Wilbur had previously broken his hip and was unable to get up unassisted. Wilbur appeared to be in distress and, as stated earlier, was in critical health. Struempler was on Wilbur's left, and Marguerite was on his right. As the women proceeded to lift him, there was a pop or "bone-like noise" from Struempler's back, and she stopped lifting. Struempler states that after she

was injured, Wilbur "said they would pay for it." Struempler broke out into a sweat and felt nauseated and walked back to her house. There, she continued to sweat and be nauseated. Struempler's doctors diagnosed her injury as being a compressed fracture to her T12 vertebra below her beltline. Wilbur subsequently died on December 12.

In sustaining appellees' motion for summary judgment, the trial court stated, "The Court cannot find any duty on the part of [appellees] owed to [Struempler] under the circumstances and the facts presented to the Court by the pleadings and the evidence."

ASSIGNMENTS OF ERROR

Struempler assigns that the trial court erred (1) in sustaining appellees' motion for summary judgment, (2) in finding Struempler's petition did not state any theory of liability upon which she might recover, and (3) in finding that the "rescue doctrine" does not entail a theory of liability upon which a rescuer might obtain relief under appropriate circumstances.

STANDARD OF REVIEW

[1] 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. *Allstate Ins. Co. v. LaRandeau, ante* p. 242, 622 N.W.2d 646 (2001); *Casey v. Levine, ante* p. 1, 621 N.W.2d 482 (2001).

ANALYSIS

Struempler asserts that when Wilbur, well knowing his life-threatening health situation, chose to continue to endanger himself by placing himself in a position of peril which invited continuing "rescue" efforts, he violated a legal duty to the potential rescuer. Struempler believes that while the rescue doctrine may be considered as a response to the defense of contributory negligence, it also forms an independent basis of liability and can effectively state a tort cause of action.

Appellees assert that under any version of the facts, they owed no duty to Struempler. Appellees argue that the question of whether there is a duty is determined by the court with no part to be decided by the fact finder.

[2,3] Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *Desel v. City of Wood River*, 259 Neb. 1040, 614 N.W.2d 313 (2000); *Ray v. Argos Corp.*, 259 Neb. 799, 612 N.W.2d 246 (2000). Therefore, in determining if appellees could be negligent, the question of whether they owed a duty to Struempler is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court. *Doksansky v. Norwest Bank Neb.*, 260 Neb. 100, 615 N.W.2d 104 (2000).

[4] In determining whether a duty exists, an appellate court employs a risk-utility test, considering (1) the magnitude of the risk, (2) the relationship of the parties, (3) the nature of the attendant risk, (4) the opportunity and ability to exercise care, (5) the foreseeability of the harm, and (6) the policy interest in the proposed solution. *Turner v. Fehrs Neb. Tractor & Equip.*, 259 Neb. 313, 609 N.W.2d 652 (2000); *Knoll v. Board of Regents*, 258 Neb. 1, 601 N.W.2d 757 (1999).

Struempler contends that Wilbur placed himself in a position of peril, thereby inviting Struempler's rescue efforts. There was no perilous situation created by Wilbur in remaining in the privacy of his own home in his condition. Any risk of harm present in lifting Wilbur to his wheelchair was not of such a degree as to create a duty on the part of Wilbur and Marguerite toward Struempler. In addition, Struempler did not submit herself to or overcome any great risk of harm in crossing the street to go to Wilbur and Marguerite's house to help Marguerite with Wilbur. Both the attendant risk and magnitude of the risk are modest in this case.

Struempler maintains that she was a "rescuer" because Wilbur placed himself in a position of peril which invited rescue. As such, Struempler came to the rescue of Wilbur. Struempler tries to invoke the rescue doctrine to create a cause of action by calling herself a rescuer. However, we see no relationship other than a neighbor who was a gratuitous helper. The relationship of the parties did not create a duty.

Struempler had the opportunity and the ability to exercise care. Struempler voluntarily went over to aid Wilbur and Marguerite and was not under a duty to render them assistance. It was not foreseeable that Struempler would suffer harm, such

as a compressed fracture to her vertebra, simply by helping to lift Wilbur to his wheelchair. In addition, other methods could have been used to lift Wilbur. For example, the fire department or paramedics could have been called for assistance.

The policy considerations present in Struempler's proposed solution imply that appellees had a duty to admit Wilbur into a nursing home or to hire in-home nursing care for him. Struempler invites us to apply the rescue doctrine to this case. Nebraska has yet to apply the rescue doctrine to a two-party case where one party negligently places himself or herself in peril, inviting rescue efforts by bystanders. We are aware of the nature and facts of these types of cases in which other states have applied the rescue doctrine. However, we decline to apply the rescue doctrine given the facts of this particular case.

CONCLUSION

After applying the risk-utility balancing test, we hold that appellees did not owe Struempler a duty. We therefore affirm the trial court's order sustaining appellees' motion for summary judgment.

AFFIRMED.

WRIGHT and GERRARD, JJ., concur in the result.

BRENT L. FINE, APPELLANT, V. NAOMI L. FINE, NOW KNOWN AS NAOMI L. COREY, APPELLEE.

626 N.W.2d 526

Filed May 25, 2001. No. S-99-1277.

1. **Divorce: Modification of Decree: Visitation: Appeal and Error.** Visitation rights established by a marital dissolution decree may be modified upon a showing of a material change of circumstances affecting the best interests of the children. Such modification is initially entrusted to the discretion of the district court, whose decision is reviewed de novo on the record and will normally be affirmed absent an abuse of discretion.
2. **Judges: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.

3. **Visitation: Parent and Child.** Visitation relates to continuing and fostering the normal parental relationship of the noncustodial parent with the minor children of a marriage which has been legally dissolved.
4. **Visitation.** The best interests of the children are the primary and paramount considerations in determining and modifying visitation rights.
5. ___. A court determines the nature and extent of visitation rights on a case-by-case basis and may consider many factors and circumstances in each individual case, such as the age and health of the child; the character of the noncustodial parent; the place where visitation rights will be exercised; the frequency and duration of visits; the emotional relationship between the visiting parent and the child; the likely effect of visitation on the child; the availability of the child for visitation; the likelihood of disrupting an established lifestyle otherwise beneficial to the child; and, when appropriate, the wishes of the child.
6. ___. The need for a stable home environment free of unsettling influences is one of the factors to be considered in determining reasonable visitation rights.
7. ___. Although limits on visitation are an extreme measure, they may be warranted where they are in the best interests of the children.
8. **Visitation: Evidence.** Judicial determination of visitation rights consistent with the best interests of the children must be based upon evidence.

Petition for further review from the Nebraska Court of Appeals, HANNON, SIEVERS, and MOORE, Judges, on appeal thereto from the District Court for Red Willow County, JOHN J. BATTERSHELL, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Sally A. Rasmussen, of Mousel, Garner & Rasmussen, for appellant.

Terry L. Rogers, of Terry L. Rogers Law Firm, P.C., and DeAnn Stover, of Koenig & Stover, for appellee.

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

STEPHAN, J.

In a memorandum opinion filed November 28, 2000, the Nebraska Court of Appeals affirmed an order of the district court for Red Willow County modifying visitation rights which it had granted to Naomi L. Fine, now known as Naomi L. Corey, at the time of the dissolution of her marriage to Brent L. Fine. We granted Brent's petition for further review.

BACKGROUND

The parties are the parents of two children, born on May 10, 1992, and August 22, 1993. In the decree of dissolution entered on March 1, 1995, the district court found that

> both parties are generally fit and proper to have the permanent care, custody and control of the parties' minor children. However, the [father] is more stable and can provide a stable and more suitable lifestyle for the children. The [mother] seems more intent at this time with her own needs and gratification. Therefore, custody of the minor children shall be placed with the [father], subject to reasonable rights of visitation in the [mother] as hereinafter ordered.

The unsupervised visitation rights awarded by the court included alternating weekends, alternating Wednesday nights, 6 weeks during the summer, and certain holidays.

On November 2, 1998, the father filed a petition for modification of the decree alleging a material change in circumstances pertinent to visitation. Specifically, the father alleged that the mother had not been able to provide a stable, healthy, or safe environment for the children during their visits with her, which at times had been sporadic; that the mother had exercised poor judgment pertaining to companions and living arrangements, placing the children's safety in jeopardy; and that there had been a deterioration in the mother's mental health since entry of the decree. The father further alleged that it would be in the best interests of the children for the mother's visits to be "restricted, supervised or terminated until [she] can demonstrate to the court that she is able to provide a stable, healthy and safe environment for the children during their visits with her."

At the hearing held on his petition for modification, the father testified that the children had resided with him in McCook, Nebraska, at all times subsequent to the dissolution of the marriage. He stated that the mother had no contact with the children from February through November 1996, during which time she was remarried and lived in Oklahoma with her husband. That marriage was of brief duration and ended because of significant physical abuse suffered by the mother. Beginning in November 1996, the mother lived on a farm near Danbury, Nebraska, with a man to whom she was engaged at the time of the hearing.

From late 1996 until September 1998, the mother exercised her weekend visitation rights as set forth in the decree, transporting the children to the farm where she resided and then returning them to the father's home in McCook. In September, the Red Willow County Sheriff notified the father that the mother had been hospitalized in Lincoln following a suicide attempt and had reported to authorities that a man she identified as her "boyfriend" had been physically abusive toward her and that she suspected him of molesting his own daughters because of photographs he had taken of them.

Upon receipt of this information, the father insisted that all future visits by the mother be exercised in his home under his supervision, and the mother complied with this request. The father testified that he was uncomfortable with this arrangement and would prefer not to personally supervise these visits. He also testified that it would be inappropriate for any member of the mother's family with whom he was acquainted to supervise the visits. He indicated that a professional visitation supervisor from the "McCook Exceptional Families Resource Center" would be acceptable to him.

The record reflects that following the dissolution of the marriage in 1995, the mother's life was marked by repeated incidents of domestic violence. In March 1995, she contacted the McCook Police Department to report that a man identified as "Marion Croney, Jr." had assaulted another man in her home and had struck her. Croney was arrested and charged with several criminal offenses. Police reports indicate that upon Croney's release from custody, he was living with the mother. In September, the mother reported to police that Croney had harassed, assaulted, and attempted to choke her. In October, the mother was involved in a fight with two women whom she heard discussing Croney outside a bar. During this altercation, she was rendered unconscious after being struck in the head by a 12-pack of beer bottles. Four months later, she married Croney and moved to Oklahoma with him. The mother testified that she left Croney because of his repeated physical abuse which included kicking and choking her and the infliction of a "blowout fracture" of her left eye. Although the mother testified that she had

never been physically abused by her current fiance, she has made contradictory statements to law enforcement authorities.

There is also evidence that the mother has struggled with mental illness and substance abuse subsequent to the dissolution. On April 13, 1995, she was taken to a McCook hospital by ambulance because of a possible overdose while her children were present in her home. Records from her hospitalization at the Hastings Regional Center from January 27 to February 11, 1998, reflect that she admitted having suicidal tendencies and had tried to commit suicide three times since December 1997, twice by slashing her wrists and once by holding a gun to her head. In December 1997, while her children were visiting at her home, she cut one of her wrists with a butter knife following an argument with her fiance. According to medical records, the mother described growing up in an abusive home and stated that her own mother was in denial and was a hypocrite. She further stated that her biggest problem with relationships is that she "picks abusive men."

There is also evidence that the mother has a history of abusing alcohol and prescription drugs. She suffers from panic attacks, anxiety, and a bipolar disorder which are all treated by various medications. The mother's physician testified during the 1999 evidentiary hearing that the mother's bipolar disorder is currently "controlled" but not "well-controlled" by medication, meaning that she is "minimally" functional. The physician further testified that the mother's anxiety and panic disorder were not currently controlled by medication and that the mother can therefore expect to experience symptoms such as headache, rapid heart rate, sweating, and a feeling of doom. The physician testified that such symptoms would impact the mother's ability to care for her children.

The record includes seven color photographs taken by the mother's fiance depicting his own adolescent daughters either nude or wearing skimpy bathing suits. The mother confirmed that she turned these photographs over to Child Protective Services in September 1998 as evidence of possible sexual molestation. The mother testified that the photographs bothered her and that she would not wish to have photographs of that nature taken of her daughter. The father testified that he considered the photographs

inappropriate and would disapprove of such photographs being taken of his daughter. The mother's fiance testified that he frequently takes pictures of family members during family gatherings and that the photographs in question were innocent in nature. No criminal charges were filed based upon the photographs, but they were retained by the sheriff as "evidence."

The children's maternal grandmother, who lives on a farm near McCook, testified briefly. She stated that she had observed the mother with the children on several occasions during the period from 1995 to 1997. She did not believe that the mother's ability to care for the children was seriously impaired and knew of no incidents in which the children were harmed or put in serious danger of harm while they were visiting their mother.

Following trial, the district court ordered that the mother's visits with the children be supervised for so long as she lived with her current fiance. In ordering supervised visitation, the district court reasoned that while there was ample evidence regarding the mother's instability, poor mental health, and problems with addiction, there was no evidence that those problems had any effect on the children. However, the district court took a different view with respect to the photographs taken by the mother's fiance, stating that they

> provide concern for the court and evidence of at least poor judgment on the part of the [mother's] boyfriend, and at worst, may show some sexual problems for [the mother's] boyfriend. These concerns convince the court that supervised visitation must be ordered until such time as [the mother] no longer resides with the boyfriend, or [the mother] furnishes evidence by way of testing and evaluation regarding his sexual preferences.

The district court ordered, sua sponte, that the mother's visits with the children be supervised by the maternal grandmother.

On August 27, 1999, the father filed a motion for new trial, which was overruled. He then perfected this appeal.

The Court of Appeals affirmed the judgment of the district court in a memorandum opinion filed on November 28, 2000. It determined that the district court properly ordered that the mother's visits be supervised based upon the conduct of her fiance and dismissed the father's argument that the district court

erred in not also requiring supervision on the basis of the mother's conduct, reasoning that the father "misunderstands" the district court to require a showing of actual harm to the children before visitation could be restricted. The Court of Appeals concurred with the district court's finding that the record revealed only one instance when Naomi's "bad behavior" occurred in front of her children. Finally, the Court of Appeals held that although the district court might "ideally" have held a hearing on the propriety of the maternal grandmother serving as visitation supervisor, the failure to do so was not an abuse of discretion due to evidence in the record that the mother had visited with the children at the grandmother's home in the past.

We granted the father's petition for further review.

ASSIGNMENTS OF ERROR

The father asserts in his petition for further review, restated, that the Court of Appeals erred in affirming the trial court's visitation order because it did not protect the children from the mother's own behavior and in affirming the district court's sua sponte appointment of the maternal grandmother to supervise the mother's visits.

STANDARD OF REVIEW

[1,2] Visitation rights established by a marital dissolution decree may be modified upon a showing of a material change of circumstances affecting the best interests of the children. See *Smith-Helstrom v. Yonker*, 253 Neb. 189, 569 N.W.2d 243 (1997). Such modification is initially entrusted to the discretion of the district court, whose decision is reviewed de novo on the record and will normally be affirmed absent an abuse of discretion. *Poll v. Poll*, 256 Neb. 46, 588 N.W.2d 583 (1999). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Weiss v. Weiss*, 260 Neb. 1015, 620 N.W.2d 744 (2001).

ANALYSIS

[3] Visitation relates to continuing and fostering the normal parental relationship of the noncustodial parent with the minor children of a marriage which has been legally dissolved. *Heyne v.*

Kucirek, 203 Neb. 59, 277 N.W.2d 439 (1979). We agree with the trial court and the Court of Appeals that the mother's visitation rights should not be terminated as the result of circumstances occurring subsequent to the decree of dissolution. The record reflects that the mother and the children enjoy a loving relationship which is in the best interests of the children to preserve.

[4] The best interests of the children are the primary and paramount considerations in determining and modifying visitation rights. See, Neb. Rev. Stat. § 42-364 (Reissue 1998); *Weinand v. Weinand*, 260 Neb. 146, 616 N.W.2d 1 (2000); *Hickenbottom v. Hickenbottom*, 239 Neb. 579, 477 N.W.2d 8 (1991); *Gerber v. Gerber*, 225 Neb. 611, 407 N.W.2d 497 (1987); *Nielsen v. Nielsen*, 217 Neb. 34, 348 N.W.2d 416 (1984); *Heyne, supra*. The best interests inquiry has its foundation in both statutory and case law. Section 42-364(1) and (2) direct courts to consider the best interests of the minor child in determining custody arrangements and time to be spent with each parent. Section 42-364(2) sets forth a nonexhaustive list of factors to be considered in determining the best interests of a child in this regard, including

> [t]he relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing; . . . [t]he desires and wishes of the minor child if of an age of comprehension regardless of chronological age, when such desires and wishes are based on sound reasoning; . . . [t]he general health, welfare, and social behavior of the minor child; and . . . [c]redible evidence of abuse inflicted on any family or household member.

[5-7] In addition to these statutory factors, we have explained that a court determines the nature and extent of visitation rights on a case-by-case basis and may consider many factors and circumstances in each individual case, such as the age and health of the child; the character of the noncustodial parent; the place where visitation rights will be exercised; the frequency and duration of visits; the emotional relationship between the visiting parent and the child; the likely effect of visitation on the child; the availability of the child for visitation; the likelihood of disrupting an established lifestyle otherwise beneficial to the child; and, when appropriate, the wishes of the child.

Hickenbottom, supra; *Gerber, supra*. In *Heyne, supra*, we identified "the need for a stable home environment free of unsettling influences" as one of the factors to be considered in determining reasonable visitation rights. 203 Neb. at 63, 277 N.W.2d at 441. Although limits on visitation are an extreme measure, they may be warranted where they are in the best interests of the children. *Poll v. Poll*, 256 Neb. 46, 588 N.W.2d 583 (1999).

Based upon our review of the record, we agree with the district court and Court of Appeals that modification of the mother's visitation rights to require that her visits be supervised is in the best interests of the children. The issues raised by the petition for further review involve two aspects of the supervision requirement: (1) its duration and (2) the person designated to provide supervision. The trial court determined that while there was a "large amount of evidence regarding the instability and mental and addiction problems of the [mother], there is virtually no evidence of any effect on the minor children." The court noted that it would be required to speculate in this regard in order to consider this evidence as bearing on the issue of modification of visitation rights. However, based upon its concern regarding the photographs taken by the mother's current fiance, the court required that visits be supervised until the mother no longer resided with the fiance or until the fiance furnished evidence "by way of testing and evaluation regarding his sexual preferences." There was no evidence that the fiance had taken similar photographs of the parties' children or harmed them in any way. However, the trial court apparently and appropriately determined that the conduct of the fiance, with whom the mother resided, posed a risk to the children's safety and contributed to an unsuitable environment for unsupervised visitation.

We conclude that the same reasoning should be applied to the considerable evidence of the mother's mental illness, substance abuse, and admitted attraction to abusive men. We do not cast fault or blame upon the mother, who has taken certain steps to confront and deal with these problems but has not yet overcome them. However, we cannot ignore the fact that the mother's living arrangements subsequent to the dissolution, including but not limited to the present one, have not provided a stable home environment free of unsettling influences which would permit

safe, unsupervised visitation. Of particular concern is the fact that the mother has engaged in self-destructive behavior on several occasions subsequent to the dissolution, at least once while the children were present at her home. In addition, the testimony of the mother's physician establishes that despite various changes in medication, the physician has not been able to achieve complete control of the mother's psychiatric illnesses. While there is no evidence that the mother would intentionally harm her children, there is considerable evidence that she is currently unable to protect them from harm during unsupervised visitation. Thus, while we find no error in ordering supervised visitation, we conclude that the district court did abuse its discretion in providing that the requirement of supervision would end when the mother no longer resided with her fiance or when the fiance furnished test results regarding his sexual preferences. For the reasons we have discussed, the mother's current living arrangement is only one of several factors which would place the children's safety at risk if visits were unsupervised. Accordingly, the district court's order should be modified to require that visits shall be supervised until the mother can make a satisfactory showing that she is able to provide a safe and stable environment for unsupervised visitation with her children consistent with their best interests.

[8] We also find merit in the father's contention that the district court erred in designating the maternal grandmother as the person who would supervise the mother's visits with the children. Judicial determination of visitation rights consistent with the best interests of the children must be based upon evidence. See *Schulze v. Schulze*, 238 Neb. 81, 469 N.W.2d 139 (1991). Although the maternal grandmother testified that the children visited their mother in her presence "many times" from 1995 to 1997, she was not asked nor did she state whether she was willing and able to supervise visitation pursuant to a court order. The father testified that in his opinion, it would be inappropriate for any member of the mother's family to supervise visitation. The mother did not testify with respect to the suitability of the grandmother to supervise visitation. However, medical records from the mother's 1998 hospitalization at Hastings Regional Center reflect that the mother reported growing up in an abusive home,

described her own mother as "in denial and a hypocrite," and further stated that she had never had a good relationship with her stepfather with whom her mother resides. On this record, designation of the maternal grandmother to supervise visitation was an abuse of discretion. An evidentiary hearing should be conducted on remand to determine whether the maternal grandmother or some other person or agency should be designated to supervise the mother's visitation with the children. This hearing should also determine the manner in which any expense incurred for such supervision is to be allocated between the parties.

CONCLUSION

For the reasons discussed herein, we conclude that the district court erred in defining the circumstances under which supervision would no longer be required and in appointing the maternal grandmother to supervise visitation in the absence of an adequate factual record establishing her willingness and suitability to perform this function. We therefore reverse the judgment of the Court of Appeals with directions to remand the cause to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

SCOTT L. MARSHALL, APPELLANT, V. EDWARD WIMES, DIRECTOR, STATE OF NEBRASKA, DEPARTMENT OF MOTOR VEHICLES, APPELLEE.

626 N.W.2d 229

Filed May 25, 2001. No. S-00-199.

1. **Administrative Law: Final Orders: Appeal and Error.** Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency.
2. ___: ___: ___. A judgment or 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.
3. **Administrative Law: Judgments: Appeal and Error.** 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.

4. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
5. **Constitutional Law: Due Process.** The due process requirements of Nebraska's Constitution are similar to those of the federal Constitution.
6. **Due Process: Notice.** Procedural due process limits the ability of the government to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard.
7. **Due Process.** The first step in a due process analysis is to identify a property or liberty interest entitled to due process protections.
8. **Motor Vehicles: Licenses and Permits: Revocation: Due Process.** Suspension of issued motor vehicle operators' licenses involves state action that adjudicates important property interests of the licensees. In such cases, the licenses are not to be taken away without that procedural due process required by the 14th Amendment.
9. **Due Process: Words and Phrases.** Though the required procedures may vary according to the interests at stake in a particular context, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.
10. **Motor Vehicles: Licenses and Permits: Due Process.** Before a state may deprive a motorist of his or her driver's license, that state must provide a forum for the determination of the question and a meaningful hearing appropriate to the nature of the case.
11. **Administrative Law: Due Process: Notice: Evidence.** In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board.
12. **Due Process.** A number of factors are to be considered in resolving an inquiry into the specific dictates of due process: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.
13. **Courts: Administrative Law: Due Process.** Neither a court nor an administrative agency may subjugate a litigant's due process rights under the guise of judicial economy.
14. **Due Process.** The concept of due process embodies the notion of fundamental fairness and defies precise definition.
15. ___. Due process is a flexible notion that must be decided on the facts presented in a particular case and calls for such procedural protections as the particular situation demands.

Appeal from the District Court for Holt County: WILLIAM B. CASSEL, Judge. Reversed and remanded with directions.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Don Stenberg, Attorney General, and Kyle C. Dahl for appellee.

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

GERRARD, J.

NATURE OF CASE

Scott L. Marshall appeals from the district court's affirmance of the order of the director of the Department of Motor Vehicles (DMV) revoking Marshall's operator's license. The issue presented in this appeal is whether the district court erred in affirming the revocation of Marshall's operator's license in light of the DMV's alleged due process violation in refusing to issue a subpoena duces tecum directing the individual who tested Marshall's blood alcohol level to appear at Marshall's revocation hearing.

FACTUAL AND PROCEDURAL BACKGROUND

The findings of fact set forth by the administrative hearing officer, and adopted by the director of the DMV and the district court, are not at issue in this appeal. Those findings of fact establish that on July 10, 1999, in O'Neill, Nebraska, a vehicle operated by Marshall was stopped for speeding. Observing Marshall's lack of coordination, the investigating officer asked if Marshall had been drinking, and Marshall admitted to consuming four or five drinks. Marshall failed three of the five field sobriety tests that were administered, and Marshall was arrested and taken to Saint Anthony's Hospital, where a sample of his blood was taken for testing. The result of that test, conducted by the Department of Health and Human Services (DHHS), indicated a blood alcohol concentration of .166 grams of alcohol per 100 milliliters of blood. The DMV was notified, and a notice of revocation was issued. Marshall petitioned for an administrative rules of evidence hearing, which was held on August 13.

Based on the evidence adduced at the hearing, the hearing officer recommended revocation of Marshall's motor vehicle

operator's license. On August 25, 1999, the director of the DMV adopted the hearing officer's recommendation and revoked Marshall's license for a period of 1 year. Marshall appealed to the district court, which affirmed the determination of the director. Marshall timely appealed.

Marshall's argument on appeal is based on the proceedings before the DMV prior to Marshall's revocation hearing. Marshall's petition for an administrative hearing was filed on August 2, 1999, and the DMV's notice of hearing was filed on August 3. Marshall immediately filed a praecipe for subpoena duces tecum, directed at the DHHS employee who tested Marshall's blood. The subpoena would have directed the witness to appear at Marshall's hearing and to bring with her a sample of Marshall's blood in her possession as well as records relating to the calibration of the equipment used to test Marshall's blood. Marshall also sought a subpoena to compel the witness to appear for a deposition prior to the hearing.

The praecipe was received by the DMV on August 5, 1999, and was denied on the same day because it did not comply with 247 Neb. Admin. Code, ch. 1, § 009.02 (1998), which provides that "[s]ubpoenas shall be requested in writing at the time of filing the hearing petition. Any request that is not both filed and received by the Director within the time and manner specified shall be denied, unless substantial injustice would result." Marshall's request to depose the witness was also denied on the basis that the applicable administrative regulations did not provide for a subpoena to compel attendance at a deposition. The record reflects that Marshall was aware of the identity of the witness prior to the filing of his petition for hearing, but had not yet been informed of the time or location of the hearing.

Marshall argued before the hearing officer and the district court that the director's application of § 009.02 in the instant case violated Marshall's due process rights.

ASSIGNMENTS OF ERROR

Marshall assigns, restated, that the district court erred in failing to find that the refusal of the director to issue Marshall's subpoena duces tecum denied Marshall due process of law and was an abuse of discretion.

STANDARD OF REVIEW

[1-3] Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency. *Lackawanna Leather Co. v. Nebraska Dept. of Rev.*, 259 Neb. 100, 608 N.W.2d 177 (2000); *A & D Tech. Supply Co. v. Nebraska Dept. of Revenue*, 259 Neb. 24, 607 N.W.2d 857 (2000). A judgment or 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. *Benitez v. Rasmussen, ante* p. 806, 626 N.W.2d 209 (2001); *Busch v. Omaha Pub. Sch. Dist., ante* p. 484, 623 N.W.2d 672 (2001). 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. *Id.*

[4] Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Benitez v. Rasmussen, supra.*

ANALYSIS

[5] Marshall argues that he was deprived of due process of law by the director's refusal to issue Marshall's requested subpoena. While Marshall does not specify whether he relies on the state or federal Constitution, this court has observed that the due process requirements of Nebraska's Constitution are similar to those of the federal Constitution. See *Wollenburg v. Conrad*, 246 Neb. 666, 522 N.W.2d 408 (1994).

Nebraska law provides that in a contested case before an administrative agency, opportunity shall be afforded to all parties to the proceeding to present evidence and argument. See Neb. Rev. Stat. § 84-913 (Reissue 1999). To that end, the Legislature has provided that an administrative hearing officer may issue subpoenas and discovery orders. See Neb. Rev. Stat. § 84-914(2) (Reissue 1999). The director of the DMV is responsible for the adoption and promulgation of rules and regulations to govern the conduct of a license revocation hearing and ensure

that the hearing will proceed in an orderly manner. See Neb. Rev. Stat. § 60-6,205(7) (Reissue 1998). The DMV adopted § 009.02 pursuant to this authority. Marshall argues that the director's strict enforcement of this regulation against Marshall deprived him of procedural due process.

[6,7] Procedural due process limits the ability of the government to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard. *Benitez v. Rasmussen, supra*; *In re Interest of Natasha H. & Sierra H.*, 258 Neb. 131, 602 N.W.2d 439 (1999). The first step in a due process analysis is to identify a property or liberty interest entitled to due process protections. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 107 S. Ct. 1740, 95 L. Ed. 2d 239 (1987).

[8] It is well established that suspension of issued motor vehicle operators' licenses involves state action that adjudicates important property interests of the licensees. In such cases, the licenses are not to be taken away without that procedural due process required by the 14th Amendment. See, *Dixon v. Love*, 431 U.S. 105, 97 S. Ct. 1723, 52 L. Ed. 2d 172 (1977); *Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971). See, also, *Illinois v. Batchelder*, 463 U.S. 1112, 103 S. Ct. 3513, 77 L. Ed. 2d 1267 (1983); *Mackey v. Montrym*, 443 U.S. 1, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979); *Gausman v. Department of Motor Vehicles*, 246 Neb. 677, 522 N.W.2d 417 (1994).

[9-11] Once it is determined that due process applies, the question remains what process is due. *Brock v. Roadway Express, Inc., supra*. Though the required procedures may vary according to the interests at stake in a particular context, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Id.* Thus, before a state may deprive a motorist of his or her driver's license, that state must provide a forum for the determination of the question and a meaningful hearing appropriate to the nature of the case. See, *Bell v. Burson, supra*; *Wollenburg v. Conrad, supra*. In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and

opportunity to present evidence concerning the accusation, and a hearing before an impartial board. *Crown Products Co. v. City of Ralston*, 253 Neb. 1, 567 N.W.2d 294 (1997). See, also, *McPherrin v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995) (due process in license revocation proceeding includes reasonable opportunity to present evidence concerning accusation).

The issue presented by Marshall's argument is whether he had the opportunity to present evidence concerning the accusation, given the director's refusal to issue the requested subpoena. Specifically, the question is whether due process was violated by the director's refusal to issue a subpoena where the praecipe was received by the DMV 8 days prior to the revocation hearing and only 3 days after the date required by § 009.02.

[12] In *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), the U.S. Supreme Court set forth a number of factors to be considered in resolving an inquiry into the specific dictates of due process: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, also, e.g., *Illinois v. Batchelder, supra*; *Mackey v. Montrym, supra*; *Dixon v. Love, supra* (applying *Mathews* analysis in context of driver's license revocation proceedings).

With respect to the first factor of the *Mathews* analysis, the private interest that is at issue in this case is the interest that was adjudicated at the administrative hearing: Marshall's interest in continued possession of a motor vehicle operator's license. We agree with a vast majority of courts that a driver's interest in his or her driving privileges is significant in today's society, as its loss may entail economic hardship and personal inconvenience. See, e.g., *Lee v. State of R.I.*, 942 F. Supp. 750 (D.R.I. 1996); *Whitesides v. State, Dept. of Public Safety*, 20 P.3d 1130 (Alaska 2001); *Berger v. State Highway Com'r*, 394 N.W.2d 678 (N.D. 1986); *State, Dep't Mtr. Vehicles v. Vezeris*, 102 Nev. 232, 720 P.2d 1208 (1986); *People ex rel. Eppinga v. Edgar*, 112 Ill. 2d

101, 492 N.E.2d 187, 96 Ill. Dec. 945 (1986). See, also, *Coleman v. Watt*, 40 F.3d 255 (8th Cir. 1994).

The next factor we consider is the risk of an erroneous determination and the value, if any, of alternative procedures. Given that Marshall had the burden of establishing that he did not have more than the allowable concentration of alcohol in his blood at the time he was operating a motor vehicle, it is clear that limitations on Marshall's ability to present evidence relevant to that determination heighten the risk of an erroneous deprivation of Marshall's interest in his operator's license. Compare *McPherrin v. Conrad, supra*. It is also clear that permitting the introduction of relevant evidence has value in reducing the risk of error.

This is particularly true where Marshall's license was revoked primarily, if not entirely, in reliance on the written report of the blood test that was performed, yet Marshall was precluded from examining the witness who performed the test in order to determine if the test was reliable. As stated by the Supreme Court of Kansas, "[w]ithout cross-examination, the hearing board has before it an unimpeachable report as evidence against the word of a self-interested licensee. The result is predictable." *Wulfkuhle v. Kansas Dept. of Revenue*, 234 Kan. 241, 247, 671 P.2d 547, 552 (1983). See, also, *Langlois v. Dept. of Employment & Training*, 149 Vt. 498, 546 A.2d 1365 (1988) (availability of subpoenas to protect right to confront witnesses is quid pro quo for allowing important administrative determinations to be made based on written hearsay evidence); *Mohilef v. Janovici*, 51 Cal. App. 4th 267, 58 Cal. Rptr. 2d 721 (1996) (due process may require agency to subpoena witnesses where, absent their testimony, agency's ultimate decision would be based solely on written reports). Compare *Mackler v. Alexis*, 130 Cal. App. 3d 44, 181 Cal. Rptr. 613 (1982) (due process right to cross-examine arresting police officer protected by right to call arresting officer to testify at hearing).

The State argues that in the instant case, there was no reason to believe that the witness' presence would have added anything to the proceeding, "because there was no indication that the blood test was somehow defective or that it was done improperly." Brief

for appellee at 6. However, this argument begs the question. While we cannot condone a "fishing expedition," Marshall was certainly entitled to inquire regarding the chain of custody of his blood sample and whether the procedures used to test that blood complied with DHHS regulations, particularly where the individual who tested the blood was also an employee of a state agency. We also note that the director did not refuse to issue the requested subpoena because the evidence and testimony sought were irrelevant; the sole stated basis for refusal was the timeliness of the praecipe.

The State also argues that adequate procedures existed for Marshall to secure a subpoena but that he failed to avail himself of these procedures. The State argues that since the DMV, and not the motorist, is responsible for the issuance of the subpoena, there is no barrier to the motorist's filing a praecipe for subpoena contemporaneous with the petition for hearing.

The State does not explain, however, precisely how the motorist should overcome the practical difficulties inherent in obtaining a subpoena for a witness to appear at a hearing when the time and place of that hearing has not yet been determined. In the first place, the motorist's request for a hearing must be filed within 10 days of the motorist's receipt of the notice of revocation. See § 60-6,205(6)(a). The State's suggested procedure would require motorists to subpoena any and all needed witnesses prior to the completion of discovery. See 247 Neb. Admin. Code, ch. 1, § 008.02 (1998). In order to obtain a subpoena, the motorist must set forth in the request for subpoena the identity and address of the witness, as well as the facts which the witness is expected to establish. 247 Neb. Admin. Code, ch. 1, § 009.03A through C (1998). The DMV's regulatory scheme also requires that prior to obtaining a subpoena, the motorist must attempt to obtain the voluntary agreement of the witness to appear and must set forth in the subpoena request that the witness refused to appear voluntarily. See, 247 Neb. Admin. Code, ch. 1, § 009.01 (1998); § 009.03D.

In other words, in order to secure the testimony of witnesses with relevant information to offer, the motorist must, within 10 days of the receipt of the notice of revocation and prior to the completion of discovery, (a) identify and locate all potential

witnesses, (b) determine the facts that those witnesses are expected to establish, and (c) secure or be denied the voluntary appearances of those witnesses at a hearing the time and place of which are still unknown. We are not persuaded by the State's argument that the procedures available to Marshall in the established regulatory scheme were adequate to protect Marshall against the erroneous deprivation of his property interest.

The State also contended, at oral argument, that Marshall could have obtained the information he sought from the witness by taking her deposition. This argument, however, is not supported by the record. The record shows that Marshall sought the voluntary appearance of the witness at a deposition and then a subpoena to compel the witness to appear at a deposition, but that the director refused to issue such a subpoena. Marshall has not appealed from the director's refusal to issue a subpoena to compel appearance at the deposition, and we do not comment on the propriety of that refusal.

We now turn to the final, and in this case perhaps most important, factor of the balancing test set out in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976): the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Significantly, in this case, the State has presented no argument as to the government's specific interest in requiring that requests for subpoenas be filed at the same time as the motorist's petition for hearing.

The State relies on the right of administrative agencies to establish procedures for compelling testimony and to retain the discretion, within legal bounds, for granting or denying requests for the attendance of witnesses. See *Bender v. Department of Motor Vehicles*, 8 Neb. App. 290, 593 N.W.2d 27 (1999). The State's general right to establish procedures for the issuance of subpoenas, however, is not at issue here. Instead, the issue is whether there is a government interest in strictly enforcing a particular regulation, § 009.02, under the circumstances presented in this case.

The State has not identified, and this court cannot discern, a governmental interest that is uniquely served by requiring that a motorist file a request for subpoena at the same time as a petition for hearing. For instance, it is well established that there is

a substantial governmental interest in protecting public health and safety by removing drunken drivers from the highways. See *Mackey v. Montrym*, 443 U.S. 1, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979). However, that interest is not advanced by § 009.02. The revocation of a motorist's operator's license for driving under the influence takes effect 30 days after the motorist's receipt of the notice of revocation, regardless of whether the motorist files a petition for hearing. See § 60-6,205(6). A continuance of the hearing stays the expiration of a motorist's temporary license only if the continuance is requested by the director. See *id.* Consequently, a praecipe for subpoena filed after the request for hearing, or even a continuance occasioned by the belated praecipe, would not interfere with the government's interest in removing dangerous motorists from the roads.

[13] The government also has an interest in ensuring that the hearing will proceed in an orderly manner. See § 60-6,205(7). That interest would certainly include a requirement that a praecipe for subpoena be filed sufficiently prior to the hearing. That goal, however, could be achieved by requiring that a praecipe be filed a certain number of days prior to the hearing, see, e.g., § 008.02. Simply put, neither a court nor an administrative agency may subjugate a litigant's due process rights under the guise of judicial economy. See *Zuco v. Tucker*, 9 Neb. App. 155, 609 N.W.2d 59 (2000). We can perceive no significant additional fiscal or administrative burden that would have been placed on the government by the issuance of Marshall's subpoena that would not have been equally present 3 days earlier, when Marshall filed his petition for hearing.

In sum, we conclude that the *Mathews* analysis demonstrates that the application of § 009.02 in this case was in derogation of Marshall's right to procedural due process. Even if Marshall had other opportunities to obtain the information or testimony of the witness, the State has demonstrated no interest in the particular procedures used to disadvantage Marshall, as opposed to other options that would reduce the risk of error in the proceedings with no additional governmental burden. Marshall's interest in the proceeding and the risk of an erroneous determination under the current regulatory scheme if Marshall is unable to present relevant evidence are not outweighed by the government's

minimal interest in requiring that all requests for subpoenas be filed at the same time that a revocation hearing is requested.

[14,15] The concept of due process embodies the notion of fundamental fairness and defies precise definition. *In re Interest of Kelley D. & Heather D.*, 256 Neb. 465, 590 N.W.2d 392 (1999). Due process is a flexible notion that must be decided on the facts presented in a particular case and calls for such procedural protections as the particular situation demands. See, *id.*; *State v. $1,947*, 255 Neb. 290, 583 N.W.2d 611 (1998). We determine, based on the facts presented in this particular case, that Marshall's procedural due process rights were violated by the director's refusal to issue the subpoena Marshall requested. Consequently, the district court erred as a matter of law in affirming the order of the DMV.

CONCLUSION

The director's refusal to issue Marshall's requested subpoena constituted a violation of Marshall's right to procedural due process of law. Thus, the district court erred as a matter of law in affirming the order of the DMV. We, therefore, reverse the judgment of the district court and remand the cause to the district court with directions to reverse the director's order of revocation and remand the cause to the DMV for new proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

BOBBY L. SMITH AND TEENA M. SMITH, HUSBAND AND WIFE, APPELLANTS, V. FIRE INSURANCE EXCHANGE OF LOS ANGELES, CALIFORNIA, APPELLEE.

626 N.W.2d 534

Filed May 25, 2001. No. S-00-299.

1. **Jury Instructions: Judgments: Appeal and Error.** Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court.
2. **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.

3. ___: ___. In reviewing a claim of prejudice from instructions given or refused, the 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 evidence, there is no prejudicial error.

Appeal from the District Court for Webster County: STEPHEN ILLINGWORTH, Judge. Reversed and remanded for a new trial.

Kenneth Cobb, of Cobb & Hallinan, P.C., for appellants.

Thomas H. Cellilli III, Matthew D. Hammes, Donald A. Kohtz, and Thomas M. Locher, of Locher, Cellilli, Pavelka & Dostal, L.L.C., for appellee.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

Bobby L. Smith and Teena M. Smith made demand under a homeowner's insurance policy to recover for the loss of their house after it was destroyed by fire. When their insurer, Fire Insurance Exchange of Los Angeles, California (Fire Insurance Exchange), denied coverage, the Smiths filed this action in the district court for Webster County. Following trial, a jury entered a verdict in favor of Fire Insurance Exchange, and the Smiths appealed.

SCOPE OF REVIEW

[1] Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court. *Pleiss v. Barnes*, 260 Neb. 770, 619 N.W.2d 825 (2000).

FACTS

In November 1997, the Smiths purchased a house at auction in Guide Rock, Nebraska, for $14,250. The Smiths paid $3,500 of the purchase price, and the balance was to be paid out of the proceeds of a $30,000 loan the Smiths obtained from the Guide Rock State Bank. The mortgage included funds for purchase of the house and additional funds for remodeling the structure.

The bank, as mortgagee, requested that the Smiths obtain a homeowner's insurance policy. The Smiths procured a policy through Fire Insurance Exchange that would provide $84,000 in insurance benefits if the home was totally destroyed. The policy excluded payment to any insured who directly caused or arranged for a loss to the house in order to obtain insurance proceeds. The effective date of the coverage was December 9, 1997.

On January 11, 1998, at approximately 2:20 a.m., a fire started in the vicinity of a wood-burning stove in the Smiths' house, which was unoccupied. The house was completely destroyed as a result of the fire, and the Smiths made demand upon Fire Insurance Exchange for coverage. After an investigation as to the cause of the fire, Fire Insurance Exchange denied payment. The Smiths then commenced their action against Fire Insurance Exchange, alleging a failure to pay its obligations under the insurance policy following the destruction of their house by a fire that the Smiths claimed was accidental. Fire Insurance Exchange denied that the fire was accidental and affirmatively alleged that the Smiths had intentionally started the fire, in violation of the terms of the policy, as well as other breaches of the Smiths' obligations under the policy.

The jury returned a verdict for Fire Insurance Exchange, and the Smiths have appealed.

ASSIGNMENTS OF ERROR

The Smiths make numerous assignments of error; however, because of our disposition of this appeal, it is not necessary for us to address each of them. The relevant assignments of error can be summarized and restated as follows: (1) The trial court erred in giving instruction No. 12 and (2) the trial court erred in failing to give proposed instructions Nos. 17, 18, and 19.

ANALYSIS

The Smiths argue that the trial court erred in giving instruction No. 12, which provided:

> It is firmly established that in cases of this kind circumstantial evidence is not only admissible, but it is usually the only evidence obtainable, since it is very evident that in almost no instance can direct testimony of eyewitnesses be

> obtained. Persons deciding to burn their property for the purpose of collecting the insurance do not discuss their intentions with others, nor do they carry out such intentions in the light of day.

The Smiths claim that instruction No. 12 was prejudicial because it overemphasized the relationship between arson and circumstantial evidence, particularly when another circumstantial evidence instruction (instruction No. 11) had already been given. Instruction No. 11 provided:

> There are two kinds of evidence, direct and circumstantial.
>
> Direct evidence is . . . physical evidence of a fact or testimony by someone who has first-hand knowledge of a fact by means of his or her senses. Circumstantial evidence is evidence of one or more facts from which another fact can logically be inferred.
>
> The law makes no distinction between these two kinds of evidence. A fact may be proved by either direct evidence or circumstantial evidence or both.

The Smiths argue that because instruction No. 12 stated that arson is carried out at night and that arsonists do not discuss their intentions, the instruction unduly emphasized Fire Insurance Exchange's factual theory of the case and that, therefore, this instruction misled the jury.

[2,3] Whether a jury instruction given by a trial court is correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court. *Pleiss v. Barnes*, 260 Neb. 770, 619 N.W.2d 825 (2000). 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. *Morris v. Rochester Midland Corp.*, 259 Neb. 870, 612 N.W.2d 921 (2000). In reviewing a claim of prejudice from instructions given or refused, the 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 evidence, there is no prejudicial error. *Smith v. Paoli Popcorn Co.*, 260 Neb. 460, 618 N.W.2d 452 (2000).

As we review instruction No. 12 in the context of the other instructions given, specifically in light of instruction No. 11, we conclude that it was prejudicial error for the trial court to give instruction No. 12. The language of instruction No. 12 appears in two Nebraska cases: *Heady v. Farmers Mut. Ins. Co.*, 217 Neb. 172, 349 N.W.2d 366 (1984), and *Weiner v. Aetna Ins. Co.*, 127 Neb. 572, 256 N.W. 71 (1934). However, jury instructions were not at issue in either case. In *Heady*, we quoted language from *Weiner* in support of the trial court's decision to permit evidence of the actual value of the property as supplying a potential motive for arson. In *Weiner*, the question was whether there was any evidence of arson that would allow the court to submit the question to the jury.

Here, instruction No. 12 was an abstract statement that was not a statement of the law and, in any event, unduly emphasized certain facts of the case. The trial court erred in giving this instruction because it adversely affected the rights of the Smiths. Thus, a new trial is warranted.

Although we have found prejudicial error in the giving of instruction No. 12 that necessitates a new trial, we briefly address another assignment of error regarding proposed jury instructions in that the issue may arise on retrial. The Smiths allege that the trial court erred in not giving their proposed instructions Nos. 17, 18, and 19.

Proposed instruction No. 17 stated: "The mere fact that the cause of a fire is of unknown origin does not in any way constitute evidence that the fire was the result of an intentional act of the Plaintiffs and, in fact, creates a presumption that it is not a fire of criminal origin." This instruction is not a correct statement of the law and would be misleading. No presumption is created because a fire is of unknown origin.

Proposed instruction No. 18 stated:

> Circumstantial evidence is not sufficient to sustain a verdict depending solely thereon for support, unless the circumstances proved by the evidence are of such a nature and are so related to each other that the conclusion reached

> by the jury is the only one that can fairly and reasonably be drawn therefrom. The evidence must be such as to make the Defendant's theory of causation reasonably probable and not merely possible.

The trial court did not err in refusing to give this instruction, as it is not a correct statement of the law and would tend to mislead the jury. The weight to be given circumstantial evidence is described in instruction No. 11.

Proposed instruction No. 19 stated:

> To justify a finding of criminal intent or intentional act on circumstantial evidence, it is necessary that the facts and circumstances essential to that conclusion must be proved by competent evidence, and when taken together, must be of such a character as to be consistent with each other, and with the hypothesis thought to be established thereby and inconsistencies with any reasonable hypothesis of innocence. Any fact or circumstance reasonably susceptible to two interpretations must be resolved against the Defendant insurer.

The case cited by the Smiths does not support this instruction, and it would tend to mislead the jury.

We conclude that the trial court did not err in refusing to give proposed instructions Nos. 17, 18, and 19.

CONCLUSION

For the reasons set forth herein, we reverse the judgment of the trial court and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

HENDRY, C.J., not participating.

IN RE INTEREST OF CLIFFORD M. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APELLEE, V. SUZETTE M., APPELLANT.

626 N.W.2d 549

Filed May 25, 2001. No. S-00-699.

1. **Juvenile Courts: Parental Rights: Appeal and Error.** In an appeal from an order terminating parental rights, an appellate court tries factual questions de novo on the

record. Appellate review is independent of the juvenile court's findings. However, when the evidence is in conflict, an appellate court may give weight to the fact that the juvenile court observed the witnesses and accepted one version of facts over another.

2. **Parental Rights: Evidence: Proof.** In order to terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in Neb. Rev. Stat. § 43-292 (Reissue 1998) exists and that termination is in the child's best interests.
3. **Statutes: Legislature: Intent: Time.** In noncriminal cases, substantive statutes are generally not given retroactive effect unless the Legislature has clearly expressed an intention that the new statute is to be applied retroactively.
4. **Statutes: Time.** When determining whether amendments to existing legislation can be applied retroactively, the critical question is whether the amendment is substantive or procedural, not whether the act or new legislation in its entirety is substantive or procedural. While substantive amendments generally are not applicable to pending cases, procedural amendments are.
5. **Words and Phrases.** A substantive right is one which creates a right or remedy which did not previously exist and which, but for the creation of the substantive right, would not entitle one to recover. A procedural right, on the other hand, is considered simply to be the method by which an already existing right is exercised.
6. **Statutes.** A substantive law creates duties, rights, and obligations, whereas a procedural law prescribes the means and methods through and by which substantive laws are enforced and applied.
7. **Juvenile Courts: Parental Rights.** A juvenile court has broad discretion to formulate a postadjudication rehabilitation plan with a goal of reuniting the child with the parent. However, termination of parental rights under Neb. Rev. Stat. § 43-292(2) (Reissue 1998) does not require proof that a parent has failed to comply with a rehabilitation plan.
8. ___: ___. A juvenile's best interests are a primary consideration in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code.
9. **Parental Rights.** The right of parents to maintain custody of their child is a natural right, subject only to the paramount interest which the public has in the protection of the rights of the child.
10. **Constitutional Law: Parental Rights.** The integrity of the family unit is one of the fundamental rights guaranteed by the Constitution of the United States, and such rights should not lightly be alienated.

Appeal from the Separate Juvenile Court of Douglas County: CHRISTOPHER KELLY, Judge. Affirmed.

Stephanie Weber Milone for appellant.

James S. Jansen, Douglas County Attorney, and Karen Kassebaum Nelson for appellee.

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

STEPHAN, J.

This is an action to terminate the parental rights of Suzette M., the biological mother of Clifford M., born February 17, 1990; Colette M., born February 1, 1992; and Chelsea M., born December 28, 1992. Following a hearing, the separate juvenile court of Douglas County, Nebraska, entered an order terminating the mother's parental rights, and she perfected this timely appeal. Finding no error, we affirm.

I. BACKGROUND

This is the third appearance of this case in the appellate courts of Nebraska. On or about March 1, 1994, the three children were removed from their mother's home and placed in the temporary custody of the Department of Health and Human Services (DHHS) because of alleged abuse. All three have been in the custody of the same foster parents since March 18, 1994. On February 3, 1995, the juvenile court adjudicated the children as being within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1993) on the basis of a second amended petition dated November 10, 1994. The adjudication was based upon the faults and habits of the mother. The juvenile court found that the mother had failed to protect Clifford from physical abuse perpetrated by her live-in boyfriend, T.C., and that all three children had been subjected to sexual contact by both the mother and T.C.

Initially, the mother was allowed to have one or two supervised visits with the children per week. Following the adjudication, the juvenile court entered a series of rehabilitation plans designed to bring about the eventual reunification of the family. Under one of those plans, adopted in 1996, the mother was ordered to enroll and participate in a program known as Parents United, which is designed to work specifically with sexual offenders and the victims of sexual abuse. Any person admitted into this program as an offender must first admit responsibility for the sexual abuse. In this case, the mother refused to acknowledge that any sexual contact occurred.

On March 27, 1997, following a hearing on a motion filed by the guardian ad litem, the juvenile court entered an order terminating the mother's parental rights to all three minor children pursuant to Neb. Rev. Stat. § 43-292(2) and (7) (Reissue 1993).

The order included a finding that "[d]ue to [the mother's] denial of the sexual contact to which she and [T.C.] subjected said children, she has effectively barred her participation in the children's therapy as ordered by this Court." The mother's visitation rights were discontinued at that time. The mother appealed, and the Nebraska Court of Appeals reversed the termination order, interpreting it as being based solely upon the mother's refusal to make the incriminating statements necessary to enroll in the Parents United program as a precursor to further participation in family therapy and holding that as such, it violated her Fifth Amendment privilege against self-incrimination. *In re Interest of Clifford M. et al.*, 6 Neb. App. 754, 577 N.W.2d 547 (1998). The Court of Appeals characterized its holding as limited to the principle that "courts may not *terminate* parental rights on the sole basis that a parent *refuses* to waive his or her right against self-incrimination" and further noted that the State was "not prejudiced from filing another motion to terminate [the mother's] parental rights on lawful grounds and presenting evidence to support such motion, if and when such action becomes appropriate." *Id.* at 774, 577 N.W.2d at 559.

Following remand, the juvenile court, in accordance with the mandate of the Court of Appeals, dismissed the first motion to terminate the mother's parental rights. On July 1, 1998, the State and the guardian ad litem filed another motion to terminate the mother's parental rights. The mother moved to dismiss and filed a separate motion to require the children, then in foster care, to be made available for visitation and family therapy. The juvenile court denied both motions, and the mother appealed. In *In re Interest of Clifford M. et al.*, 258 Neb. 800, 606 N.W.2d 743 (2000), we determined that we lacked jurisdiction because there was no final, appealable order and dismissed the appeal.

On December 28, 1998, the State and the guardian ad litem filed an amended motion for termination of parental rights. This motion sought termination under § 43-292(2) and (7) (Reissue 1998). The mother filed an answer on January 22, 1999, denying the allegations in the amended motion and asserting several affirmative defenses, including a claim that § 43-292(2) and (7) as amended by 1998 Neb. Laws, L.B. 1041, does not apply

retroactively and that the amended motion therefore violated her right to due process.

An evidentiary hearing on the amended motion for termination was held on May 23 and 24, 2000. Prior to taking any evidence, the juvenile court asked the mother whether she had seen the amended motion and understood the nature of the allegations. She responded that her lawyer had explained the allegations to her. The court then advised the mother that if the allegations in the amended motion were found to be true by clear and convincing evidence, her parental rights could be terminated. She was also informed of her right to an attorney, to remain silent, to confront and cross-examine witnesses, to compel the testimony of witnesses, to a speedy trial, and to appeal.

During the hearing, various exhibits were offered by both parties, several witnesses testified on behalf of the State, and the mother testified on her own behalf. We will discuss the substance of this evidence in conjunction with our analysis of the mother's specific assignments of error. In its order terminating parental rights, the juvenile court found by clear and convincing evidence that grounds for termination had been established under § 43-292(2) and (7) (Reissue 1998) and that termination of parental rights was in the best interests of the children.

II. ASSIGNMENTS OF ERROR

The mother assigns, restated, that the juvenile court erred in (1) applying § 43-292(2) and (7) (Reissue 1998) retroactively; (2) finding clear and convincing evidence sufficient to terminate her parental rights under § 43-292(2) and (7) (Reissue 1998); (3) violating her due process rights by failing to hold an exception hearing prior to terminating her parental rights under § 43-292(2) and (7) (Reissue 1998); (4) violating her due process rights by failing to provide adequate notice of the nature and consequences of the proceedings and of the statutory provisions upon which termination was sought; (5) basing the termination of her parental rights upon § 43-292(2) and (7) (Reissue 1993), as those statutory sections have been amended; (6) finding clear and convincing evidence to support termination of her parental rights under § 43-292(2) and (7) (Reissue 1993); (7) determining that the termination of her parental rights is in the

best interests of the children; and (8) denying her motion to dismiss.

III. STANDARD OF REVIEW

[1] In an appeal from an order terminating parental rights, an appellate court tries factual questions de novo on the record. Appellate review is independent of the juvenile court's findings. However, when the evidence is in conflict, an appellate court may give weight to the fact that the juvenile court observed the witnesses and accepted one version of facts over another. *In re Interest of Kalie W.*, 258 Neb. 46, 601 N.W.2d 753 (1999).

IV. ANALYSIS

1. INTRODUCTION

[2] In order to terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists and that termination is in the child's best interests. *In re Interest of Michael B. et al.*, 258 Neb. 545, 604 N.W.2d 405 (2000); *In re Interest of Kalie W., supra*. Here, the State alleged and the juvenile court determined that the statutory grounds set forth in § 43-292(2) and (7) were established. For the reasons outlined below, we conclude based upon our de novo review that there is clear and convincing evidence justifying termination of parental rights pursuant to § 43-292(2) (Reissue 1998), and we therefore limit our discussion to that issue.

2. RETROACTIVITY

The operative amended motion to terminate parental rights was filed in this case on December 28, 1998, after the date on which amendments to the Nebraska Juvenile Code enacted by the Nebraska Legislature in that year became operative. See 1998 Neb. Laws, L.B. 1041. As we noted in *In re Interest of Sarah K.*, 258 Neb. 52, 601 N.W.2d 780 (1999), the legislative history of L.B. 1041 indicates that it was necessitated by the terms of the federal Adoption and Safe Families Act of 1997, which mandated certain changes to state juvenile codes as a condition to continued federal funding of certain state programs, including foster care. See 42 U.S.C. § 671 (1994 & Supp. IV 1998). As a result of these amendments, § 43-292(2) provides

that parental rights can be terminated upon a showing that "[t]he parents have substantially and continuously or repeatedly neglected and refused to give the juvenile *or a sibling of the juvenile* necessary parental care and protection." (Emphasis supplied.) The addition of the italicized phrase was the only change made to § 43-292(2) by L.B. 1041. The language of the statute as amended in 1998 was utilized by the State in its amended motion for termination of parental rights and cited by the juvenile court in its termination order. The mother generally contends that this "retroactive" application of the amended statute deprived her of due process.

[3-6] In noncriminal cases, substantive statutes are generally not given retroactive effect unless the Legislature has clearly expressed an intention that the new statute is to be applied retroactively. *Battle Creek State Bank v. Haake*, 255 Neb. 666, 587 N.W.2d 83 (1998). When determining whether new amendments to existing legislation can be applied retroactively, the critical question is whether the amendment is substantive or procedural, not whether the act or new legislation in its entirety is substantive or procedural. *Kratochvil v. Motor Club Ins. Assn.*, 255 Neb. 977, 588 N.W.2d 565 (1999). While substantive amendments generally are not applicable to pending cases, procedural amendments are. *Id.* A substantive right is one which creates a right or remedy which did not previously exist and which, but for the creation of the substantive right, would not entitle one to recover. *Id.* A procedural right, on the other hand, is considered simply to be the method by which an already existing right is exercised. *Id.* A substantive law creates duties, rights, and obligations, whereas a procedural law prescribes the means and methods through and by which substantive laws are enforced and applied. *Cheloha v. Cheloha*, 255 Neb. 32, 582 N.W.2d 291 (1998).

In this case, it is unnecessary to determine whether the 1998 addition of the phrase "or a sibling of the juvenile" to § 43-292(2) was a substantive or a procedural change to the statute because we are not presented with the question of whether parental rights can be terminated based upon abuse and neglect of a nonadjudicated sibling. Here, each of the children was adjudicated to be within the jurisdiction of the juvenile court, and

there is evidence that each child was subjected to abuse and neglect at the hands of the mother and T.C. Depriving an adjudicated juvenile of necessary parental care and protection was a statutory basis for terminating parental rights both prior and subsequent to the 1998 amendments to the juvenile code, and therefore the mother's contention that § 43-292(2) was applied "retroactively" by the juvenile court is without merit.

3. Sufficiency of Evidence

(a) State's Evidence

Dr. Cynthia M. Wengel, formerly chief of the pediatrics department at Creighton Medical Center, testified with respect to colposcopic examinations which she performed on each of the children on October 7, 1994. This medical procedure involves the use of a magnification device to examine the genitalia and rectum in order to evaluate whether a child has been sexually abused. Wengel testified that during such an examination, it is not uncommon for children to spontaneously offer information. As she was examining Clifford, he mentioned that "[T.C.] put his wiener in my bottom." Clifford also volunteered that T.C. similarly subjected Colette and Chelsea to anal penetration when they were playing the "doctor game." Wengel testified that Clifford's examination was normal but that such examinations were often normal even when sexual abuse had actually occurred due to the body's ability to heal. Wengel further testified that her vaginal examinations of Colette and Chelsea were normal but that the rectal tissue of both girls showed evidence of prior tearing. Wengel testified that while constipation or trauma could cause tearing of rectal tissue, it was her opinion that the injuries to Colette and Chelsea were caused by sexual abuse.

Dr. Michael Moran, a board-certified pediatrician who reviewed the colposcopic examinations, testified that the negative clinical findings with respect to Clifford could not rule out the possibility that Clifford had been subjected to sexual abuse. Moran opined that both Colette and Chelsea had been sexually abused because the position of the rectal scarring was inconsistent with other causes of injury.

Kay McMahon, a licensed certified social worker and an expert in child sexual abuse, testified that she treated the three children from 1994 to 1998. At that time, the children were diagnosed as suffering from posttraumatic stress disorder, which McMahon explained occurs in persons who have suffered trauma outside the normal life experience. McMahon testified that her sessions with the children in 1996 occurred shortly after visits with their mother. She stated that they were often distraught after such visits. Clifford was more anxious, less able to maintain concentration, and more aggressive toward Colette and Chelsea after the visits. He reported that he "can't stop being scared" of the mother. Clifford was also afraid to sleep and vomited before and after visits with his mother. Colette cried and begged that the visits be stopped because she was dreaming of her mother at night and was scared. She also became more clingy and regressed to "baby talk." Chelsea had nightmares and night terrors following visits with her mother. According to McMahon, the children's symptoms ended when the visits with their mother were discontinued and this sudden change demonstrated, in her opinion, that the mother was the cause of their anxiety.

McMahon was contacted about doing family therapy in 1996. In the initial meeting, the mother stated to McMahon that her family therapy goal was to find out why Clifford was lying about the sexual abuse. McMahon testified that she responded by explaining that Clifford clearly believed the abuse occurred and that being adversarial would not establish a positive therapeutic ground upon which to build. In McMahon's second meeting with the mother, the mother again accused Clifford of lying and refused to participate in further therapy with McMahon. McMahon testified that she refused to conduct family therapy under those circumstances because, in her opinion, Clifford would suffer extreme psychological damage by such confrontations with his mother. McMahon testified that all of the children wanted visits with their mother stopped and that it was in their best interests for the mother's parental rights to be terminated.

On cross-examination, McMahon admitted that she never observed the children interact with their mother. She further admitted that Clifford had stated that he loved his mother and

opined that it was possible that he was not being fully truthful in his allegations. McMahon also testified, however, that she had repeatedly questioned Clifford and that his reports of the abuse were always consistent. According to McMahon, the primary way to protect a young child from posttraumatic stress disorder is to remove the original source of trauma from the child's life.

The licensed foster mother who has cared for the children since March 1994 testified that the behavior of the children worsened after visits with the mother. The children would argue, become destructive, vomit, and have night terrors. Specifically, Chelsea had nightmares about someone in her bed after her toes or her private parts. The foster mother stated that the behavior improved as the contact with their mother decreased.

Clifford's deposition was admitted by stipulation of the parties. The deposition was taken on February 17, 1999, Clifford's ninth birthday. He testified that he lived with his mother when he was about 3 years old and that a man named "T.C." and Colette and Chelsea also lived with them. Clifford said he did not feel safe when he lived with his mother because of what she did to him. Clifford testified that while wearing rubber gloves, T.C. touched him on his "private parts," which he described as his "bottom" and his "front private part" which was "straight." He said the touching made him feel bad. Clifford testified that when T.C. touched his "front private," he smacked it around. T.C. called this "the doctor game." T.C. told Clifford to touch T.C.'s privates and Clifford complied. He described ejaculation by T.C. when Clifford touched T.C.'s "front private."

Clifford testified that his mother was in the room when T.C. engaged in this activity and that she touched Clifford in the same places and in the same manner as T.C. Clifford also touched his mother because she told him to do so. He said that he touched her front and back privates and her chest. Clifford said that his mother's front private part looked different than T.C's because it was not straight.

Clifford stated that he saw T.C. going "up and down, up and down" while he was touching Colette and both were naked. Clifford said that T.C. touched Colette with his "dick-ke-do" on her "dick-ke-do," which Clifford described as the same thing as a front private. Clifford said that his mother was present when

this occurred but that she did not say anything. She also did not say anything when T.C. was touching Clifford. Clifford said that he also observed T.C. engaging in the same type of activity with Chelsea, also in his mother's presence.

Dr. Cynthia Topf, a licensed clinical psychologist, testified that she visited with the children in 1994 and again in 1998. In 1994, Clifford spoke to her about the sexual abuse committed by his mother and T.C. Clifford told her that he had seen the two adults touch each other and also touch Chelsea and Colette. Clifford told Topf that he would "suck on dickey" and kissed his mother's "boobies." Clifford also discussed digital penetration and said he was forced to participate because his mother and T.C. told him not to tell or they would hit or hurt him. At that time, Topf diagnosed Clifford with posttraumatic stress disorder and found that Colette was also exhibiting symptoms. She recommended no visitation with the mother in 1994.

Topf reiterated this recommendation after meeting with the three children in 1998. Topf testified that in 1998, all three children exhibited very severe behavioral and emotional reactions at the thought of seeing their mother. Clifford began crying and said he did not want to see his mother. Chelsea had a bad dream, and Colette became very clingy and needy. Topf opined that these symptoms were an acute exacerbation of posttraumatic stress disorder. On cross-examination, Topf admitted that she did not observe the children interacting with their mother. She testified that she formed her 1998 opinion based upon the children's reports, her observations of the children, and the foster mother's reports of the children's behavior after visits with their mother. Topf testified that she scheduled six sessions with the children but ended her evaluation after one session with Colette and Chelsea and three sessions with Clifford because she thought it was too emotionally damaging for them to discuss their mother. In her opinion, forcing the children to talk about the trauma was not effective and treatment should begin only when the children were ready to bring up the trauma on their own.

Deniz Leuenberger, an employee of DHHS, became the case manager in this matter in July 1998. She met with the three children in August. When she questioned the children about their

mother, they talked about their foster mother. When asked whether they had another mother, the children referred to the "visit mom" and did not know her name. Leuenberger testified that the children became noticeably agitated when talking about their "visit mom."

In 1999, Leuenberger concluded that she could not implement a safety plan for this family because the history of sexual abuse required the mother to obtain help or to at least acknowledge that the children believed that they had been abused and were frightened because of it. Leuenberger testified that the mother could not acknowledge the children's feelings and that there was no party that could protect the children. Leuenberger stated her opinion that the mother's parental rights should be terminated because of this inability to formulate a safety plan, the children's resistance to reunification, and the uncertainty faced by the children during their extended stay in foster care.

On cross-examination, Leuenberger admitted that she saw the children for 1½ hours in August 1998 and 2 hours in February 1999. She had one or two meetings and a couple of telephone contacts with the mother. She did not observe the mother interact with the children, and no family therapy was conducted because the children resisted it.

Leuenberger testified that 24-hour supervision of the children in their mother's home was not a reasonable service to offer and that even if offered, it would not reduce the risk enough to provide the children with safety. She testified that DHHS would not force a child to visit his or her parent and would not force a child to participate in therapy.

(b) Mother's Evidence

The mother testified on her own behalf. Her testimony focused primarily upon her efforts at reunification with her children. She stated that she was not made aware of many of the case plans in her case. She understood that the goal of the court's orders was reunification of her family, and she therefore tried to comply with the orders. She obtained housing, obtained a legal income, began learning to read, and attended a domestic violence course on her own. She completed psychiatric evaluations that were requested of her and lined up her own doctors and therapists

without assistance from DHHS. The mother testified that she requested family therapy and that she understood after her first meeting with McMahon that the children would be at the second meeting. When the children were not present at the second meeting, she informed McMahon that she already had an individual therapist and walked out. She testified that she never missed a visit with her children. She expressed concern about the manner in which DHHS transported the children to visits because Colette and Chelsea were not in car seats and Clifford was riding in the front seat of a car equipped with an airbag. The mother testified that she terminated her relationship with T.C. in 1995 and is willing to participate in family and individual therapy. She denied being informed that there was no point in attempting to comply with the other portions of the court's orders if she refused to admit the abuse. The mother testified that she has done everything asked of her by the court and DHHS.

On cross-examination, the mother admitted that DHHS accepted all of the services she obtained on her own as a fulfillment of the court's orders and that DHHS paid for at least a portion of the services she obtained. She testified that she receives Social Security disability benefits "probably" for her mental health due to her depression and anxiety, but that raising three kids would not be stressful. She denied telling McMahon that she wanted to confront Clifford about why he was lying. She testified that she understood the family therapy was first to be individually and then with the family. She thought it was in the best interests of the children to be with her and that they could be treated with counseling. The mother stated that she needed the children to be made available by DHHS for family therapy. She further testified that she did not trust McMahon's diagnosis of posttraumatic stress disorder and that such diagnosis would have to be made in writing by someone she could trust.

The mother testified that she has never admitted or denied Clifford's account of the alleged sexual abuse. She stated that criminal charges which were pending against her in 1995 had been dismissed. She testified that she does not understand why the State is seeking to terminate her parental rights and believes that it is in the best interests of her children to be with her. She requested 24-hour supervised visitation with her children.

(c) Resolution

The mother argues that the foregoing fails to establish by clear and convincing evidence that termination of her parental rights was appropriate pursuant to § 43-292(2). In addition, she argues the evidence is insufficient to support a finding that termination of her parental rights is in the best interests of the children. We disagree with both arguments.

Our independent review of the record leads us to conclude that Clifford truthfully described repeated acts of sexual abuse perpetrated upon the three children by T.C. with the mother's knowledge, and by the mother herself, before the children were removed from the mother's home. The events Clifford described to Wengel in 1994, at the age of 4, are consistent with his deposition testimony given 5 years later on his ninth birthday. Wengel, Moran, McMahon, and Topf, each of whom testified that he or she has experience and expertise in the detection and treatment of sexual abuse of children, all testified that they found Clifford's account to be credible. The testimony of McMahon in this regard is particularly persuasive. When asked on cross-examination by counsel for the mother how McMahon determined whether Clifford was lying, she responded as follows:

> Okay. It is one of the things I have been specially trained in. One never wants to assume an allegation of abuse, especially sexual abuse, is true. It is traumatizing to the child and to the alleged offender. I, therefore, look for several things when I ask children. I ask — I look for over time is there consistency in their story? Is the general outlines [sic] of the story consistent over time? In this case that was true.
>
> Secondly, is the general outlying of the case and the allegations so consistent that it's almost identical, in other words, like a rehearsed thing the child can't take something out of the full context and just talk about one piece, you know. In this case Clifford could talk about aspects without other — talk about other aspects at any given time, in other words, did not feel or seem to be a rehearsed kind of report.
>
> The third thing you look for is if you throw in what would be or seem an extenuating question off the wall, can the child answer it. In other words, if a child has been rehearsed to report, for instance, sexual abuse and you

> asked them what room it was in, they can usually tell you, in the bedroom. What color was the bedspread? A child who has been rehearsed is not going to be able to answer. That question really throws them. A child who has will look at you like that's a stupid question, but they pretty well answer it.
>
> Over the course of many months, I would do all three lines of questioning, and Clifford consistently was able to convince me, in my professional opinion, that he was telling me the truth.

Further, it is undisputed that the colposcopic examination of Colette and Chelsea revealed rectal scarring consistent with sexual abuse.

[7] The mother argues, however, that her parental rights should not be terminated because she has taken substantial steps to comply with the rehabilitation plans formulated by the juvenile court and that the reunification has been thwarted by the refusal of DHHS to permit even supervised visitation with her children since 1997. With respect to the reunification plan, we have consistently held that a juvenile court has broad discretion to formulate a postadjudication rehabilitation plan with a goal of reuniting the child with the parent. *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997). However, termination of parental rights under § 43-292(2) does not require proof that a parent has failed to comply with a rehabilitation plan. *In re Interest of S.B.E. et al.*, 240 Neb. 748, 484 N.W.2d 97 (1992). Although failure to achieve reunification pursuant to such a plan is a separate and independent ground for termination of parental rights pursuant to § 43-292(6), see *In re Interest of Kassara M.*, 258 Neb. 90, 601 N.W.2d 917 (1999), that has not been alleged in this case. Therefore, we will consider the potential efficacy of the rehabilitation plan only in the larger context of whether termination of parental rights, as opposed to efforts to reunify the family, is in the best interests of the children, as discussed below.

With respect to visitation, the record demonstrates that DHHS has not permitted the mother to have supervised visitation with her children since 1997. There is undisputed evidence in the record, however, that it would be emotionally and psy-

chologically damaging for the children to have contact with their mother. It is also undisputed that the children do not wish to have contact with the mother and that DHHS will not force children to visit their parents. Moreover, we conclude from our review of the record that the State and/or the guardian ad litem have been seeking termination of the mother's parental rights during approximately the same time period in which the mother has been denied visitation with her children.

There is no evidence in the record to refute or cast serious doubt upon Clifford's description of what occurred in his mother's home. The record clearly and convincingly establishes that the mother continuously or repeatedly neglected and refused to give each of these three children necessary care and protection, and therefore grounds for termination pursuant to § 43-292(2) have been established. We therefore turn to the question of whether the evidence establishes that termination of parental rights would be in the best interests of the children.

[8-10] A juvenile's best interests are a primary consideration in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code. *In re Interest of Sunshine A. et al.*, 258 Neb. 148, 602 N.W.2d 452 (1999). The right of parents to maintain custody of their child is a natural right, subject only to the paramount interest which the public has in the protection of the rights of the child. *In re Interest of Kelley D. & Heather D.*, 256 Neb. 465, 590 N.W.2d 392 (1999). The integrity of the family unit is one of the fundamental rights guaranteed by the Constitution of the United States, and such rights should not lightly be alienated. *In re Interest of Joshua M. et al.*, 256 Neb. 596, 591 N.W.2d 557 (1999).

As noted above, we consider the potential efficacy of the reunification plan in our analysis of whether termination of the mother's parental rights is in the best interests of the children. Based upon our independent review of the record, we conclude that there is no substantial likelihood that these children can ever be reunited with their mother pursuant to a rehabilitation plan.

The record clearly reveals that the children have a profound negative reaction to personal contact with their biological mother. McMahon testified that when she began seeing the children in 1996, they became distraught and aggressive and

exhibited various other symptoms of posttraumatic stress disorder after visiting their mother. All three children told McMahon that they wanted the visits stopped. The symptoms suddenly subsided when visitation was discontinued in 1997, leading McMahon to conclude that contact with the mother reminded the children of the abuse they had experienced and produced the symptoms of anxiety. McMahon testified that the primary method of protecting a young child from posttraumatic stress disorder is to remove the original source of the trauma.

In a similar vein, Topf testified that when she saw the children in 1998, they exhibited very severe behavioral and emotional reactions to even the thought of seeing their mother. These symptoms included crying, destructive behavior, simulation of oral sex, nightmares, masturbation, and emotional regression. Topf eventually canceled scheduled evaluation sessions with the children because she felt it was too emotionally damaging for them to be reminded of what they had experienced.

The record thus reflects that the sexual abuse inflicted upon these children early in their lives has opened an emotional and psychological chasm between them and their mother which is unlikely to be bridged. The abuse has damaged the familial relationship beyond repair, and termination of the mother's parental rights is therefore in the best interests of the children.

4. Adequacy of Notice

The mother argues that the juvenile court violated her right to due process by failing to give her notice of changes to § 43-292 brought about by the passage of L.B. 1041 in 1998. Specifically, she contends that "[t]here is nothing in the record to show [the mother] was provided adequate and sufficient notice of the possibility that her parental rights could be terminated under a new version of the law which was not in existence when this case began nor for almost four years thereafter." Brief for appellant at 29. As noted in our previous discussion, termination of the mother's parental rights was justified on the grounds set forth in language contained in § 43-292(2) before and after the 1998 amendment.

Notice to parents in juvenile proceedings to terminate parental rights is governed by Neb. Rev. Stat. § 43-279.01

(Reissue 1998), which was not changed by the 1998 amendments to the juvenile code. Section 43-279.01(1)(a) requires the court to advise a parent or custodian of the "[n]ature of the proceedings and the possible consequences or dispositions" as well as various procedural rights. The record reflects that prior to the May 23, 2000, hearing on the amended motion to terminate parental rights, the court gave each of the advisements required by § 43-279.01. The mother affirmatively stated that her attorney explained the allegations of the operative motion to her and that she understood her parental rights could be terminated if the allegations were proved by clear and convincing evidence. We conclude that the mother was given the notice to which she was entitled by statute and due process of law and reject her argument to the contrary.

5. Failure to Conduct § 43-292.03 Hearing

The mother argues that her due process rights were violated by the failure of the juvenile court to conduct an exception hearing pursuant to Neb. Rev. Stat. § 43-292.03 (Reissue 1998), which was added to the juvenile code by 1998 Neb. Laws, L.B. 1041, and became operative on July 1, 1998. Section 43-292.03 must be read in conjunction with Neb. Rev. Stat. § 43-292.02 (Reissue 1998), which was also added to the juvenile code by the enactment of L.B. 1041. In pertinent part, § 43-292.02 provides:

> (1) A petition shall be filed on behalf of the state to terminate the parental rights of the juvenile's parents or, if such a petition has been filed by another party, the state shall join as a party to the petition . . . if:
>
> (a) A juvenile has been in foster care under the responsibility of the state for fifteen or more months of the most recent twenty-two months; . . .
>
> . . . .
>
> (3) The petition is not required to be filed on behalf of the state or if a petition is filed the state shall not be required to join in a petition to terminate parental rights . . . if:
>
> . . . .
>
> (c) The family of the juvenile has not had a reasonable opportunity to avail themselves of the services deemed necessary in the case plan or permanency plan approved by

> the court if reasonable efforts to preserve and reunify the family are required under section 43-283.01.

Section 43-292.03 provides in part:

> (1) Within thirty days after the fifteen-month period under subsection (1) of section 43-292.02, the court shall hold a hearing on the record and shall make a determination on the record as to whether there is an exception under subsection (3) of section 43-292.02 in this particular case. If there is no exception, the state shall proceed as provided in subsection (1) of section 43-292.02.

The record does not indicate that the juvenile court ever conducted an "exception" hearing pursuant to § 43-292.03(1), despite the mandatory directive of the statute. However, it does not logically follow that the mother was thereby deprived of due process. The purpose of an exception hearing, derived from the plain language of § 43-292.03(1), is to determine whether the State may be excused from the mandatory requirement of § 43-292.02(1) that it file a petition to terminate parental rights under certain circumstances, including those where a juvenile has been in foster care under the responsibility of the State for 15 of the most recent 22 months. The State is not *required* to file a petition to terminate if the juvenile court determines at the exception hearing that any of the circumstances specified in § 43-292.02(3) exist. If such circumstances are not shown, § 43-292.03(1) provides that "the state shall proceed as provided in subsection (1) of section 43-292.02," which requires the filing of a petition to terminate parental rights under specified circumstances. While an exception hearing may afford a basis for *relieving* the State of its statutory obligation to file a petition to terminate under § 43-292.02(1), we find no language in either § 43-292.02 or § 43-292.03 which would *prevent* the State from petitioning for termination of parental rights under § 43-292 even if it were not required to do so.

The filing of a petition to terminate parental rights in this circumstance did not deprive the mother of due process because she retained a full opportunity to appear and present defenses at the hearing on the petition and to obtain judicial review of an adverse determination. Accordingly, this assignment of error is without merit.

V. CONCLUSION

For the reasons discussed above, we conclude on the basis of our independent review that the State and the guardian ad litem have established by clear and convincing evidence that there is a factual basis for termination of the mother's parental rights under § 43-292(2) (Reissue 1998) and that termination of such rights is in the best interests of each of the three adjudicated juveniles. We also determine that the procedures utilized by the juvenile court in terminating the mother's parental rights did not deprive her of due process. Accordingly, the judgment of the separate juvenile court terminating the mother's parental rights with respect to each of the three children is affirmed.

AFFIRMED.

MICHAEL L. CARTER, APPELLEE, V. ANNIE B. CARTER, APPELLANT.
626 N.W.2d 576

Filed June 1, 2001. No. S-00-121.

1. **Divorce: Property Division: Alimony: Attorney Fees: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees.
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.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the 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. **Property Division.** Pursuant to Neb. Rev. Stat. § 42-365 (Reissue 1998), the purpose of property division is to distribute the marital assets equitably between the parties.
5. ___. The ultimate test for determining the appropriateness of the division of property is reasonableness as determined by the facts of each case.
6. **Divorce: Property Division.** The debts of the parties should be considered in making a property division pursuant to a divorce.
7. **Property Division: Taxes.** Income tax liability incurred during the marriage is one of the accepted costs of producing marital income, and thus, income tax liability should generally be treated as a marital debt.
8. ___: ___. An innocent spouse who has filed separate tax returns, and paid his or her taxes in a timely fashion, should not be forced to share in any statutory penalties for the late filings of a dilatory spouse.

9. **Divorce: Appeal and Error.** Appeals in domestic relations matters are heard de novo on the record, and thus, an appellate court is empowered to enter the order which should have been made as reflected by the record.

Appeal from the District Court for Douglas County: MICHAEL MCGILL, Judge. Affirmed as modified.

Michael T. Levy for appellant.

No appearance for appellee.

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

MCCORMACK, J.

NATURE OF CASE

This is an appeal from a decree of dissolution in a domestic relations case. Annie B. Carter appeals from the decree entered on January 4, 2000, because the trial court found that a debt owed to the Internal Revenue Service (IRS) of approximately $58,000 was a marital debt and ordered each party to pay one-half of this debt. We affirm as modified.

BACKGROUND

Appellee, Michael L. Carter, and Annie were married on September 18, 1977. The couple were separated at various periods throughout their marriage. At the end of 1993, Michael received an employment severance payout from Union Pacific Railroad. Michael's total salary for 1993, including his severance payout, was $208,712.70. Neither Michael nor Annie filed a 1993 income tax return until 1998, when each filed a separate return. Michael designated his filing status as "Married filing separate return." Annie did not sign Michael's 1993 tax return. Exhibit 13, Michael's 1993 federal income tax return, shows a total income of $208,712.70 with $39,313.01 withheld for federal income taxes. Michael testified that $58,000 was due as tax liability for the 1993 severance payout. This $58,000 consists of the original tax liability of approximately $21,000 plus penalties and interest.

The record reveals that Michael deposited $92,990.14 into his own personal bank account on January 31, 1994. Annie did not have access to this account, and the statements on this account

were sent to Michael at his parents' home. Michael testified that in 1994 and 1995, $15,000 that he invested in a business was lost and $30,000 was lost "on a concert." Michael stated that the rest of the money was used by the parties for living expenses for 2 years.

Annie stated that she was never aware of Michael's business investments until after the fact. Annie testified that no severance money was ever deposited into the parties' joint bank account and that Michael never gave any money directly to the household. Annie stated that during 1994 and 1995, Michael paid only about $500 a month for bills. Annie testified that the household bills were paid from the joint account and that Michael never deposited any money into this account in 1993. Annie testified that she believes that the rest of the severance money was gambled away by Michael or used to pay gambling debts. Annie stated that Michael had a gambling problem and had received counseling for this problem.

Michael claims that he was separated from Annie from January to August 1993 and again from November 1994 to December 1995. However, Annie testified that Michael lived with her for probably the whole year of 1993 and the whole year of 1994. Annie stated that the parties separated in December 1994. Michael filed for dissolution of marriage on October 6, 1998. The marriage was dissolved on January 4, 2000.

Michael has not filed a brief in this case but stated on direct examination at trial that he wanted the trial court to divide the $58,000 tax liability in half. The trial court ruled that each party was responsible to pay one-half of the $58,000 debt to the IRS. On appeal, Annie argues that the initial tax principal of approximately $21,000 should be considered as nonmarital debt because it was spent solely by Michael for nonmarital purposes. Annie also argues that the approximately $37,000 in interest and penalties should also be considered as nonmarital debt because that amount was incurred by reason of Michael's dilatory income tax filing for which he was solely responsible.

ASSIGNMENTS OF ERROR

Annie assigns as error (1) that the trial court erred and abused its discretion in finding that the $58,000 debt to the IRS was a

marital debt and in ordering each party to pay one-half of that debt and (2) that the result of the allocation by the trial court of one-half of the IRS debt to each party was an untenable property division and an abuse of discretion by the trial court in dividing the marital estate.

STANDARD OF REVIEW

[1] In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees. *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000); *Meints v. Meints*, 258 Neb. 1017, 608 N.W.2d 564 (2000); *Parde v. Parde*, 258 Neb. 101, 602 N.W.2d 657 (1999).

[2] 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. *Meints v. Meints, supra.*

[3] A judicial abuse of discretion exists when the 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. *Id.*

ANALYSIS

[4-6] The purpose of property division is to distribute the marital assets equitably between the parties. Neb. Rev. Stat. § 42-365 (Reissue 1998). The ultimate test for determining the appropriateness of the division of property is reasonableness as determined by the facts of each case. *Meints v. Meints, supra*; *Hajenga v. Hajenga*, 257 Neb. 841, 601 N.W.2d 528 (1999). The debts of the parties should be considered in making a property division pursuant to a divorce. *Id.*; *Black v. Black*, 221 Neb. 533, 378 N.W.2d 849 (1985).

The issue in this case is whether the $58,000 income tax liability incurred by Michael is a marital debt or an individual debt of Michael. Annie argues that the case of *Meints v. Meints, supra*, controls the outcome of this case and requires a modification of the original decree to find that Michael is entirely liable for the $58,000 income tax burden.

The decree was entered January 4, 2000, and *Meints* was decided in March 2000. The trial court, therefore, did not have the benefit of the *Meints* decision when entering the decree.

Meints involved a marital dissolution proceeding. In *Meints*, between 1990 and 1996, the husband, who was self-employed, incurred a federal income tax liability of $19,162.31, plus an additional $11,235.36 in statutory penalties for late filing, for a total IRS liability of $30,397.67. During those years, the husband and the wife filed separate income tax returns. The wife filed timely tax returns. The husband testified that he spent the funds that he failed to withhold for IRS tax purposes on family expenses, and the wife did not dispute this claim.

The wife argued that she paid her taxes on time, unlike her husband, and claimed it would be unfair to require her to pay one-half of the outstanding income tax liability which was the direct result of the husband's failure to timely pay his share of the taxes. The husband claimed that the fact that the parties filed separate income tax returns was irrelevant because the tax liability incurred was a marital debt and the funds that he failed to pay were spent on family expenses.

[7,8] On appeal, we d etermined that income tax liability incurred during the marriage is one of the accepted costs of producing marital income and, thus, income tax liability should generally be treated as a marital debt. *Meints v. Meints*, 258 Neb. 1017, 608 N.W.2d 564 (2000). We further stated that an innocent spouse who has filed separate tax returns, and paid his or her taxes in a timely fashion, should not be forced to share in any statutory penalties for the late filings of a dilatory spouse. *Id.*

The wife in *Meints* did not dispute her husband's assertion that the money he failed to withhold was spent on family expenses. In the instant case, however, Annie argues that the initial tax principal of approximately $21,000 should be considered nonmarital debt because it was spent solely by Michael on nonmarital purposes. In addition, Annie argues the amount of penalties and interest should be nonmarital debt because of Michael's dilatory filing.

The *Meints* decision dictates the penalties assessed and the accrued interest in the present case be nonmarital debt because it was solely attributable to Michael's delay in filing. Therefore,

the trial court abused its discretion in that it determined all of the tax debt, which included penalties and interest, was marital debt.

The next inquiry is whether credible evidence establishes that Michael spent significant funds on nonmarital pursuits. This will determine if the approximately $21,000 of original tax principal is a marital or nonmarital debt. In *Meints*, we noted that "equity may not demand the same result if credible evidence establishes that the delinquent tax-paying spouse spent significant funds on nonmarital pursuits." 258 Neb. at 1024, 608 N.W.2d at 569.

[9] Appeals in domestic relations matters are heard de novo on the record, and thus, an appellate court is empowered to enter the order which should have been made as reflected by the record. *Davidson v. Davidson*, 254 Neb. 656, 578 N.W.2d 848 (1998). Michael testified that out of the $130,000 he received, he deposited $92,000 into the account solely in his name and on which the statements were sent to his parents' home. He also testified that $30,000 was lost on a concert and $15,000 was lost on a failed business. Michael stated the rest of the money was used for the parties' living expenses for 2 years.

However, the record shows that Michael deposited $92,990.14 in his personal bank account on January 31, 1994, and that on September 28, 1994, there was only $643.84 in the bank account. This conflicts with Michael's testimony that the rest of the money was used for the parties' living expenses for 2 years.

Annie's testimony contradicted Michael's testimony. Annie stated that she was never aware of Michael's business investments until after the fact. The $92,000 account in Michael's name only was one which Annie did not have access to. The bank statements for this account were sent to Michael to an address that Annie testified was Michael's parents' address.

Annie testified that no severance money was ever deposited into the parties' joint bank account and that Michael never contributed any money directly to the household. Annie stated that during 1994 and 1995, Michael only paid about $500 a month for bills. Annie testified that the household bills were paid from the joint bank account and that Michael made no deposits in that account during 1993. Annie testified that she believed the rest of the severance money was gambled away by Michael or used to pay gambling debts.

We determine there is credible evidence contained in the record to conclude that Michael spent significant funds on nonmarital pursuits. The trial court abused its discretion in ordering Annie to pay one-half of the $58,000, which required her to pay one-half of the original tax principal.

CONCLUSION

We hold under the facts of this case that equity demands the tax principal be treated as nonmarital debt because credible evidence established that it was spent by Michael on nonmarital pursuits. Michael shall be solely liable for the original tax principal of approximately $21,000 from his severance package. We also determine that Michael is also solely liable for all assessed penalties and accrued interest due to Michael's dilatory filing, as it is also nonmarital debt.

AFFIRMED AS MODIFIED.

ROGER E. HARDERS, APPELLEE, V. MARILYN J. ODVODY AND MILTON E. ODVODY, WIFE AND HUSBAND, APPELLANTS.

626 N.W.2d 568

Filed June 1, 2001. No. S-00-136.

1. **Injunction: Equity: Appeal and Error.** An action for injunction sounds in equity. In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, 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.
2. **Easements: Adverse Possession: Proof.** To establish a road or highway by prescription, there must be a use by the general public, under a claim of right adverse to the owner of the land, of some particular or defined line of travel, and the use must be uninterrupted and without substantial change for 10 years, the period of time necessary to bar an action to recover the land.
3. **Easements: Adverse Possession.** The use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate.
4. **Easements: Adverse Possession: Time.** The use of an easement must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, with the knowledge and acquiescence of the owner of the servient tenement, for the full prescriptive period.

5. **Easements: Adverse Possession: Time: Presumptions.** Where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under claim of right.
6. **Easements: Adverse Possession: Time: Presumptions: Proof.** If a person proves uninterrupted and open use for the necessary period without evidence to explain how the use began, the presumption is raised that the use is adverse and under claim of right, and the burden is on the owner of the land to show that the use was by license, agreement, or permission. The presumption of adverse use and claim of right, when applicable, prevails unless it is overcome by a preponderance of the evidence.
7. **Easements: Time: Proof.** To prove a prescriptive right to an easement, all the elements of prescriptive use must be generally established by clear, convincing, and satisfactory evidence.
8. **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. 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.
9. **Injunction: Property: Trespass.** Where the nature and frequency of trespasses are such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land, an injunction will be granted.
10. **Easements: Conveyances.** The extent of an easement created by a conveyance is fixed by the conveyance, and the meaning thereof is to be found in its language construed in the light of relevant circumstances.
11. **Records: Appeal and Error.** It is incumbent on the party appealing to present a record which supports the errors assigned, and absent such a record, the decision of the lower court will be affirmed.

Appeal from the District Court for Saunders County: MARY C. GILBRIDE, Judge. Affirmed.

James L. Haszard, of McHenry, Haszard, Hansen & Roth, for appellants.

Curtis A. Bromm, of Edstrom, Bromm, Lindahl, Sohl & Freeman-Caddy, for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Appellee, Roger E. Harders, brought an action for an injunction against appellants, Marilyn J. Odvody (Marilyn) and Milton E. Odvody (Milton), to prevent the Odvodys from using a lane or road on his land for access to the Odvodys' farm ground. The

Odvodys filed a counterclaim seeking an injunction against Harders' interfering with their use of the road to access their field. The trial court determined that Harders was entitled to an injunction preventing the Odvodys from using the road and dismissed the Odvodys' counterclaim. The Odvodys appealed. We took this case under our power to regulate the caseloads of this court and the Nebraska Court of Appeals.

BACKGROUND

Harders bought a parcel of pasture land from James E. Bauer and Lorraine M. Bauer in 1988. At this time, Harders was also deeded a 66-foot-wide strip of land that included a road entering the property from the south. Allegedly contained in this 66-foot strip was a 25-foot-wide easement to the "Morse Bluff Dike and Drainage District No. 1" for ingress and egress to the dike. The easement lies in the west 25 feet of the 66-foot strip.

In 1990, Harders purchased another parcel of land from the Bauers located directly to the east of the 66-foot-wide strip. Harders later sold this second parcel of land to Michael A. Brecka in 1995. In this sale, Harders included 33 feet of the 66-foot-wide strip. Harders included this strip of land in the sale so that Brecka could put his own entrance onto that property. The remaining 33 feet, which contained the 25-foot-wide road and the dike and drainage district easement, was retained by Harders.

When Brecka decided to sell this property, Harders and Brecka made a verbal agreement that Brecka would inform any new owners that they were not to use Harders' road and would provide a culvert allowance to the new owners of the property. In exchange, Brecka would pay Harders $1 at the auction where Brecka planned to sell the property to allow the new owners to have temporary access to the road on Harders' property. The reasoning was that it was late in the year and that the new owners would not have time to put in their own lane. At the auction, an announcement was made that Harders would lease access to his road for 1 year for $1 or until a new access road was built. However, the property did not sell at the auction.

Marilyn, who was employed with the real estate agency that was doing the auction and was present at the auction when the announcement was made, and Milton bought the property in a

private sale. The Odvodys bought the property for approximately $86,500, which included a $360 "Credit from Seller for Culvert." However, Marilyn stated that the culvert allowance was used to lower the price of the land.

The Odvodys did not build a new lane. Marilyn did not believe she was bound to use the lane for only 1 year because everyone in the community used the lane and she had been using it for 12 or 13 years. Marilyn testified that she and Milton travel the road to go back to the drainage dike to pick mushrooms in the spring and berries in the fall. She never asked for anyone's permission to use the lane. Since 1997, she and Milton have been up and down the road an average of 12 times a year, and prior to 1997, it was maybe 4 or 5 times a year.

Marilyn also testified that she had seen others using the road but did not ask them if they had permission. She believes that the 33 feet is "public access" that has been used since the 1930's. Marilyn also testified that she had performed maintenance on the road by filling in potholes and mowing the grass between the road and their property. Marilyn believes there is no other access to their property.

Milton testified that he has used the road for recreational purposes since 1960 and used the road probably six times a year. He never asked anybody for permission, nor was he told by anyone that you needed permission to use the lane. Milton testified that he believed he could use the road because it was used as a public place to go down to the dike for fishing. He said the lane was used that way by all of his friends. Milton also testified that he believed that the dike and drainage district's easement allowed him to use the lane. He stated that he shredded the weeds, dragged the lane, and backfilled potholes about twice a year on the lane.

Milton further testified that they decided not to build an entrance onto the county road from their land because of safety factors concerning visibility and his belief that the road which is the subject of this action was public. He also testified that he "would have to go and get the permits and go through all that" and that a new road on his land would require the use of what is now tillable farm ground.

After the first year that the Odvodys owned their parcel of land, Harders put up a fence and a gate to prevent access to the

lane. Harders testified that he telephoned William "Bud" Vopalensky and Charlie Vopalensky, who own land directly to the north of the Odvody land, and their attorney, and gave all of them the combination to the lock. Harders then testified that once the Odvodys got the combination from the Vopalenskys, Harders changed the lock to a key lock and gave Charlie Vopalensky a key and extra keys for Bud Vopalensky and his tenant farmer. However, Marilyn testified that Harders supplied the combination to their attorney to access their property. Harders stated that the gates were later torn off. Harders testified the public does not use the road without his permission. Harders also testified that he and Charlie Vopalensky have an agreement whereby if Harders does give permission for people to be on his land, Harders will tear out a deposit slip from his checkbook and give written permission. This permission includes the dates to be on his land and includes use of the road.

Harders maintains that he has only experienced two times where private citizens have been traveling the lane as a public road. Harders testified that in the first instance, he told the person that it was a private lane and he never saw that person again. In the second instance, Harders testified that he could not find the person so he had the person's car towed. Harders lives 24 to 26 miles from this piece of property, however, he averages driving by it two to four times per week during the summer and winter.

Testimony was given from several witnesses concerning people using the road either to access land or for recreational purposes. There was also testimony concerning whether these people may have had either an easement or permission to use the lane. Harders testified that Bud Vopalensky and the dike and drainage district have written easements recorded at the register of deeds.

Larry Dolezal, who owns property to the east of the road, has used this road at times to access his land. Dolezal is 51 years old and testified he has used the road for at least 20 years. Dolezal also testified that he has used the road every year for recreational purposes from the time he was 10 or 15 years old. He stated that he never obtained permission from anyone to use the road and was never told by anyone that he could not use the road or that he needed permission to use the road. Dolezal believed the road was public.

Dolezal also testified that he saw other people using the road for recreational purposes, although he could not say when. However, he said it was possible that those people may have had permission to use the lane. When asked if it was a common occurrence to see people using the lane when he used it, Dolezal responded, "I don't know how common you'd call it . . . ." Dolezal was asked on cross-examination how often he saw people that he did not recognize using the lane within the last 15 years. He responded, "I'd say probably a couple times a year. But I'm not there all the time either. It's just maybe some years none and others [sic] years there would be somebody. It's hard to say. I couldn't answer that to be real accurate."

On cross-examination, it was discovered that Dolezal was a friend of the prior owners, the Bauers. Dolezal's initial use of the lane started when he was hunting and fishing with the Bauers' children. Harders stated in his brief that Dolezal had permission from the Bauers to use the lane. The Odvodys maintained that Harders misstated Dolezal's testimony. Dolezal was asked, "Would it be fair to say that your initial use of the lane started when you were hunting and fishing with the Bauer children?" He replied, "Probably that's when I first started."

Bud Vopalensky testified that he needs to use the lane to access his property. Bud Vopalensky is 74 years old and testified that his land has been in the family since 1917. He also testified that he used the lane for hunting and fishing at least once a year and "[p]robably three or four times a day . . . ." He stated that he never asked anyone's permission and had never been told by anyone that he needed permission to use the lane. Bud Vopalensky said he also saw other people use the lane for access to the dike area but he did not know whether they had permission because "nobody even thought of asking permission cause they, everybody was each other's friend."

Bud Vopalensky said that he also performed some maintenance to the road by dragging it and filling in the potholes. He testified that he has an easement across the dike and drainage district property. However, Bud Vopalensky gave conflicting testimony on cross-examination about whether he has an easement to use the 25-foot-wide road. First, he stated that he did not have a written easement of the lane. Later in the cross-examination,

he stated that he did have an easement in the property described as the lane.

William Lindholm, the director of public works for Saunders County, testified that a permit was needed to obtain access off a public road in Saunders County. Lindholm specifically looked at the Odvodys' property line along the county road. He testified that he did not see any reason to deny an application for an entrance to this property if one were requested from his department. He did say that an engineering study would first have to be performed.

ASSIGNMENTS OF ERROR

The Odvodys assign, restated, that the court erred (1) in granting an injunction to Harders as the decision was contrary to law and not supported by the facts, (2) in dismissing the counterclaim of the Odvodys because the decision was contrary to law and not supported by the facts, (3) in not finding an easement in favor of the Odvodys over the lane belonging to Harders, (4) in granting an injunction to Harders without evidence of irreparable harm, and (5) in granting an injunction to Harders when he had an adequate remedy at law.

STANDARD OF REVIEW

[1] An action for injunction sounds in equity. In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, 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. *Village of Winslow v. Sheets, ante* p. 203, 622 N.W.2d 595 (2001).

ANALYSIS

The Odvodys make four arguments asserting they have a right to use the lane located on Harders' property. The Odvodys argue that a prescriptive easement was gained through public use. They argue the dike and drainage district easement constitutes an easement for public use. The Odvodys further maintain that an injunction should not be issued because Harders has an ade-

quate remedy at law and has not suffered irreparable harm. The Odvodys also argued in their brief that the easement was by necessity, but have abandoned this argument.

NO PRESCRIPTIVE EASEMENT THROUGH PUBLIC USE

[2] To establish a road or highway by prescription, there must be a use by the general public, under a claim of right adverse to the owner of the land, of some particular or defined line of travel, and the use must be uninterrupted and without substantial change for 10 years, the period of time necessary to bar an action to recover the land. *Sturm v. Mau*, 209 Neb. 865, 312 N.W.2d 272 (1981).

[3,4] The general rules applicable to prescriptive easements are as follows:

> "The use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. It must be adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, with the knowledge and acquiescence of the owner of the servient tenement, for the full prescriptive period."

Svoboda v. Johnson, 204 Neb. 57, 62, 281 N.W.2d 892, 897 (1979).

[5,6] The prevailing rule is that where a claimant has shown open, visible, continuous, and unmolested use of land for a period of time sufficient to acquire an easement by adverse user, the use will be presumed to be under claim of right. *Svoboda v. Johnson, supra.* If a person proves uninterrupted and open use for the necessary period without evidence to explain how the use began, the presumption is raised that the use is adverse and under claim of right, and the burden is on the owner of the land to show that the use was by license, agreement, or permission. The presumption of adverse use and claim of right, when applicable, prevails unless it is overcome by a preponderance of the evidence. *Id.*

[7] To prove a prescriptive right to an easement, all the elements of prescriptive use must be generally established by clear, convincing, and satisfactory evidence. *Id.* The trial court made

specific fact findings in its journal entry dated January 11, 2000. In holding that a prescriptive easement by public use was not established, the trial court stated:

> The evidence reveals that the Access Way is simply a farm lane. It is not a well-traveled or well-defined roadway. The evidence shows that the persons using it are either using it with permission or out of necessity. The [Odvodys] adduced evidence that the Access Way had been used in the past by persons seeking access to the dike for pleasure purposes: hunting, picnicking, etc. While this use may well have occurred, it does not amount to clear and convincing proof of the requisite elements.

Under our standard of review, where credible evidence is in conflict on a material issue of fact, 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. See *Village of Winslow v. Sheets, ante* p. 203, 622 N.W.2d 595 (2001). The trial court's fact findings and ruling determining that a prescriptive easement by public use was not established are supported by the record before this court. The remaining reports of occasional traffic across the lane are insufficient under the clear and convincing standard to establish a prescriptive easement by public use. From our de novo review, we conclude that a prescriptive easement by public use was not created over the 25-foot-wide lane or road contained on Harders' property.

Irreparable Harm

[8] An injunction is an extraordinary remedy and ordinarily should not 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. *Central States Found. v. Balka*, 256 Neb. 369, 590 N.W.2d 832 (1999); *State v. World Diversified, Inc.*, 254 Neb. 307, 576 N.W.2d 198 (1998).

In the present case, Harders alleges that the Odvodys have continued to access his land even after a fence with a gate was constructed. Harders alleges that he will suffer irreparable harm by the Odvodys' continuing to pass through his real estate. The

Odvodys argue there was no evidence adduced that any harm came to the road as a result of their use. Therefore, the Odvodys conclude that Harders has not suffered any harm and could be compensated in an action at law if any damages were established.

[9] This court stated in *Sillasen v. Winterer*, 76 Neb. 52, 54, 107 N.W. 124, 125 (1906), that "the rule is firmly established in this state and elsewhere that, where the nature and frequency of trespasses are such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land, an injunction will be granted." We also stated in *Thomas v. Weller*, 204 Neb. 298, 304, 281 N.W.2d 790, 793 (1979), that "[c]oncerning simple acts of trespass, equity has, in most cases, no jurisdiction, but if the nature and frequency of trespasses are such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land, an injunction will be granted."

Therefore, we conclude the Odvodys' repeated trespasses on Harders' property would be a proper case for an injunction to be used to prevent continued trespasses by the Odvodys.

Dike and Drainage District Easement

[10] The Odvodys argue that the dike and drainage district easement constitutes a public easement thereby allowing them the use of the lane. The extent of an easement created by such a conveyance is fixed by the conveyance, and the meaning thereof is to be found in its language construed in the light of relevant circumstances. *Bors v. McGowan*, 159 Neb. 790, 68 N.W.2d 596 (1955).

[11] The trial court made a finding that nothing in the language of the easement allowed for a public road. However, in this case, the actual dike and drainage district easement is not contained in the record before this court. It is incumbent on the party appealing to present a record which supports the errors assigned, and absent such a record, the decision of the lower court will be affirmed. *Durkan v. Vaughan*, 259 Neb. 288, 609 N.W.2d 358 (2000).

Easement by Necessity

The Odvodys conceded their easement by necessity argument at oral argument before this court. As such, we refrain from analyzing this assignment of error any further.

CONCLUSION

We affirm the trial court's decision denying the Odvodys' request for an injunction and dismissing their counterclaim. We also affirm the trial court's determination that the Odvodys be enjoined from interfering with the property of Harders and that they be expressly enjoined from trespassing thereon.

AFFIRMED.

IN RE ESTATE OF THOMAS J. READING, DECEASED. PAULA SPEAR AND KATHERINE READING, APPELLANTS, V. NORWEST BANK NEBRASKA, N.A., APPELLEE.

626 N.W.2d 595

Filed June 1, 2001. No. S-00-238.

1. **Decedents' Estates: Appeal and Error.** An appellate court reviews probate cases for error appearing on the record made in the county court.
2. **Limitations of Actions: Waiver.** The benefit of the statute of limitations is personal and, like any other personal privilege, may be waived and will be unless pleaded.
3. **Limitations of Actions: Pleadings.** The statute of limitations does not operate by its own force as a bar, but, rather, operates as a defense to be pleaded by the party relying upon it.
4. ____: ____. Judicial determination of whether a claim is barred by a statute of limitations ordinarily requires both the assertion of the claim and the responsive pleading of the defense, either by answer or demurrer.
5. **Courts: Jurisdiction.** Existence of an actual case or controversy is necessary for the exercise of judicial power, even though it is not a constitutional prerequisite for jurisdiction.
6. **Courts: Justiciable Issues.** A court decides real controversies and determines rights actually controverted, and does not address or dispose of abstract questions or issues that might arise in a hypothetical or fictitious situation or setting.
7. **Justiciable Issues.** A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.
8. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.

Appeal from the County Court for Douglas County: LAWRENCE BARRETT, Judge. Affirmed.

Thomas K. Harmon, of Respeliers and Harmon, P.C., for appellants.

William E. Seidler, Jr., of Seidler & Seidler, P.C., for appellee.

HENDRY, C.J., WRIGHT, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

In closing the estate of Thomas J. Reading, deceased, the county court for Douglas County ordered the personal representative to transfer five promissory notes from the estate to a revocable trust which was in existence at the time of Reading's death. Paula Spear, one of Reading's two surviving adult children and the maker of the promissory notes, and Katherine Reading (Katherine), his surviving spouse, perfected this timely appeal from that order. Spear and Katherine argue that the notes were not assets of the estate because an action upon them would be barred by the applicable statute of limitations and that the notes therefore should have been canceled. We moved this case to our docket pursuant to our authority to regulate the dockets of the appellate courts. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

BACKGROUND

On October 3, 1995, Connie Distransky, the other surviving child of Reading, filed a petition for probate, determination of heirs, and appointment of a personal representative in the county court for Douglas County. In her petition, Distransky alleged that Reading died testate on September 22, 1995, while domiciled in Douglas County. Distransky nominated Norwest Bank Nebraska, N.A. (Norwest), to serve as personal representative of the estate, noting that Norwest currently served as the trustee of the "Thomas and Katherine Lee Reading" trust. This trust held the bulk of the assets of Reading and Katherine, who was alleged to be "under guardianship in Indiana." The petition identified Spear as the guardian. The petition recites that a will dated October 3, 1984, was filed with the court and offered for probate, but the will does not appear in the record on appeal. On October 31, 1995, the county court entered an order declaring the will to be valid and admitting it to probate; determining the heirs to be Katherine, Distransky, and Spear; and appointing Norwest as personal representative of the estate.

The personal representative filed an "Amended Inventory and Appraisement" on September 20, 1996, which listed five promissory notes on which Spear was a maker or comaker as assets of the estate. The notes were dated between 1977 and 1983 and were listed on the amended inventory as having a value at date of death in the total amount of $52,044.61. The estate was shown as the sole owner of two of the notes, and Katherine was shown as a "co-tenant" with the estate on the remaining three notes.

The personal representative filed a "Petition for Determination of Inheritance Tax" on July 8, 1997. This petition refers to a "settlement agreement" dated December 2, 1994, a copy of which is attached to the petition. The settlement agreement, entered into by Reading's attorney in fact, Distransky, Spear, and a guardian ad litem appointed for Katherine, recites that it is intended to resolve disputed claims and issues among the Reading family members regarding the formation and validity of various powers of attorney and trusts. To carry out the settlement, a new trust designated as the "Thomas J. Reading and Katherine Lee Reading Revocable Trust" was formed on or about the same date that the settlement agreement was executed, naming Norwest as trustee. Under the terms of this trust, all assets of Reading and Katherine were to be delivered to the trustee. During their lifetimes, Reading and Katherine were to receive all trust income and so much of the principal as necessary to provide for their support, in the sole discretion of the trustee. The trust instrument provided that upon the first death, trust assets would be divided into separate trusts known as the "Decedent's Trust" and the "Survivor's Trust." All income of the decedent's trust and so much of the principal as the trustee determined to be necessary to provide for the support of the survivor was to be distributed to the surviving spouse during his or her lifetime. Upon the death of the surviving spouse, both trusts were to terminate and the trustee was to distribute assets to Distransky and Spear or their issue, per stirpes. The petition for inheritance tax determination states in part with respect to the trust:

> In making the inheritance tax determination, the Trustee has calculated that Katherine Reading has an ownership interest in one-half of the assets . . . of the Survivor's Trust

> and one-half of the assets of the Decedent's Trust. She also has a life estate in one-half of the assets of the Survivor's Trust and one-half of the assets of Decedent's Trust by virtue of the death of Thomas Reading. The remainder persons of both trusts are Connie Distransky and Paula Spear, children of Thomas and Katherine Reading.

No order determining inheritance tax appears in the record. However, a "Final Report" filed by the personal representative on April 21, 1998, reflects an inheritance tax payment to Douglas County in the amount of $1,724.46.

On January 9, 1998, the personal representative filed an "Application for Instructions" regarding a proposed distribution which had been accepted by Distransky but not by Spear. The proposed distribution included transfer of the promissory notes to the trust at the inventory value, with no further interest accrual. The personal representative's proposal was outlined in a letter to Spear and Distransky, which was attached to the application for instructions. That letter stated that "[o]n Katherine Reading's passing the notes would be distributed to Paula [Spear] at the value on the date of Thomas's death. The notes and their interest accrued to that date would be credited to Paula's share of the trust."

The application for instructions includes a certificate of service reciting that true and correct copies were served by mail upon Distransky, Spear, and the trustee on January 9, 1998.

On January 23, 1998, the county court entered an order providing in part that the interest of the estate in the promissory notes was to be distributed to the trustee at the values shown on the inventory; and that upon completion of this and other distribution of assets, the personal representative was to "proceed to close this estate after notice to all persons." No appeal was taken from this order.

Thereafter, on April 21, 1998, the personal representative filed a "Formal Petition for Complete Settlement After Formal Testate Proceeding" and a "Schedule of Distribution," which reflected that certain assets of the estate, including but not limited to the five promissory notes, were to be distributed to "Norwest Bank, Trustee." The only assets scheduled for personal distribution to Spear and Distransky were "½ Personal Effects and Household

Furnishings" to each. Spear and Katherine filed an objection alleging that the final accounting and schedule of distribution had not been provided to their counsel, but, rather, retrieved by him from the court file. They further alleged that the promissory notes "are not assets of the Estate and should have been canceled" and that "any such distribution of these promissory notes will constitute a breach of an agreement of this interested party and the Decedent prior to death." Spear and Katherine prayed that "the Court continue this matter to allow the attorneys adequate time to prepare that the accounting and distribution in its current form be rejected; and for any and all such other relief as the Court deems just and appropriate."

On May 24, 1999, Spear and Katherine filed a "Motion for Stay of Proceedings or in the Alternative a Motion for Continuance." They alleged that the issues raised with respect to the closing of the estate were related to those being litigated in a declaratory judgment action then pending in an Indiana state court and requested that all estate proceedings be stayed pending the conclusion of the Indiana litigation. In response, the personal representative filed a resistance alleging that the matter had already been continued on several occasions at the request of Spear, that the issues in the Indiana proceedings had no bearing on the estate proceeding, and that "[a]ll issues raised in the Indiana proceeding can be addressed on the disposition of assets in the Thomas and Katherine Reading Trust."

On December 10, 1999, the personal representative filed an "Amended Formal Petition for Complete Settlement After Formal Testate Proceeding" and an "Amended Schedule of Distribution" which again reflected that the promissory notes would be distributed to the trustee. In response, Spear and Katherine filed a "Second Motion for Stay of Proceedings or in the Alternative a Motion for Continuance," again arguing that the issues would be decided in the ongoing Indiana litigation. The court held a hearing on these matters on December 28. No evidence was offered or received during this hearing, although a copy of the aforementioned settlement agreement was marked for identification. The hearing consisted entirely of a colloquy between the judge and counsel for the parties, which included the following:

> [Counsel for Norwest]: What I'd like to do is set up some kind of a framework, so we can bring this to a conclusion.
>
> THE COURT: . . . But this set-off of the notes, I don't know. That's interesting. I've never seen that.
>
> [Counsel for Spear and Katherine]: If I may, Judge. I — I think that that's a legal issue that the Court is going to have to make some determination of, but it seems to me statutorily that's certainly a defense that Paula Spears [sic] is entitled to bring for the Court's consideration.
>
> [Counsel for Norwest]: And its going to come up some time or another. It's—
>
> [Counsel for Spear and Katherine]: Absolutely—
>
> [Counsel for Norwest]: It's either going to come up today—
>
> [Counsel for Spear and Katherine]: —absolutely.
>
> [Counsel for Norwest]: —or it's [sic] come up on the death of Katherine when the Trustee says, "We're distributing these notes, and they're worth $70,000.00. He're [sic] you go."

Thereafter, on January 3, 2000, Spear and Katherine filed an "Objection to the Amended Petition for Complete Settlement and the Final Distribution Schedule." They asserted that the promissory notes were not assets of the estate because they should have been canceled and are barred from collection by the applicable statute of limitations.

On February 2, 2000, the county court filed a "Formal Order for Complete Settlement After Formal Testate Proceeding" and a separate order directing the personal representative to transfer the promissory notes to the trustee through a single transaction conservatorship. On February 22, the trustee filed a "Formal Closing Receipt" acknowledging receipt of various assets from the estate including the promissory notes. On February 29, Spear and Katherine filed a notice of appeal from the orders filed on February 2.

ASSIGNMENTS OF ERROR

Spear and Katherine assign that the county court erred in ordering the promissory notes transferred from the estate to the

trust because their enforcement is barred by the statute of limitations. They also assign error in the admission of testimony based on hearsay, speculation, conjecture, and conclusions.

STANDARD OF REVIEW

[1] An appellate court reviews probate cases for error appearing on the record made in the county court. *In re Estate of Jakopovic, ante* p. 248, 622 N.W.2d 651 (2001); *In re Estate of Myers*, 256 Neb. 817, 594 N.W.2d 563 (1999).

ANALYSIS

[2-4] Spear and Katherine's principal contention is that any attempt to enforce Spear's liability on the promissory notes is barred by the statute of limitations set forth in Neb. Rev. Stat. § 25-205 (Reissue 1995), which provides in pertinent part that "an action upon . . . any agreement, contract, or promise in writing . . . can only be brought within five years." We have stated that the " 'benefit of the statute of limitations is personal and, like any other personal privilege, may be waived and will be unless pleaded.' " *State ex rel. Marsh v. Nebraska St. Bd. of Agr.*, 217 Neb. 622, 630, 350 N.W.2d 535, 540 (1984), quoting *Vielehr v. Malone*, 158 Neb. 436, 63 N.W.2d 497 (1954). The statute of limitations does not operate by its own force as a bar, but, rather, operates as a defense to be pleaded by the party relying upon it. *Vielehr v. Malone, supra.* It follows that judicial determination of whether a claim is barred by a statute of limitations ordinarily requires both the assertion of the claim and the responsive pleading of the defense, either by answer or demurrer. See *Welsch v. Graves*, 255 Neb. 62, 582 N.W.2d 312 (1998).

The record reflects no action by the personal representative against Spear to enforce liability on the promissory notes. Nevertheless, Spear and Katherine argue that assertion of the statute of limitations defense was necessary and appropriate because of Neb. Rev. Stat. § 30-24,101 (Reissue 1995), which provides:

> Unless a different intention is indicated by the will, the amount of a noncontingent indebtedness of a successor to the estate if due, or its present value if not due, shall be offset against the successor's interest; but the successor has

> the benefit of any defense which would be available to him in a direct proceeding for recovery of the debt.

As used in this statute, a "successor" is a person, other than a creditor, who is "entitled to property of a decedent under his or her will or the Nebraska Probate Code." Neb. Rev. Stat. § 30-2209(46) (Cum. Supp. 2000).

As noted above, the will which was admitted to probate does not appear in the appellate record. Under the amended schedule of distribution, Spear and Distransky were each to receive one-half of Reading's personal effects and household furnishings, with all other assets to be distributed to the trust. There is nothing in the record to indicate that the personal representative sought to offset any liability which Spear may have on the notes against her share of the personal effects and household furnishings, or against any other present interest she may have. The only reference to any offset is found in the personal representative's letter to Spear and Distransky attached to its application for instructions, wherein it states that "[o]n Katherine Reading's passing the notes would be distributed to Paula at the value on the date of Thomas's death" and "[t]he notes and their interest accrued to that date would be credited to Paula's share of the trust." In ordering the notes transferred to the trustee, the county court made no determination as to whether enforcement of the notes by action or offset at some future date would be barred by the statute of limitations. Unlike the circumstances of *Matter of Will of Cargill*, 420 N.W.2d 268 (Minn. App. 1988), upon which Spear and Katherine rely, the county court in this case was not presented with the question of whether an heir's interest in an estate should be offset by an indebtedness existing at the time of death.

[5-7] Existence of an actual case or controversy is necessary for the exercise of judicial power, even though it is not a constitutional prerequisite for jurisdiction. *State v. Jacob*, 256 Neb. 492, 591 N.W.2d 541 (1999); *Gaylen v. Balka*, 253 Neb. 270, 570 N.W.2d 519 (1997). A court decides real controversies and determines rights actually controverted, and does not address or dispose of abstract questions or issues that might arise in a hypothetical or fictitious situation or setting. *US Ecology v. State*, 258 Neb. 10, 601 N.W.2d 775 (1999); *Gaylen v. Balka, supra*. A justiciable issue requires a present, substantial contro-

versy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement. *Greater Omaha Realty Co. v. City of Omaha*, 258 Neb. 714, 605 N.W.2d 472 (2000); *Putnam v. Fortenberry*, 256 Neb. 266, 589 N.W.2d 838 (1999).

In this case, there is no justiciable issue requiring adjudication of Spear and Katherine's statute of limitations defense because no claim on the notes has been asserted, either directly or as an offset pursuant to § 30-24,101. The fact that the record suggests that this issue may arise in the future, following the death of Katherine, merely illustrates that no present controversy exists with respect to the statute of limitations issue asserted by Spear and Katherine. Thus, the county court correctly refrained from determining whether the statute of limitations barred any action on the promissory notes because it was not presented with a justiciable controversy requiring this determination to be made.

[8] We do not reach Spear and Katherine's argument that the county court erred in admitting testimony that was based on hearsay, speculation, conjecture, and conclusions, because this issue is not argued in their brief. Errors that are assigned but not argued will not be addressed by an appellate court. *State ex rel. NSBA v. Flores, ante* p. 256, 622 N.W.2d 632 (2001); *Bowers v. Dougherty*, 260 Neb. 74, 615 N.W.2d 449 (2000). Moreover, we note that based upon the record submitted for our review, no testimony or other evidence was received by the county court.

CONCLUSION

Finding no error on the record, we affirm the judgment of the county court authorizing the transfer of the promissory notes to the trustee.

AFFIRMED.

CONNOLLY, J., not participating.

EDMUND H. BLANKENAU, APPELLEE, V. JACKIE LANDESS, APPELLANT.

626 N.W.2d 588

Filed June 1, 2001. No. S-00-255.

1. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court.
2. **Limitations of Actions: Appeal and Error.** Which statute of limitations applies is a question of law that an appellate court must decide independently of the conclusion reached by the trial court.
3. ___: ___. The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong.
4. **Limitations of Actions: Landlord and Tenant: Leases.** A cause of action to recover possession of real property from a tenant who remains in possession without the landlord's consent after a lease has expired or been terminated under Neb. Rev. Stat. § 76-1437 (Reissue 1996) is an action for the possession of real property, and is therefore subject to the 10-year statute of limitations as provided in Neb. Rev. Stat. § 25-202 (Reissue 1995).
5. **Limitations of Actions.** A period of limitations begins to run upon the violation of a legal right, that is, when the aggrieved party has the right to institute and maintain suit.
6. **Limitations of Actions: Landlord and Tenant: Leases.** A cause of action to recover possession of property when a tenant remains in possession after the expiration or termination of a lease pursuant to Neb. Rev. Stat. § 76-1437 (Reissue 1996) accrues at the point the lease expires or is terminated and the tenant remains in possession without the consent of the landlord.
7. **Property: Conveyances: Landlord and Tenant: Leases.** Generally, the owner of leased property may sell the property, and such grant conveys the landlord's interest in the lease.
8. **Real Estate: Conveyances: Landlord and Tenant.** A sale by the lessor of real estate, during the unexpired leasehold term under which the tenant is holding, does not, of itself, abrogate the lease, determine the leasehold estate, or authorize the landlord or the tenant to treat the lease as at an end. Its effect is to grant all the rights of the original landlord to the grantee of the reversion. The grantee then becomes the landlord by operation of law, and the tenant becomes a tenant of the grantee of the reversion.
9. **Limitations of Actions.** The plain language of Neb. Rev. Stat. § 25-221 (Cum. Supp. 2000) states that a jury trial on the statute of limitations issue is required only when issues of fact are raised; issues of law are to be determined by the court without a jury.
10. ___. If there are only conclusions of law asserted on the statute of limitations issue, a separate hearing to address the statute of limitations issue is not required under Neb. Rev. Stat. § 25-221 (Cum. Supp. 2000).
11. **Homesteads.** The purpose of the homestead exemption under Neb. Rev. Stat. § 40-101 (Reissue 1998) is to protect a debtor and his or her family in a home from forced sale on execution or attachment.

12. ___. Any interest in real estate, either legal or equitable, that gives a present right of occupancy or possession, followed by exclusive occupancy, is sufficient to support a homestead right therein.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

K.C. Engdahl, of Raynor, Rensch & Pfeiffer, for appellant.

W. Patrick Betterman and Dave J. Skalka, of Betterman & Dixon, for appellee.

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

GERRARD, J.

Edmund H. Blankenau filed a petition for restitution to recover possession of property from Jackie Landess pursuant to Neb. Rev. Stat. § 76-1441 (Reissue 1996). The district court entered judgment in favor of Blankenau, and Landess appealed. The main issues we are presented with in this case are whether Blankenau filed his petition within the applicable statute of limitations period and whether Landess has a homestead exemption in the property in question.

FACTS

Blankenau claims that his corporation, Custom Trophy, Inc., as landlord, entered into a written residential lease with Landess in 1990. In 1991, Custom Trophy deeded the property to Blankenau. Although the term of the lease was 2 years, Blankenau permitted Landess to occupy the property through August 1999 and claims that Landess did not pay any of the rent due under the lease agreement. In August, Blankenau sent Landess a notice of nonrenewal of the lease which requested that Landess leave the premises by the end of October. At the same time, Blankenau sent Landess a demand for unpaid rent that Blankenau claimed was due under the lease.

Landess did not pay the rent or vacate the premises, and in December 1999, Blankenau filed a petition for restitution in the district court seeking possession of the property under § 76-1441 of the Uniform Residential Landlord and Tenant Act.

Landess defended on several grounds, including, inter alia, that the action was time barred by the statute of limitations and that Landess was protected by a homestead interest in the property. Landess' statute of limitations argument was based on the premise that the action was, in fact, an action on the lease agreement, and was therefore an action for breach of contract that was barred by the 5-year statute of limitations on written contracts. See Neb. Rev. Stat. § 25-205 (Reissue 1995).

On February 10, 2000, a bench trial was had on Blankenau's petition for restitution. The district court found that Blankenau is the owner of the subject property and that the property was leased to Landess. In the district court's judgment, the court rejected Landess' arguments and found in favor of Blankenau, ordering the preparation and issuance of a writ of restitution directing the sheriff to restore possession of the property to Blankenau. Landess filed for and was granted a stay of the writ of restitution during her appeal to this court. Landess appealed, and we moved the case to our docket pursuant to our authority to regulate the dockets of the appellate courts.

ASSIGNMENTS OF ERROR

On appeal, Landess assigned, restated, that the district court erred in (1) determining that Blankenau's claim was not barred by the statute of limitations, (2) overruling Landess' motion for a separate trial on the statute of limitations issue, and (3) concluding that Landess did not have a homestead exemption in the property.

STANDARD OF REVIEW

[1] When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court. *North Bend Senior Citizens Home v. Cook, ante* p. 500, 623 N.W.2d 681 (2001).

[2,3] Which statute of limitations applies is a question of law that an appellate court must decide independently of the conclusion reached by the trial court. *Adkins v. Burlington Northern Santa Fe RR. Co.*, 260 Neb. 156, 615 N.W.2d 469 (2000). The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the

district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong. *Nebraska Popcorn v. Wing*, 258 Neb. 60, 602 N.W.2d 18 (1999).

ANALYSIS

It is not disputed that Landess has lived in the subject residence from May 31, 1990, through the present. After Landess' 2-year lease term expired in May 1992, Blankenau allowed Landess to remain on the premises that he owned. At that point, the lease became a month-to-month tenancy in which either the landlord or the tenant could terminate the tenancy by giving at least 30 days' written notice to the other. See Neb. Rev. Stat. §§ 76-1437 and 76-1414(3) (Reissue 1996). The district court determined that Blankenau mailed notice to Landess on August 20, 1999, stating that the lease would not be renewed and would terminate on October 31, 1999. Blankenau's petition in this action was filed under the authority of § 76-1437(3), which provides that a landlord may bring an action for possession if the tenant remains in possession after termination of the lease without the landlord's consent.

Under the Uniform Residential Landlord and Tenant Act, actions for possession of any premises subject to the act shall be commenced in the manner described in Neb. Rev. Stat. §§ 76-1441 to 76-1447 (Reissue 1996). See Neb. Rev. Stat. § 76-1440 (Reissue 1996). Thus, Blankenau's petition for restitution seeking possession of the property in question was properly brought pursuant to § 76-1441 as Blankenau commenced this action due to Landess' unauthorized holdover after her lease terminated on October 31, 1999. See § 76-1437.

We now turn to Landess' first argument—that Blankenau's cause of action was not timely filed. Landess argues that a 5-year statute of limitations applies in this case pursuant to § 25-205 because Blankenau's cause of action was an action on a written contract, i.e., the 1990 lease agreement. Contrary to Landess' assertions, we determine that Blankenau's cause of action was not based on a contract.

[4] Blankenau filed suit pursuant to § 76-1437, which provides that a landlord may institute possession proceedings when a tenant remains in possession of the leased premises without

the landlord's consent after the lease has expired or been terminated. The cause of action is not based on the contractual relationship between the parties. Rather, Blankenau's cause of action under § 76-1437 was for possession of real estate. Therefore, at the time Blankenau brought this action, the lease had been terminated or had expired and Blankenau's cause of action for possession was not based on the lease agreement—it was an action to recover the possession of real estate. Because Blankenau's action was an action for the recovery of possession of real estate, the 10-year statute of limitations provided in Neb. Rev. Stat. § 25-202 (Reissue 1995) applies in the case at bar.

[5,6] A period of limitations begins to run upon the violation of a legal right, that is, when the aggrieved party has the right to institute and maintain suit. *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999). A cause of action to recover possession of property when a tenant remains in possession after the expiration or termination of a lease pursuant to § 76-1437 accrues at the point the lease expires or is terminated and the tenant remains in possession without the consent of the landlord. In this case, Landess remained in possession without Blankenau's consent after the lease terminated on October 31, 1999. Blankenau's right to bring an action for possession accrued under § 76-1437 after October 31, 1999. Thus, Blankenau had 10 years after October 31, 1999, to bring his action for possession against Landess. Therefore, we conclude that the district court did not err in determining that Blankenau's claim was not barred by the statute of limitations because Blankenau brought his action well within 10 years of Landess' becoming a holdover tenant.

Landess also asserted that the district court's ruling was in error because the original lease was between Landess and Custom Trophy, not between Landess and Blankenau. Therefore, Landess argues that Blankenau is not her landlord, regardless of Blankenau's current ownership of the property, and that he cannot recover the property under the Uniform Residential Landlord and Tenant Act. The law does not support Landess' argument.

[7,8] Generally, the owner of leased property may sell the property, and such grant conveys the landlord's interest in the lease.

49 Am. Jur. 2d *Landlord and Tenant* § 1052 (1995). A sale by the lessor of real estate, during the unexpired leasehold term under which the tenant is holding, does not, of itself, abrogate the lease, determine the leasehold estate, or authorize the landlord or the tenant to treat the lease as at an end. *Kirk Corp. v. First American Title Co.*, 220 Cal. App. 3d 785, 270 Cal. Rptr. 24 (1990); *Plastone Plastic Co. v. Whitman-Webb Realty Co.*, 278 Ala. 95, 176 So. 2d 27 (1965); 49 Am. Jur. 2d *Landlord and Tenant* § 1060 (1995). Its effect is to grant all the rights of the original landlord to the grantee of the reversion. *Id.* The grantee then becomes the landlord by operation of law, and the tenant becomes a tenant of the grantee of the reversion. *Id.* See, also, *Watson v. Calvin*, 69 Ark. App. 109, 9 S.W.3d 571 (2000) (when lessor sells property that is subject to unfulfilled lease, buyer takes property subject to terms of lease); *Murphrey v. Winslow*, 318 S.E.2d 849 (N.C. App. 1984), *reversed on other grounds* 313 N.C. 320, 327 S.E.2d 878 (1985) (when title passes, lessee ceases to hold under grantor and becomes tenant of grantee; privity is automatically established between lessor's grantee and lessee).

In the instant case, Custom Trophy deeded the property to Blankenau prior to the expiration of the original 2-year lease. Blankenau became Landess' landlord upon the transfer of the property to Blankenau. Landess' argument that Blankenau is not her landlord is wholly without merit.

Next, Landess asserts that she should have been given a separate trial on the statute of limitations issue under Neb. Rev. Stat. § 25-221 (Cum. Supp. 2000) prior to the trial on Blankenau's restitution claim. Section 25-221 states in relevant part:

> In any action in which it is claimed by one or more of the defendants that the action is barred by the statute of limitations any party may move that the issue raised by the statute of limitations be tried separately and determined before any other issues in the case. Issues of fact raised by the statute of limitations shall be tried before a jury unless trial by jury is waived by all parties. Issues of law raised by the statute of limitations shall be determined by the court without a jury. If the issue raised by the statute of limitations is determined by the jury or the court in favor of the plaintiff the remaining issues shall then be tried.

[9,10] The plain language of the statute states that a jury trial on the statute of limitations issue is required only when issues of fact are raised; issues of law are to be determined by the court without a jury. See *id.* See, also, *Baltensperger v. Wellensiek*, 250 Neb. 938, 554 N.W.2d 137 (1996). Moreover, if there are only conclusions of law asserted on the statute of limitations issue, a separate hearing to address the statute of limitations issue is not required. See *id.*

At a hearing prior to the trial on Blankenau's petition for restitution claim, the district court determined that the statute of limitations was not an issue in Blankenau's cause of action for restitution. Landess had asserted that Blankenau's wife might be a co-owner of the premises and that no allegation was made that she had consented to Landess' staying on the premises after the expiration of the original 2-year lease term. Landess argued that she was entitled to a separate trial on the statute of limitations issue because the necessity of the consent of Blankenau's wife to Landess' possession of the property after the 2-year lease expired had not been resolved.

Although after a trial on Blankenau's petition for restitution the district court determined that Blankenau was the owner of the property in question, we will address whether there was a question of fact necessitating a separate trial on the statute of limitations issue at the time it was raised by Landess, i.e., before the trial on Blankenau's petition for restitution. We conclude that even if the consent of Blankenau's wife was needed in order for Landess to be a holdover tenant with consent after the expiration of the original 2-year lease, the statute of limitations issue was properly decided as a matter of law. There was no question of material fact raised by Landess' assertions.

Assuming, for purposes of discussion, that there had been no proper consent to Landess' occupancy of the premises after the 2-year lease term expired, Landess would have been a tenant in possession without consent after the expiration of the lease term under § 76-1437. Blankenau's petition for restitution to recover possession of property under § 76-1441 would therefore have been proper under this scenario. Such action would not have been an action on a written contract as Blankenau's action would have been to recover possession of property that was

being occupied by Landess after the expiration of the 2-year lease contract.

Thus, even if Landess was a holdover without consent in 1992, as she appears to argue, Blankenau's petition for restitution action would have been brought within the 10-year statute of limitations applicable to actions for possession of real estate under § 25-202. The district court did not err in refusing to hold a separate trial on the statute of limitations issue because Landess presented no material issue of fact, only questions of law. See, § 25-221; *Baltensperger v. Wellensiek, supra.*

Finally, Landess argues that she is entitled to a "homestead exemption" as defined in Neb. Rev. Stat. § 40-101 (Reissue 1998), which would exempt $12,500 in a homestead occupied by Landess from "judgment liens and from execution or forced sale." Landess argues that her right to possess the property under the 1990 lease is sufficient to gain a homestead interest in the property, regardless of whether she was a holdover without consent. In effect, Landess argues that when a person rents residential property, that person has a homestead exemption so long as his or her possession of the property has been continuous, even if the person is a holdover tenant without consent. Without deciding whether a petition for restitution is an "execution" for purposes of the homestead exemption statute, we determine that Landess does not have a homestead right in the case at bar.

[11,12] The purpose of the homestead exemption is to protect a debtor and his or her family in a home from forced sale on execution or attachment. See *Fisher v. Kellogg*, 128 Neb. 248, 258 N.W. 404 (1935). Any interest in real estate, either legal or equitable, that gives a present right of occupancy or possession, followed by exclusive occupancy, is sufficient to support a homestead right therein. *Mainelli v. Neuhaus*, 157 Neb. 392, 59 N.W.2d 607 (1953). See, also, *Fisher v. Kellogg, supra.* It is not necessary that the ownership be of an estate in fee simple, but any interest, either legal or equitable, that gives a present right of occupancy or possession, followed by exclusive occupancy, is sufficient to support a homestead right therein. *Id.*

In the case at bar, Landess had no interest in the subject property which would have given her a present right of occupancy or possession at the time Blankenau brought his petition for resti-

tution. On the contrary, Landess had no legal right to be on the property after the termination of her lease in October 1999. Clearly, Landess did not have a present right of occupancy at the time Blankenau brought his petition for restitution. Therefore, the district court did not err in refusing to grant Landess a homestead exemption in the property at issue.

CONCLUSION

Blankenau properly filed his petition for restitution to recover possession of property from Landess within the applicable 10-year statute of limitations period, and the district court properly concluded that Landess did not have a homestead exemption in the property at issue. For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

DALE E. GRUBER, APPELLANT, V. DONA M. GRUBER, APPELLEE.

626 N.W.2d 582

Filed June 1, 2001. No. S-00-269.

1. **Res Judicata: Judgments: Appeal and Error.** The applicability of res judicata presents a question of law, requiring an appellate court to reach a conclusion independent of that of the lower court.
2. **Modification of Decree: Appeal and Error.** Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court.
3. **Res Judicata.** Under the traditional rule of res judicata, sometimes called claim preclusion, any rights, facts, or matter in issue directly adjudicated or necessarily involved in the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated by the parties and privies.
4. **Divorce: Modification of Decree: Property Settlement Agreements: Pensions.** Where parties to a divorce action voluntarily execute a property settlement agreement which is approved by the dissolution court and incorporated into a divorce decree from which no appeal is taken, provisions dealing with division of pension benefits will not thereafter be vacated or modified in the absence of fraud or gross inequity.

Appeal from the District Court for Douglas County: SANDRA L. DOUGHERTY, Judge. Affirmed.

Thomas P. Strigenz for appellant.

Tim B. Streff, of Govier, Milone & Streff, L.L.P., for appellee.

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

STEPHAN, J.

Dale E. Gruber appeals from an order of the district court for Douglas County granting the application of Dona M. Gruber, now known as Dona M. Witters, to modify a 1995 decree dissolving their marriage and dividing the marital property. The district court determined that in order to avoid a gross inequity, it was necessary to modify the decree to provide for the division of Gruber's pension as originally agreed by the parties. Finding no abuse of discretion, we affirm.

FACTS

The marriage of Gruber and Witters was dissolved pursuant to a decree of dissolution on August 3, 1995. The decree divided marital property pursuant to the terms of a settlement agreement negotiated by both parties and their respective counsel. The decree provision at issue provided:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the retirement plan at the City of Omaha Firefighters in the approximate sum of $58,138.02 in the name of [Gruber] shall be equally divided between [Gruber] and [Witters] as of the 20th day of July, 1995 and that said division shall [be] done by a Qualified Domestic Order.

The referenced qualified domestic relations order (QDRO) was entered by the court on the same day and provided for an equal division of Gruber's pension as of July 20, 1995.

Subsequent to the entry of the decree and the QDRO specified therein, Witters learned that the board of trustees of the "City of Omaha Police and Fire Retirement System" would not recognize the QDRO and refused to divide Gruber's pension as required by the decree. After adding Omaha's police and fire retirement system as a party to the divorce action pursuant to an agreement of the parties, Witters filed an "Application for Order" on January 29, 1997. This application sought an order requiring the board of

trustees to implement division of Gruber's pension in accordance with the decree and the QDRO. In an order dated June 20, 1997, the district court determined that it did not have jurisdiction to grant such relief in the context of a dissolution proceeding and dismissed the application with prejudice.

Thereafter, on May 28, 1999, Witters filed an application for modification of decree. An evidentiary hearing on the application was held on January 28, 2000. Paul Murphy, the benefits manager for Omaha's police and fire retirement system, testified on behalf of Witters. According to Murphy, the city of Omaha does not accept QDRO's because it is a governmental entity exempt from the provision of the Employee Retirement Income Security Act of 1974. Murphy testified that because the city had been presented with numerous QDRO's attempting to divide pensions, its law department developed language for incorporation into dissolution decrees in order to accomplish a division of city pension benefits between the parties to a dissolution proceeding. This occurred subsequent to the entry of the original decree in this case. Murphy testified that the only means to ensure that Witters received her share of the pension as set forth in the decree would be to incorporate the language developed by the city into the decree. He testified that a supplement to the decree, exhibit 4, contained the necessary language authorizing the city to award Witters the pension benefits as delineated in the decree.

On cross-examination, Murphy testified that the city's law department received numerous calls from attorneys seeking advice on the proper treatment of pension benefits in divorce decrees prior to the development of the language. He admitted that it was possible the board of trustees could in the future decide to honor QDRO's, as they were not legally prevented from doing so, but indicated that such a change was unlikely.

Witters testified that when she agreed to the property settlement, it was her understanding that she would receive one-half of the amounts Gruber had contributed to his pension at that time and that she would not have agreed to the settlement without this provision. She testified that she bargained for the pension to be equally divided as of July 20, 1995, and that she did not learn of the possibility that she could receive none of the pension moneys

until after the decree was entered. On cross-examination, she stated that she understood she would receive one-half of the pension contributions made as of the date of dissolution, plus interest. She admitted that the decree provided that this would be accomplished through a QDRO. She further admitted that she specifically informed the judge at the time the property settlement was entered into that she accepted the agreement.

Gruber testified that he is currently a fire captain for the city of Omaha. Gruber stated that at the time of the settlement negotiations, he offered to pay Witters one-half of the value of the pension in a lump sum, but she declined because she wanted her one-half interest to remain in the pension system. Gruber testified that it was his intention to have the decree divide the pension so that he would have one-half of the contributions in his name in the pension system and she would have one-half of the contributions in her name in the system. He further stated that he now wants "what's fair" and that he did not agree at the time of the decree that Witters should receive none of the pension moneys. On cross-examination, he again stated the decree was their understanding of the agreement and that Witters wanted to become a member of the pension system through the QDRO.

After taking the matter under advisement, the district court entered an order granting Witters' application to modify on February 9, 2000. The district court found that as part of their property settlement in 1995, the parties agreed that Witters was to receive one-half of Gruber's pension as of July 20, 1995. It further found that Witters would receive no part of the pension unless the decree was modified. The court reasoned that to deny Witters her one-half interest in the pension because the retirement plan would not accept a QDRO would be grossly unfair and accordingly granted the application to modify. On March 2, the district court entered a supplement to the decree of dissolution based upon the language developed by the city of Omaha, which provided for the one-half division of Gruber's pension benefits as of July 20, 1995. Gruber filed this timely appeal.

ASSIGNMENTS OF ERROR

Gruber assigns, restated, that the trial court erred (1) in not applying the doctrine of res judicata, (2) in finding a material

change in circumstances not within the reasonable contemplation of the parties at the time of the decree, and (3) in modifying the decree based on a finding of gross inequity.

STANDARD OF REVIEW

[1] The applicability of res judicata presents a question of law, requiring an appellate court to reach a conclusion independent of that of the lower court. *Ryan v. Ryan*, 257 Neb. 682, 600 N.W.2d 739 (1999).

[2] Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court. *Reinsch v. Reinsch*, 259 Neb. 564, 611 N.W.2d 86 (2000).

ANALYSIS

Res Judicata

Gruber first argues that the district court erred in not finding that Witters' application for modification was barred by the doctrine of res judicata. He contends that the court's ruling on her 1997 application for an order directing the board of trustees to comply with the decree precludes the present action.

[3] Under the traditional rule of res judicata, sometimes called claim preclusion, any rights, facts, or matter in issue directly adjudicated or necessarily involved in the determination of an action before a competent court in which a judgment or decree is rendered *upon the merits* is conclusively settled by the judgment therein and cannot again be litigated by the parties and privies. *Schuelke v. Wilson*, 255 Neb. 726, 587 N.W.2d 369 (1998). In its June 20, 1997, order resolving Witters' application for an order directed to the board of trustees, the district court held that it had no jurisdiction to enter such an order in the context of a divorce proceeding. Because this was not a resolution on the merits, the doctrine of res judicata does not apply.

Modification of Property Settlement

[4] It is undisputed that the division of Gruber's pension set forth in the decree was the result of a property settlement agreement entered into by the parties. Where parties to a divorce

action voluntarily execute a property settlement agreement which is approved by the dissolution court and incorporated into a divorce decree from which no appeal is taken, provisions dealing with division of pension benefits will not thereafter be vacated or modified in the absence of fraud or gross inequity. *Reinsch v. Reinsch, supra.* See, *Hoshor v. Hoshor*, 254 Neb. 743, 580 N.W.2d 516 (1998); *Pascale v. Pascale*, 229 Neb. 49, 424 N.W.2d 890 (1988). The issue presented is therefore whether either fraud or gross inequity is present in the instant case so as to justify modification of the decree. Because there is no allegation of fraud, we limit our review to whether the district court abused its discretion in determining that failure to modify the decree would result in gross inequity.

Gruber argues there is no gross inequity present for two reasons. First, he contends that it was "well within the power of [Witters] to create the necessary language in the consent decree of 1995." Brief for appellant at 15. The record reveals, and the district court found, that the language drafted by the city of Omaha to assist attorneys in dividing pensions in divorce decrees did not exist in 1995. Nevertheless, Gruber argues that Witters could have contacted the city for assistance in drafting the agreement.

In support of this argument, Gruber cites *Pascale v. Pascale, supra*, and *Robbins v. Robbins*, 3 Neb. App. 953, 536 N.W.2d 77 (1995). In *Pascale*, a dissolution decree divided the property of the parties pursuant to the terms of a settlement agreement. The relevant portion of the agreement provided that although the parties would file joint tax returns for the year 1985, the husband alone would be entitled to any tax refund for that year or obligated for any tax liability. When the wife sold shares of stock awarded to her in the decree, resulting in an increase of approximately $26,000 in tax liability, the husband filed an application to modify, contending her action in selling the stock justified the modification. We determined that it was obvious from the record that the husband knew the tax consequences relating to all of the financial dealings of the parties at the time of the decree. We noted that the husband regularly prepared the parties' tax returns and that the husband furnished the figures upon which the settlement agreement was based. We therefore

held that it "cannot be said that the respondent should not have reasonably contemplated a sale of the stock by the petitioner and the resulting tax consequences." *Id.* at 50, 424 N.W.2d at 891. We then found that because the parties voluntarily entered into the agreement, it could be vacated or modified only in circumstances of fraud or gross inequity. Finding that there was no evidence of either in the record, we reversed the district court's modification order.

In *Robbins v. Robbins, supra*, the parties voluntarily entered into a property settlement agreement awarding the wife $20,000 in lieu of her interest in the husband's pizza business. When the husband subsequently sold the business and incurred a substantial tax liability, he sought modification of the decree, contending that the wife "obtained an unconscionable advantage due to his ignorance concerning the tax consequences of the sale of the business." *Id.* at 963, 536 N.W.2d 85. Although the husband asserted that the tax consequences of the sale were not within the reasonable contemplation of the parties at the time of the agreement, the Court of Appeals, relying on *Pascale v. Pascale*, 229 Neb. 49, 424 N.W.2d 890 (1988), reasoned that the husband had intimate knowledge of the business and regular contact with an accountant. The court thus concluded that the tax consequences were reasonably contemplated at the time of the agreement and that the agreement was not subject to modification.

Gruber argues that *Pascale* and *Robbins* control the instant case and bar modification of the decree because it was within the reasonable contemplation of Witters at the time the settlement agreement was made to properly draft the language incorporated in the decree. He contends that because she failed to do so at the time, there is no justification for now modifying the decree in order to correct the error. Both *Pascale v. Pascale, supra*, and *Robbins v. Robbins*, 3 Neb. App. 953, 536 N.W.2d 77 (1995), however, are distinguishable from the instant case. In both cases, the issue was whether modification of the agreement of the parties was justified based on a contention that the agreement as made was inequitable. In contrast, the instant case presents the issue of whether modification of a decree which fails to properly preserve the undisputed agreement of the parties is justified because such result is grossly inequitable. Because it is

undisputed that neither party reasonably contemplated that the agreement would result in Witters' taking less than one-half of Gruber's pension, *Pascale* and *Robbins* are inapposite.

Gruber also argues that the district court erred in modifying the decree because denying Witters her approximately $29,000 interest in the pension does not result in an inequitable distribution of property between the parties. He contends that "[t]he issue that this Court must determine is whether or not $29,069.01 is gross [sic] inequitable if not awarded to [Witters]." Brief for appellant at 16. In support of this argument, he again relies on *Pascale* and *Robbins* and further cites *Hoshor v. Hoshor*, 254 Neb. 743, 580 N.W.2d 516 (1998). We disagree with both his statement of the issue and his citation of authority.

In *Pascale*, we held that the $26,672 incurred by the husband in tax liability as a result of the agreement he voluntarily entered into did not result in a division of property that was grossly inequitable. In *Robbins*, we similarly held that a $37,000 tax liability incurred by the husband as a result of a voluntary property settlement agreement was not grossly inequitable. In *Hoshor*, we addressed the division of a husband's pension benefits set forth in a property settlement agreement reached by the parties and incorporated into the decree. The provision of the consent decree at issue provided that " '[the husband] is the beneficiary of a pension and retirement plan . . . . [The wife] should receive one-fourth of any payments received from the pension and retirement plan by [the husband] at the time such payments are received.' " *Id.* at 745, 580 N.W.2d at 519. The husband argued that gross inequity would result unless the consent decree was modified to limit the wife to one-fourth of the pension benefits "existing as of the date of the termination of the parties' marriage, rather than to give the wife one-fourth of the pension benefits when ultimately obtained by the husband." *Id.* at 753, 580 N.W.2d at 522. Noting that we could not ascertain from the record to what extent the wife's share would be greater under the decree than if it were modified, we declined to find the existence of gross inequity. We further noted that because the parties were represented by counsel at the time the settlement was entered into and that they both understood the terms of the agreement, the "wife is entitled to the benefit of her bargain." *Id.* at 753, 580 N.W.2d at 523.

Gruber contends that *Pascale v. Pascale*, 229 Neb. 49, 424 N.W.2d 890 (1988), and *Robbins v. Robbins*, 3 Neb. App. 953, 536 N.W.2d 77 (1995), establish that the failure to award the $29,000 amount to Witters "in and of itself is not gross inequity." Brief for appellant at 18. He further argues that because Witters bargained to receive her one-half interest in the pension by way of a QDRO, she is entitled to only the benefit of her bargain, as in *Hoshor v. Hoshor, supra*. The issue in this case, however, is not simply whether the failure of the decree to award Witters $29,000 as her one-half interest in the pension results in a property division that is inequitable, but, rather, whether the failure of the original decree to fully preserve the undisputed agreement of the parties would result in gross inequity. It is clear that the benefit of the bargain in this case was a one-half share of the pension plan, not the legal device by which it was originally sought to be realized. The unforeseen refusal of the city to recognize a QDRO would unfairly deprive Witters of this benefit and allow Gruber to retain it, thereby requiring modification of the decree to prevent a gross inequity. *Pascale*, *Robbins*, and *Hoshor* are therefore not applicable to this case.

Based on the record before us, particularly the undisputed evidence that both parties intended to divide the pension equally as of July 20, 1995, we conclude that the district court did not abuse its discretion in finding that gross inequity would result in the absence of modification of the decree. The judgment of the district court is therefore affirmed.

AFFIRMED.

HONDA CARS OF BELLEVUE AND O'DANIEL MOTOR CENTER, NEBRASKA CORPORATIONS, APPELLEES, V. AMERICAN HONDA MOTOR CO., INC., FORMERLY KNOWN AS HONDA NORTH AMERICA, INC., A CALIFORNIA CORPORATION, APPELLANT.

628 N.W.2d 661

Filed June 8, 2001. No. S-99-1085.

1. **Administrative Law: Final Orders: Appeal and Error.** Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency.
2. ___: ___: ___. A judgment or final order rendered by the 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.
3. **Administrative Law: Judgments: Appeal and Error.** 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.
4. **Judgments: Jurisdiction: Appeal and Error.** The determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its own conclusion independent of that of the trial court.
5. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.
6. **Administrative Law: Jurisdiction: Appeal and Error.** When an administrative agency lacks subject matter jurisdiction over a claim, the courts also lack subject matter jurisdiction on appeal.
7. **Jurisdiction.** Litigants cannot confer subject matter jurisdiction upon a tribunal by acquiescence or consent.
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.
9. **Statutes: Contracts.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning, and a court is not free to rewrite a contract or to speculate as to terms of the contract which the parties have not seen fit to include.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Reversed and remanded with directions.

Con M. Keating, of Keating, O'Gara, Davis & Nedved, P.C., and George E. Feldmiller and H. David Barr, of Berkowitz, Feldmiller, Stanton, Brandt, Williams & Stueve, L.L.P., for appellant.

Stephen H. Nelsen, of Cline, Williams, Wright, Johnson & Oldfather, for appellees.

CONNOLLY, GERRARD, STEPHAN, and MILLER-LERMAN, JJ., and HANNON, Judge.

STEPHAN, J.

In an administrative proceeding pursuant to Neb. Rev. Stat. § 60-1422 (Reissue 1998), the Nebraska Motor Vehicle Industry Licensing Board (the Board) determined that American Honda Motor Company, Inc. (American Honda), had shown good cause for the establishment of a Honda motor vehicle franchise near 144th and F Streets in Omaha, Nebraska. The franchise in question was to be relocated from Council Bluffs, Iowa. Honda Cars of Bellevue, Inc. (Honda Bellevue), and O'Daniel Motor Center (O'Daniel), both Honda franchisees located in the Omaha metropolitan area, protested the application and appealed the Board's findings and order to the district court for Lancaster County pursuant to the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 1994 & Cum. Supp. 1998). The district court reversed the findings and order of the Board, and American Honda initiated this timely appeal. We reverse, and remand with directions based upon our determination that the Board and therefore the district court lacked subject matter jurisdiction under the motor vehicle industry licensing statutes, Neb. Rev. Stat. §§ 60-1401.01 to 60-1440 (Reissue 1998).

BACKGROUND

In 1997, Superior Honda of Council Bluffs (Superior), a Honda franchisee located in Council Bluffs, Iowa, requested permission from American Honda to relocate to a site near 144th and F Streets in Omaha, Nebraska. After internally approving the relocation, American Honda filed a letter of application with the Board seeking a determination whether the relocation would establish an additional dealership in the community and, if so, whether the requisite statutory good cause existed for such establishment. O'Daniel and Honda Bellevue protested the application to move Superior to the west Omaha area.

Following the filing of the protests, American Honda filed a motion requesting that the Board

> proceed to the licensing of the relocating dealer, Superior Honda, because it is an existing dealership that under Nebraska law is not in the "community" of the protesting dealers or, alternatively, to dismiss the protests and proceed to licensing of the relocating dealership because there are no legislative constraints on relocation of an existing dealership other than licensing.

During a hearing on October 15 and 16, 1998, the Board permitted each party to present evidence bearing upon this motion. The evidence included an "Automobile Dealer Sales and Service Agreement" between American Honda and O'Daniel for the period of March 21, 1994, through March 31, 1999, and a similar agreement between American Honda and Honda Bellevue for the period of July 17, 1995, through July 31, 2000. In each agreement, American Honda granted to O'Daniel and Honda Bellevue, respectively, "the nonexclusive right to . . . identify itself as a Honda dealer at the Dealership Location," which was identified by street address in each agreement. O'Daniel and Honda Bellevue agreed "to sell and service effectively Honda Products within Dealer's Primary Market Area and to maintain premises satisfactory to American Honda." A separate document entitled "Automobile Dealer Sales and Service Agreement Standard Provisions," which was incorporated by reference into the aforementioned agreements, provided in relevant part:

> Dealer understands and agrees that, while it has responsibility for the promotion and retail sale and servicing of Honda Products within the Primary Market Area, it has no territorial exclusivity. Further, American Honda reserves the right, based upon reasonable criteria, to appoint other authorized dealers of Honda Products in the Primary Market Area.

Representatives of O'Daniel and Honda Bellevue testified that the current dealer agreements were drafted by American Honda with no input from them. Each acknowledged that no "area of responsibility" or "primary market area" was stipulated in the agreement and that they were never told by American Honda that their "primary market area" constituted their "area of responsibility." Following this testimony, the Board went into

executive session and then, in open session, denied the motion to dismiss.

The Board then conducted an evidentiary hearing on the issue of whether good cause had been shown for the relocation of Superior. In a findings and order dated December 18, 1998, the Board concluded that good cause had been established. The Board noted that Superior's proposed location at 144th and F Streets in Omaha "is not reserved to either one of the protesting dealers in their franchise." It further noted that Superior was already competing with O'Daniel and Honda Bellevue and that the three dealerships had "no specific areas of responsibility set out in their franchise agreements." The Board concluded that

> the establishment of an additional dealership will result in an increase in employment and competition, which will result in better pricing and service, as well as increased convenience for the buyers of Honda products and, therefore, the application of [American Honda] to establish a Honda franchise at 144th and F Streets, Omaha, Nebraska, and receive a motor vehicle dealer's license from this Board at that location, should be and the same hereby is granted.

On appeal, the district court held that the issue of whether Superior would be permitted to relocate was properly before the Board, but that the Board's determination was not supported by the evidence because American Honda had "failed to show good cause for establishment of an additional dealership in the Omaha Metro area and that the additional dealership is in the public interest." It therefore reversed the Board's findings and order. American Honda perfected this timely appeal, which we removed to our docket on our own motion pursuant to our authority to regulate the dockets of the appellate courts. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

American Honda assigns, restated, that (1) the district court erred in concluding that O'Daniel and Honda Bellevue are in the same "community" as Superior's proposed location because the O'Daniel and Honda Bellevue franchise agreements do not specify that the proposed location is within their area of

responsibility; (2) the district court erred in concluding this was an additional dealership because the evidence established the entire Omaha metropolitan area, including Council Bluffs, was one community; (3) the district court erred in not giving the Board's decision a presumption of validity and in functioning as a trial court; and (4) the district court erred in concluding that American Honda had not established good cause to relocate Superior to the proposed Omaha location.

STANDARD OF REVIEW

[1-3] Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency. *Marshall v. Wimes, ante* p. 846, 626 N.W.2d 229 (2001); *Lackawanna Leather Co. v. Nebraska Dept. of Rev.*, 259 Neb. 100, 608 N.W.2d 177 (2000). A judgment or final order rendered by the 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. *Marshall v. Wimes, supra*; *Benitez v. Rasmussen, ante* p. 806, 626 N.W.2d 209 (2001). 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. *Id.*

[4] The determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its own conclusion independent of that of the trial court. *Baye v. Airlite Plastics Co.*, 260 Neb. 385, 618 N.W.2d 145 (2000); *In re Estate of Emery*, 258 Neb. 789, 606 N.W.2d 750 (2000).

ANALYSIS

The motor vehicle industry licensing statutes, codified at §§ 60-1401.01 to 60-1440, regulate certain aspects of the relationship between automobile franchisors and franchisees. One stated purpose of the regulatory authority conferred by the licensing statutes is to "establish guidelines for enforcement of a fair

and equitable balance" between parties to franchises and to regulate the "disparity in bargaining power" between automobile manufacturers and dealers. *In re Application of General Motors Corp.*, 232 Neb. 11, 14, 439 N.W.2d 453, 456 (1989); § 60-1401.01.

The administrative proceeding which we review here was conducted pursuant to § 60-1422, which provides:

> No franchisor shall enter into any franchise for the purpose of establishing an additional motor vehicle, combination motor vehicle and trailer, motorcycle, or trailer dealership in any community in which the same line-make is then represented, unless the franchisor has first established in a hearing held under the provisions of Chapter 60, article 14, that there is good cause for such additional motor vehicle, combination motor vehicle and trailer, motorcycle, or trailer dealership under such franchise, and that it is in the public interest.

[5-8] Subject matter jurisdiction is the power of a tribunal to hear and determine a case of the general class or category to which the proceedings in question belong and to deal with the general subject matter involved. *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000); *Muir v. Nebraska Dept. of Motor Vehicles*, 260 Neb. 450, 618 N.W.2d 444 (2000). When an administrative agency lacks subject matter jurisdiction over a claim, the courts also lack subject matter jurisdiction on appeal. *R-D Investment Co. v. Board of Equal. of Sarpy Cty.*, 247 Neb. 162, 525 N.W.2d 221 (1995). Litigants cannot confer subject matter jurisdiction upon a tribunal by acquiescence or consent. *Muir v. Nebraska Dept. of Motor Vehicles, supra.* Administrative bodies have only that authority specifically conferred upon them by statute or by construction necessary to achieve the purpose of the relevant act. *Southeast Rur. Vol. Fire Dept. v. Neb. Dept. of Rev.*, 251 Neb. 852, 560 N.W.2d 436 (1997); *Grand Island Latin Club v. Nebraska Liq. Cont. Comm.*, 251 Neb. 61, 554 N.W.2d 778 (1996). The threshold subject matter jurisdiction issue in this case is whether the proposed relocation of Superior would result in an additional dealer in the "community" pursuant to § 60-1422 so as to enable the Board to exercise the regulatory powers conferred by that statute.

Our analysis of this issue begins with the statutory definitions for certain terms utilized in the licensing statutes, and specifically in § 60-1422. For purposes of the licensing statutes, under § 60-1401.02(20), the term "franchise" means

> a contract between two or more persons when all of the following conditions are included:
>
> (a) A commercial relationship of definite duration or continuing indefinite duration is involved;
>
> (b) The franchisee is granted the right to offer and sell motor vehicles manufactured or distributed by the franchisor;
>
> (c) The franchisee, as an independent business, constitutes a component of the franchisor's distribution system;
>
> (d) The operation of the franchisee's business is substantially associated with the franchisor's trademark, service mark, trade name, advertising, or other commercial symbol designating the franchisor; and
>
> (e) The operation of the franchisee's business is substantially reliant on the franchisor for the continued supply of motor vehicles, parts, and accessories.

Section 60-1401.02(22) defines "franchisor" as "a person who manufactures or distributes motor vehicles and who may enter into a franchise." "Franchisee" is defined in § 60-1401.02(21) as "a new motor vehicle dealer who receives motor vehicles from the franchisor under a franchise and who offers and sells such motor vehicles to the general public." The term "community" as used in § 60-1422 is defined in § 60-1401.02(23) as "a franchisee's area of responsibility as stipulated in the franchise."

American Honda argues that because its franchises with O'Daniel and Honda Bellevue do not stipulate an area of responsibility for either dealer, there is no contractually defined "community" and thus no basis for an adjudication pursuant to § 60-1422 of whether "good cause" for an additional franchise exists. O'Daniel and Honda Bellevue argue that the relevant "community" is the Omaha metropolitan area, based upon testimony establishing a course of dealing of the parties, and that the proposed relocation of Superior from Council Bluffs to Omaha triggers the requirement that good cause be established pursuant

to § 60-1422. In resolving this issue in favor of O'Daniel and Honda Bellevue, the district court first noted that Nebraska's licensing statutes do not apply to Superior in its Iowa location and that its proposed relocation to Nebraska therefore resulted in an "additional dealership" under the provisions of the licensing statutes. The court then noted that the statutory definition of "franchise" did not require a written agreement and that "[s]imply because there is no area of responsibility in the written franchise agreement does not mean areas of responsibility do not exist." The district court concluded: "If the community of a dealership is to be determined by reference to only what is in the written franchise agreement, by not defining an area of responsibility in the written franchise, a franchisor would be able to circumvent the provisions of the [motor vehicle industry licensing statutes]." The district court determined that the evidence supported O'Daniel and Honda Bellevue's contention that the "Omaha Metro" area was the relevant community for purposes of § 60-1422 and that O'Daniel and Honda Bellevue had standing to protest the application.

The plain language of the licensing statutes protects motor vehicle franchisees from the establishment of additional competing franchises within a *contractually* defined geographical "community." This is illustrated by the decision in *Chrysler Corp. v. Jim Earp Chrysler-Plymouth*, 8 Neb. App. 836, 602 N.W.2d 43 (1999), which involved an application to establish a Jeep franchise in Papillion, Nebraska. A protest was filed by another Jeep franchisee, which contended that the new dealership would be within its "community." The Board determined that the new franchise could not be established without complying with § 60-1422, despite the fact that the new franchise was not located within the community specifically named in the protesting dealer's franchise. On appeal, the district court reversed the Board's order based upon its determination that the new franchise location did not fall within the community defined in the franchise of the protesting dealer. In its analysis of this issue, the Nebraska Court of Appeals cited the statutory definition of community set forth in § 60-1401.02(23) and reasoned that in order to determine the protesting dealer's

community or area of responsibility, it was necessary to examine that dealer's franchise agreement under accepted standards of contract construction. Noting that the protesting dealer's franchise agreement described a community consisting of Omaha and several surrounding communities, but not Papillion, the Court of Appeals affirmed the district court's determination that the proposed location of the new franchise was not within the protesting dealer's "community" for purposes of § 60-1422.

O'Daniel and Honda Bellevue contend that the present case is distinguishable from *Chrysler Corp. v. Jim Earp Chrysler-Plymouth, supra*, in that their franchises with American Honda do not specify geographic areas of responsibility, which they attribute to an attempt by American Honda to exercise its superior bargaining power to circumvent Nebraska's licensing statutes. In resolving this appeal, we are bound by the pertinent statutory language. Where, as here, the Legislature has acted to regulate the relationship between automobile franchisors and franchisees and has done so pursuant to clearly articulated and specifically addressed principles, the regulation is necessarily limited to the scope so defined. See *BMW of North America v. New Motor Veh. Bd.*, 162 Cal. App. 3d 980, 209 Cal. Rptr. 50 (1984). While § 60-1401.02(23) defines "community" as the area of responsibility which is "stipulated" in the franchise, the statutorily prescribed components of a "franchise" do not include a stipulation of the franchisee's area of responsibility. See § 60-1401.02(20)(a) through (e). Thus, the licensing statutes do not require that an area of responsibility be included in a motor vehicle dealership franchise.

The O'Daniel and Honda Bellevue franchise agreements, which were in effect at the time of the proposed relocation of Superior, do not stipulate geographical areas of responsibility. Moreover, each contract provides: "This Agreement may not be varied, modified or amended except by an instrument in writing, signed by duly authorized officers of the parties, referring specifically to this Agreement and the provision being modified, varied or amended." In addition, the standard provisions of American Honda's automobile dealer sales and service agreement, which were incorporated by reference into the franchise

agreements of both O'Daniel and Honda Bellevue, provide: "The terms of the Agreement may not be modified except in writing signed by an authorized officer of the parties. Without limiting the generality of the foregoing, no course of dealing will serve to modify or alter the terms of the Agreement."

[9] Thus, in order to conclude that a "community" could be defined in this case through a course of dealing of the parties, we would be required to disregard the plain language of § 60-1401.02(23) which defines "community" as the area of responsibility "as stipulated in the franchise" and the parties' contractual agreements which contain no such stipulation and expressly provide that they can be modified or amended only in writing. We are unable to disregard either. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning, *Brunken v. Board of Trustees, ante* p. 626, 624 N.W.2d 629 (2001), and a court is not free to rewrite a contract or to speculate as to terms of the contract which the parties have not seen fit to include. *Kropp v. Grand Island Pub. Sch. Dist. No. 2*, 246 Neb. 138, 517 N.W.2d 113 (1994).

Courts in other jurisdictions construing similar statutes have held there is no basis for the regulation of a proposed new franchisee where the existing franchisee's agreement did not specify an area of responsibility. *Scala/O'Brien Porsche v. Volkswagen of Amer.*, 87 Ill. App. 3d 757, 760, 410 N.E.2d 205, 207, 43 Ill. Dec. 205, 207 (1980) (construing provision of Illinois' Motor Vehicle Franchise Act which regulated establishment of additional franchise in existing franchisee's "'area of primary responsibility *as defined in its franchise*'"). See, also, *Ace Cycle World, Inc. v. American Honda Motor Co.*, 788 F.2d 1225 (7th Cir. 1986). We reach the same conclusion here. Because the applicable O'Daniel and Honda Bellevue franchise agreements included no stipulated area of responsibility and by their terms precluded modification by oral agreement or course of dealing, there was no defined "community" for purposes of an adjudication under § 60-1422 and the Board had no jurisdiction to proceed under that statute. See *Kizzier Chevrolet Co. v. General Motors Corp.*, 705 F.2d 322 (8th Cir. 1983). Accordingly, the district court erred in determining that § 60-1422 was applicable to the facts presented in this record.

In reaching this result, we are constrained by the fact that the Board is an administrative agency and, as such, has only that authority specifically conferred upon it by statute or by construction necessary to achieve the purpose of the relevant act. *Southeast Rur. Vol. Fire Dept. v. Neb. Dept. of Rev.*, 251 Neb. 852, 560 N.W.2d 436 (1997). By defining "community" as that which is stipulated in the franchise agreement without requiring that the agreement include such a stipulation, the Legislature precluded the Board's authority to regulate the addition of a new franchisee over the protest of an existing franchisee whose franchise agreement, for whatever reason, does not specify a geographic area of responsibility. We note that other states have enacted regulatory schemes which utilize purely statutory definitions of a franchisee's area of responsibility. See, e.g., Del. Code Ann. tit. 6, § 4902(10) (1999), Ky. Rev. Stat. Ann. § 190.047(6) (Michie 1997), and Minn. Stat. Ann. § 80E.14 (West 1999) (all defining statutory equivalent of "community" with reference to fixed geographic radius around existing dealership, without regard to franchise agreement). Following the decision in *Scala/O'Brien Porsche v. Volkswagen of Amer., supra*, Illinois amended its Motor Vehicle Franchise Act to statutorily define the "relevant market area" of a franchisee, for purposes of regulating new franchises, as either the area defined in the franchise agreement or the area within a 10- to 15-mile radius from the principal location of the franchise, depending upon the population in the county of location. 815 Ill. Comp. Stat. Ann. 710/2(q) (Lexis 1999). See *Ace Cycle World, Inc. v. American Honda Motor Co., supra*. If the current provisions of Nebraska's motor vehicle industry licensing statutes are deemed inadequate to meet their stated purposes, recourse must be to the Legislature.

CONCLUSION

For the reasons discussed above, the judgment of the district court is reversed with directions to remand the cause to the Board for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

HENDRY, C.J., and WRIGHT and MCCORMACK, JJ., not participating.

THOMAS H. CEPEL ET AL., AS TRUSTEES OF THE CEPEL FAMILY TRUST, APPELLANTS, AND THOMAS H. CEPEL ET AL., INTERVENORS-APPELLEES AND CROSS-APPELLANTS, V. PEGGY SMALLCOMB ET AL., APPELLEES AND CROSS-APPELLEES.

628 N.W.2d 654

Filed June 8, 2001. No. S-00-021.

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 a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Limitations of Actions: Contribution.** The appropriate statute of limitations in a contribution action is Neb. Rev. Stat. § 25-206 (Reissue 1995).
4. **Actions: Contribution: Time.** An action for contribution does not accrue until a coobligor has paid more than his or her proportionate share of the debt as a whole.
5. **Liens: Equity.** An equitable lien is a right, not recognized at law, to have a fund or specific property, or its proceeds, applied in whole or in part to the payment of a particular debt or class of debts.
6. ___: ___. An equitable lien is not an estate or property in the thing itself, nor is it a right to recover the thing; that is, it is not a right which may be the basis of a possessory action, but it is merely a charge upon it.
7. **Debtors and Creditors: Equity.** Before a creditor can have the aid of a court of equity to decree the property of a debtor subject to the payment of a debt, the creditor must show that he or she has no adequate remedy at law.
8. **Courts: Judgments.** In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Raymond A. Hervert, of Nye, Hervert, Jorgensen & Watson, P.C., for appellants and intervenors-appellees.

Larry W. Beucke, of Parker, Grossart, Bahensky & Beucke, for appellees except Farm Credit Services of the Midlands.

Noyes W. Rogers for appellee Farm Credit Services of the Midlands.

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

PER CURIAM.

In this appeal, Thomas H. Cepel, Janell M. Macek, Kenneth O. Cepel, and Jeff J. Cepel, as trustees of the Cepel Family Trust (Cepel Trust), claim they paid more than their share of installment payments on a real estate mortgage. The Cepel Trust and the beneficiaries of the trust seek contribution from Peggy Smallcomb and others (the Smallcombs) and Farm Credit Services of the Midlands (Farm Credit), their codebtors on the mortgage. The Cepel Trust owned one section of land, and the Smallcombs owned another. Both sections were security for a mortgage which was held by Farm Credit. After four payments were made on the mortgage using funds from an estate under which the Cepels were devisees, the Smallcombs paid one-half of a payment. No further payments were made. This action ensued, which resulted in Farm Credit's seeking foreclosure and the Cepel Trust and the beneficiaries' seeking an accounting, contribution, and a declaration that the real property of the Smallcombs be sold first in foreclosure.

The district court ordered foreclosure on each property. The district court also determined that the statute of limitations had run on the first three payments and that the fourth payment was barred because of procedural errors.

We determine that the district court did not err in failing to direct that one property be sold before the other in foreclosure. We also determine, however, that the district court erred in concluding that the statute of limitations and procedural errors barred an award of contribution. We conclude that a cause of action for contribution accrues when a co-obligor has paid more than his or her share of the entire debt instead of accruing at each installment payment. Accordingly, we affirm in part, and in part reverse and remand for further proceedings.

BACKGROUND

At one time, both the Cepel property and the Smallcomb property were owned by Harold Smallcomb and Mary Iva Smallcomb, husband and wife. Harold and Mary Smallcomb had two children, Maurice H. Smallcomb and Joan Smallcomb Cepel. Harold and Mary Smallcomb entered into a mortgage agreement with The Federal Land Bank of Omaha, which is now

Farm Credit. Both properties were included in the agreement. In September 1966, Harold and Mary Smallcomb restructured their ownership of the properties, with the result that Harold Smallcomb became the sole title owner of the Smallcomb property and Mary Smallcomb became the sole title owner of the Cepel property.

In 1974, Harold Smallcomb died and, through his last will and testament, left the Smallcomb property to Mary Smallcomb for life, then to Maurice Smallcomb. As a result of Harold Smallcomb's death, the mortgage agreement was reamortized, with the principal debtors being Mary Smallcomb, Maurice Smallcomb, and Maurice's wife, Peggy Smallcomb. Maurice Smallcomb later died and devised one-half to Peggy Smallcomb and an undivided one-half to his seven children, subject to a life estate in Peggy Smallcomb. In September 1991, Mary Smallcomb died, leaving nearly all of her estate in trust to Joan Cepel. Joan Cepel died 2 years later, conveying the remaining portions of the trust property to her four children.

Mary Smallcomb had paid the principal and interest under the mortgage agreement until her death. After Mary Smallcomb died, James Smallcomb, Maurice and Peggy Smallcomb's son, was appointed personal representative of Mary Smallcomb's estate and later was appointed the trustee of the trust created for Joan Cepel and her children. Using estate assets and income, James Smallcomb made four payments on the mortgage to Farm Credit as follows: (1) $8,672.73 on March 30, 1992, (2) $8,481.25 on March 31, 1993, (3) $8,250.90 on April 1, 1994, and (4) $9,035.56 on March 29, 1995. No other payments were made during this period of time by any party to Farm Credit. During this period of time, Joan Cepel died, and in July 1995, James Smallcomb distributed the Cepel property to Joan Cepel's children, who then placed the property into a second trust, the Cepel Trust. In October 1995, the county court entered a formal order for complete settlement of Mary Smallcomb's estate.

In July 1996, the Cepel Trust paid $4,481.64 to Farm Credit as principal and interest on the mortgage and the Smallcombs also paid $4,481.64 to Farm Credit. After this time, no further payments were made, and in July 1997, Farm Credit declared the mortgage in default and applied $4,700 of Farm Credit stock

against the unpaid balance. As of December 17, 1998, the court determined that Farm Credit was owed $32,950.51 in principal and $6,744.68 in accrued interest, with interest accruing at a daily rate of approximately $12.

On April 8, 1998, the Cepel Trust filed a petition seeking an accounting, foreclosure upon the Smallcomb property, and contribution for the amount the Cepel Trust paid over its proportionate share of the mortgage debt. In May, Farm Credit filed a cross-petition seeking an accounting, foreclosure, and a declaration that it held the first lien on the properties. The Smallcombs demurred to the Cepel Trust's petition, and in August, the district court sustained the demurrer on the ground that the petition failed to state a claim upon which relief could be granted except to the extent that the petition alleged contribution owed. The court further sustained the demurrer to claims for contribution arising before 1995 because the statute of limitations had run. In September, the Cepel Trust voluntarily dismissed its petition without prejudice.

In October 1998, the Cepel Trust filed an answer to Farm Credit's cross-petition, which also sought an accounting, contribution in the form of a money judgment against the Smallcombs, and foreclosure of the Smallcomb property before any foreclosure of the Cepel property. The Smallcombs filed a cross-petition and answer seeking an accounting of amounts due to Farm Credit, a finding that one-half was due each from the Cepel Trust and the Smallcombs, and a finding that upon a payment by the Smallcombs of their share, that the Cepel property be foreclosed first if the Cepel Trust failed to pay its share.

On February 1, 1999, the beneficiaries of the Cepel Trust and their spouses filed a petition in intervention, seeking the same relief as that of the Cepel Trust. The record does not show that a motion to intervene was ever sustained by the district court. The record does, however, show that Farm Credit and the Smallcombs each filed documents labeled as "Answer to Cepel Petition in Intervention," with both seeking that the petition in intervention be dismissed. Nothing in the record indicates that the petition in intervention was dismissed as a result of those pleadings.

All parties filed motions for summary judgment, with the beneficiaries intervening in the motion for summary judgment made by the Cepel Trust. In April 1999, the district court determined

that Farm Credit was entitled to foreclosure and sustained its motion for summary judgment. As a result, the court ordered that the Cepel Trust and/or the Smallcombs pay the amounts due on the mortgage within 20 days or the properties would be sold for satisfaction of the mortgage. The court then concluded that the Cepel Trust could have raised its concerns about the payment of funds from Mary Smallcomb's estate to Farm Credit at the time of the formal settlement of the estate or at the conclusion of the trust administration by James Smallcomb. The court further concluded that the Cepel Trust was not entitled to represent the interests of the beneficiaries in a contribution action, stating that such an action is an individual personal right and that no assignments of that right had been made to the Cepel Trust. As a result, the district court dismissed the cross-petition of the Cepel Trust.

Apparently recognizing that the summary judgment motions of the Cepel Trust and the Smallcombs had not been finally disposed of, the district court entered an order on December 10, 1999, incorporating the findings in the April order and formally denying the Cepel Trust's motion for summary judgment and sustaining the Smallcombs' motion for summary judgment. In its order, the court stated that each property was subject to payment of one-half of the debt to Farm Credit. The court declined, however, to direct Farm Credit to foreclose on one property before the other, stating that it would not direct Farm Credit in how to proceed in securing payment on the mortgage secured by the properties. The Cepel Trust filed a notice of appeal, as did the beneficiaries. See Neb. Ct. R. of Prac. 1C and 1E (rev. 2000).

ASSIGNMENTS OF ERROR

The Cepel Trust and the beneficiaries filed a joint brief and assign, rephrased, that the district court erred in sustaining the motions for summary judgment of Farm Credit and the Smallcombs and in denying the Cepel Trust's motion for summary judgment.

STANDARD OF REVIEW

[1] 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. *Allstate Ins. Co. v. LaRandeau, ante* p. 242, 622 N.W.2d 646 (2001); *Casey v. Levine, ante* p. 1, 621 N.W.2d 482 (2001).

[2] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Riggs v. Riggs, ante* p. 344, 622 N.W.2d 861 (2001); *Jones v. Paulson, ante* p. 327, 622 N.W.2d 857 (2001).

ANALYSIS

The Cepel Trust and the beneficiaries argue that the district court erred in sustaining the motions for summary judgment made by the Smallcombs and Farm Credit and in overruling their motion for summary judgment. The district court based its decision to sustain the Smallcombs' and Farm Credit's motions for summary judgment on several alternate grounds.

Cepel Trust as Proper Party

The district court determined that the Cepel Trust was not entitled to represent the interests of the beneficiaries in a contribution action, stating that such an action is an individual personal right and that no assignments of that right had been made to the Cepel Trust. The beneficiaries of the Cepel Trust, however, intervened in the action. Thus, regardless of whether the Cepel Trust could or could not represent the interests of the beneficiaries, the beneficiaries were also individual parties to the action. To the extent that the district court based its decision to sustain the Smallcombs' motion for summary judgment on the basis that the beneficiaries of the Cepel Trust were not represented in the action and had not assigned their claims, the court was in error.

Issues Not Raised in Estate Proceedings

The district court also determined that the Cepel Trust could have raised its concerns about the payment of funds from Mary Smallcomb's estate to Farm Credit at the time of the formal settlement of the estate or the conclusion of the trust administration by James Smallcomb. The Cepel Trust's action, however, is not based on the premise that the payments to Farm Credit should not have been made with estate funds. Rather, it is an action for contribution, in which the Cepel Trust seeks an order compelling the

Smallcombs to pay their proportionate share of the debt. Thus, the action is entirely separate from the probate and trust proceedings. We conclude that to the extent the district court sustained the Smallcombs' motion for summary judgment on the basis that issues of contribution should have been raised in probate and trust proceedings, the court was in error.

STATUTE OF LIMITATIONS

The district court sustained the Smallcombs' demurrer to claims for contribution arising before 1995 because the statute of limitations had run. The Cepel Trust and the beneficiaries rely on principles of equity to argue that a statute of limitations does not apply.

[3] However, we have previously referred to an action for contribution as an action that was, in effect, an action at law upon an implied contract. *Scotts Bluff County v. State*, 133 Neb. 508, 276 N.W. 185 (1937). Accordingly, we conclude that the appropriate statute of limitations in this case is Neb. Rev. Stat. § 25-206 (Reissue 1995), which states that "[a]n action upon a contract, not in writing, expressed or implied . . . can only be brought within four years." Because the Cepel Trust made multiple payments to Farm Credit, the next issue is whether the action accrued on each payment where the Cepel Trust paid more than its proportionate share of the payment, or if the action accrues when more than the proportionate share of the entire balance of the debt is paid.

We have not previously addressed whether the statute of limitations in a contribution action begins to run on the date of each payment. Few jurisdictions have squarely addressed the issue. Of these, a majority hold that a statute of limitations begins to run on each payment where one party pays more than his or her proportionate share of the payment. See, *Hudson v. Bennett*, No. 88C-NO-25, 1989 WL 12241 (Del. Super. Jan. 27, 1989); *Bushnell vs. Bushnell and another*, 77 Wis. 435, 46 N.W. 442 (1890); *Robinson v. Jennings*, 70 Ky. 630 (7 Bush) (1871) (applying state statute and stating in dicta that same rule would apply absent applicable statute); 18 Am. Jur. 2d *Contribution* § 104 (1985 & Cum. Supp. 2000). See, generally, *Kee v. Lofton*, 12 Kan. App. 2d 155, 737 P.2d 55 (1987) (citing *Bushnell, supra*, and *Robinson, supra*).

[4] In *Exchange Elevator Company v. Marshall*, 147 Neb. 48, 22 N.W.2d 403 (1946), however, we indicated that the right to contribution does not accrue until a party has made payments that exceed his or her proportionate share of the entire debt. We are persuaded that this is the better rule. As co-obligors to a debt, the parties are each liable for a proportionate share of the debt as a whole. Thus, we hold that an action for contribution does not accrue until a co-obligor has paid more than his or her proportionate share of the debt as a whole.

In this case, the district court erred in determining that the statutory period had run on all payments made before April 8, 1994. Instead, a cause of action for contribution accrued or will accrue at the time when the Cepel Trust paid or does pay more than one-half of the debt as a whole. At the point where the Cepel Trust pays or has paid one-half of the debt as a whole, it is entitled to contribution for any payments made over that amount and the statute of limitations begins to run. We are unable to determine from the record whether the Cepel Trust has yet paid over one-half of the debt as a whole. Accordingly, we remand for a determination of whether the statute of limitations has accrued and the amount of contribution owed by the Smallcombs, if any.

The Cepel Trust and the beneficiaries next contend that principles of equity should intervene to allow them to force a sale of the Smallcomb property, instead of the Cepel property, in order to pay any remaining debt. Their argument is essentially that the Cepel Trust holds an equitable lien upon the Smallcomb property which it can foreclose in order to pay the remainder of the debt owed to Farm Credit.

[5-7] An equitable lien is a right, not recognized at law, to have a fund or specific property, or its proceeds, applied in whole or in part to the payment of a particular debt or class of debts. *Allied Mut. Ins. Co. v. Midplains Waste Mgmt.*, 259 Neb. 808, 612 N.W.2d 488 (2000); *Schroeder v. Ely*, 161 Neb. 252, 73 N.W.2d 165 (1955). It is not an estate or property in the thing itself, nor is it a right to recover the thing; that is, it is not a right which may be the basis of a possessory action, but it is merely a charge upon it. *Id.* But before a creditor can have the aid of a court of equity to decree the property of a debtor subject to the payment of a

debt, the creditor must show that he or she has no adequate remedy at law. This can be shown only by alleging and proving that the creditor has exhausted all means provided by law for the collection of the debt, for example, by showing a recovery of judgment, the issuing of execution, and its return unsatisfied. *State Bank of Ceresco v. Belk*, 68 Neb. 517, 94 N.W. 617 (1903). In this case, the Cepel Trust and the beneficiaries have yet to obtain a judgment that they can foreclose through an equitable lien theory. Accordingly, their argument is without merit.

[8] The Cepel Trust and the beneficiaries next contend that the district court erred in declining to direct Farm Credit to sell the Smallcomb property instead of the Cepel property if a foreclosure sale were to become necessary. Although Farm Credit sought and was granted foreclosure, the parties were given 20 days to pay the amount due to Farm Credit. Nothing in the record indicates that the parties will not pay their debt to Farm Credit and that a foreclosure sale will actually occur. Thus, issues regarding how any future foreclosure sale should be handled are speculative. In the absence of an actual case or controversy requiring judicial resolution, it is not the function of the courts to render a judgment that is merely advisory. *US Ecology v. State*, 258 Neb. 10, 601 N.W.2d 775 (1999). We conclude that the district court did not err in declining to direct Farm Credit to sell one tract of property before another.

CONCLUSION

We conclude that the district court was correct in sustaining Farm Credit's motion for summary judgment and in declining to direct Farm Credit to sell one tract of property before another. We also conclude, however, that the district court erred in determining that the statute of limitations barred the Cepel Trust and the beneficaries' claims for contribution for payments made before April 8, 1994, and erred in sustaining the Smallcombs' motion for summary judgment as it pertains to the claims for contribution. Accordingly, we remand the matter for a determination of when or if a cause of action for contribution has accrued and the amount of contribution due, if any.

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

DANIEL HAWKINS AND JULIUS BALLARD, APPELLEES, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT.

627 N.W.2d 118

Filed June 8, 2001. No. S-00-139.

1. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.
2. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
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. **Damages: Appeal and Error.** The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved.
5. **Municipal Corporations: Wages: Claims.** The filing of a claim pursuant to Neb. Rev. Stat. § 14-804 (Reissue 1997) is a procedural prerequisite to the prosecution of a wage claim against a city in the district court.
6. **Statutes: Appeal and Error.** Neb. Rev. Stat. § 25-1937 (Reissue 1995) provides the procedure for appeal when a statute confers a right to appeal but fails to prescribe the procedure.
7. **Administrative Law: Appeal and Error.** The standard of review for error proceedings limits a district court to a determination of whether the inferior tribunal acted within its jurisdiction and whether the inferior tribunal's decision is supported by sufficient relevant evidence.
8. ___: ___. A district court's review in an error proceeding is limited to the record created before the lower tribunal, and the district court cannot reweigh evidence or make independent findings of fact.
9. ___: ___. Orders made in the exercise of judicial functions by a board or tribunal inferior to the district court are reviewable by proceedings in error.
10. ___: ___. It is only when the inferior board or tribunal acts judicially that a review by error proceedings is allowed.
11. ___: ___. A board or tribunal exercises a judicial function if it decides a dispute of adjudicative fact or if a statute requires it to act in a judicial manner.
12. **Evidence: Proof: Words and Phrases.** Adjudicative facts are facts which relate to a specific party and are adduced from formal proof.
13. ___: ___: ___. Adjudicative facts pertain to questions of who did what, where, when, how, why, and with what motive or intent. They are roughly the kind of facts which would go to a jury in a jury case.
14. **Administrative Law: Appeal and Error.** Whether a board or tribunal is required to conduct a hearing and receive evidence may be considered in determining whether the inferior board or tribunal exercised judicial functions.

15. ___: ___. Where an inferior board or tribunal decides no question of adjudicative fact and no statute requires the board or tribunal to act in a judicial manner, such orders are not reviewable by error proceedings.
16. **Statutes: Appeal and Error.** Neb. Rev. Stat. §§ 25-1901 to 25-1908 (Reissue 1995 & Cum. Supp. 1998) do not provide a procedure for appeal in situations in which the inferior board or tribunal does not exercise judicial functions.
17. **Trial: Waiver: Appeal and Error.** A litigant's failure to make a timely objection waives the right to assert prejudicial error on appeal.
18. **Trial: Expert Witnesses.** Determining the weight that should be given expert testimony is uniquely the province of the fact finder.
19. **Trial: Appeal and Error.** A ruling regarding the extent, scope, and course of the cross-examination rests within the discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed.

Sheri E. Cotton, Assistant Omaha City Attorney, for appellant.

Thomas F. Dowd, of Dowd & Dowd, for appellees.

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

HENDRY, C.J.

INTRODUCTION

Daniel Hawkins and Julius Ballard (plaintiffs), employees of the City of Omaha (the City), brought an action against the City claiming they were improperly classified under the job classification "City Maintenance Foreman I" (CMF I). Plaintiffs asserted that they were performing the duties of job classification "City Maintenance Foreman II" (CMF II) and were entitled to compensation appropriate for that job classification. Plaintiffs' claims were denied by resolution of the Omaha City Council on December 5, 1995. Plaintiffs appealed to the district court. After conducting a trial de novo, the district court ordered the City to reclassify plaintiffs under the CMF II classification, account for the wages lost due to the improper classification, and pay plaintiffs those wages. The City appealed. Plaintiffs then filed a petition to bypass the Nebraska Court of Appeals, which this court granted.

FACTUAL BACKGROUND

Plaintiffs are employees of the City and are classified under the job classification CMF I. In 1993, due to their belief that they were actually performing the duties of the CMF II classification, a job classification with a higher rate of pay, plaintiffs requested that the City Personnel Department perform a "job study" for each of them to determine whether they were working outside their CMF I job classification. The personnel department conducted job studies for plaintiffs in 1993 and concluded that neither was working outside the CMF I job classification.

On August 29, 1994, plaintiffs filed a claim with the city comptroller for underpayment of wages pursuant to Neb. Rev. Stat. § 14-804 (Reissue 1997). Section 14-804 provides:

> Before any claim against the city . . . is allowed, the claimant or his agent or attorney shall verify the same by his affidavit, stating that the several items therein mentioned are just and true and the services charged therein or articles furnished, as the case may be, were rendered or furnished as therein charged, and that the amount therein charged and claimed is due and unpaid, allowing all just credits. The city comptroller and his deputy shall have authority to administer oaths and affirmations in all matters required by this section. All claims against the city must be filed with the city comptroller. When the claim of any person against the city is disallowed, in whole or in part, by the city council, such person may appeal from the decision of said city council to the district court of the same county, as provided in section 14-813.

On August 30, 1994, the city comptroller submitted plaintiffs' claims to the Omaha City Attorney.

On December 5, 1995, the city attorney submitted to the Omaha City Council a recommendation that a resolution be adopted denying plaintiffs' claims because the job studies conducted by the personnel department in 1993 showed that plaintiffs had not been misclassified. At its December 5 meeting, the city council adopted a resolution denying plaintiffs' claims based upon the recommendation by the city attorney. No hearing was held before the city council regarding plaintiffs' claims.

When a claim submitted to the comptroller under § 14-804 is denied by the city council, the party whose claim was denied may appeal to the district court as provided by Neb. Rev. Stat. § 14-813 (Reissue 1997). § 14-804. Plaintiffs appealed and, pursuant to § 14-813, filed a bond with the city clerk and filed a petition and a transcript of the city council proceedings in the district court. This transcript consisted of the bond filed with the city clerk, the city council agenda for December 5, 1995, affidavits submitted by plaintiffs to the comptroller, correspondence from the city attorney's office, and the city council's resolution.

A trial de novo on plaintiffs' claims was held in the district court on April 28 and 29 and May 13 and 14, 1999. The job descriptions issued by the City for both the CMF I and CMF II job classifications were admitted into evidence. The job description for the CMF I classification described this position as "a lead foreman position on an assigned crew performing maintenance and/or construction duties" which involves "supervising and participating in those duties which are performed by an assigned crew." The functions of the CMF I classification included scheduling and directing the work of crew members, operating various types of equipment when assisting subordinate employees in performance of duties, and directing automotive equipment repair. The CMF I classification description did not provide for authority to initiate disciplinary action against subordinate employees, to coordinate projects with other maintenance divisions, or to communicate with the public regarding complaints or requests for service.

The CMF II classification was described as "skilled and supervisory work as foreman in charge of overall effective operation of a City facility or assigned area." The job description for the CMF II classification further stated that "[w]ork involves responsibility for supervising subordinate personnel engaged in general duties in the designated area." Functions of the CMF II classification included counseling and evaluating employees, recommending disciplinary action against employees, coordinating work projects with other maintenance divisions, and communicating with the public regarding complaints or requests for service.

At trial, Hawkins testified that he had been employed with the traffic maintenance division of the City as a CMF I, initially

working in the pavement markings section beginning in September 1990. Ballard testified that he had been employed with the traffic maintenance division of the City as a CMF I, initially working in the parking meter section beginning in 1988. Testimony was also adduced that in early 1994, plaintiffs switched positions, with Ballard taking over the position as a CMF I in the pavement markings section and Hawkins taking over the position as a CMF I in the parking meter section. At all relevant times, plaintiffs were classified at the CMF I level, regardless of whether they were with the parking meter section or the pavement markings section.

Plaintiffs testified that the duties they performed while employed in both the pavement markings section and the parking meter section included counseling and evaluating employees, recommending disciplinary action against employees, coordinating work projects with other maintenance divisions, and communicating with the public regarding complaints or requests for service. Plaintiffs further testified that operating equipment and participating in the actual physical work performed by their crew was not a regular part of the duties they performed, but that they did participate in such functions in emergency situations when there was a shortage in personnel due to vacations or illness.

Patrick Lulow, plaintiffs' immediate supervisor, testified that absent an emergency situation, neither plaintiff operated equipment when assisting subordinate employees in performance of assigned duties. Lulow agreed that plaintiffs had been performing duties described only under the CMF II classification.

Plaintiffs called Gary L. Troutman as an expert witness. Troutman owns a human resources consulting firm which specializes in providing personnel services to cities and counties, including the development of job descriptions. Prior to starting his own business, Troutman earned a bachelor of arts degree in 1972 and thereafter was employed with the City in the personnel department for a period of 12 years. His employment with the City included serving as personnel specialist from 1972 to 1974, compensation manager from 1974 to 1978, personnel director from 1978 to 1982, and labor relations director from 1982 to 1984. During his tenure with the City, Troutman was involved in drafting the job descriptions for the CMF I and CMF II classifi-

cations. In all, Troutman had 27 years of experience in the area of personnel, compensation, and development of job descriptions.

Troutman reviewed the CMF I and CMF II job descriptions and the 1993 job studies performed by the City. He conducted personal interviews with plaintiffs and Lulow and listened to the testimony adduced in court from plaintiffs and Lulow. Based on this information, Troutman testified that in his opinion, plaintiffs were performing the duties of the CMF II classification. Troutman acknowledged that there was some overlap between the duties of the CMF I and CMF II classifications. However, Troutman testified that plaintiffs were not regularly participating in the activities performed by their crews, which is a function of the CMF I classification but not of the CMF II classification. Troutman further stated that plaintiffs were performing many of the functions described only in the CMF II classification, which required them to exercise a higher level of independent judgment, such as recommending disciplinary action, coordinating projects with other divisions, and communicating with the public regarding complaints. For these reasons, Troutman believed plaintiffs were performing the duties of the CMF II classification.

The City called two expert witnesses, Tracy Svevad, compensation manager for the City, and Robert L. Ottemann, chair of the management department of the College of Business Administration at the University of Nebraska at Omaha. Svevad held a bachelor's degree in business administration with an emphasis in human resource management and had 12 years' experience in the areas of job classification and evaluation. Ottemann had a bachelor's degree in psychology, a master's degree in industrial psychology, a doctorate in business administration, and a law degree. Ottemann had consulted in the area of job analysis and evaluation for 25 years.

Based on their reviews of the CMF I and CMF II job descriptions, the 1993 job studies performed by the City, and testimony adduced at trial, both Svevad and Ottemann testified that plaintiffs were performing the duties of the CMF I classification. Svevad opined that plaintiffs were not working outside the CMF I classification because they were performing the functions listed on the job description for the CMF I classification. However, Svevad acknowledged that there was some overlap

between the duties of the CMF I and CMF II classifications. Ottemann testified that because plaintiffs were carrying out both "supervisory" and "nonsupervisory" activities and were participating in some of the same activities as their subordinates, they were properly classed at the CMF I level.

On cross-examination, Ottemann testified that there were certain areas of ambiguity in the CMF I and CMF II job descriptions, leaving them open to more than one interpretation. Ottemann further acknowledged that he had graduated from law school and was aware of a legal proposition that when a document has an ambiguity and is susceptible to more than one interpretation, the intention of the drafter is relevant. The City objected to this testimony as not within the expert's area of expertise and beyond the scope of direct examination. The objection was overruled. Ottemann further testified, over objection, that Troutman was the drafter of the job descriptions and that in differentiating between the CMF I and CFM II classifications, Troutman's intent was "[n]ot controlling, but relevant."

As a result of this trial, the trial court entered orders requiring the City to reclassify plaintiffs under the CMF II classification, place plaintiffs on the appropriate pay scale for that classification, account for the wages lost due to the improper classification, and pay plaintiffs those wages for the period beginning February 29, 1993, and until such time as the City reclassified plaintiffs under the CMF II classification. The court also awarded attorney fees to plaintiffs pursuant to the Nebraska Wage Payment and Collection Act. The City's motions for new trial were denied, and a timely appeal followed. Plaintiffs then filed a petition to bypass, which this court granted.

ASSIGNMENTS OF ERROR

[1] The City contends, restated, that the trial court erred in (1) holding a trial de novo on plaintiffs' claims rather than restricting its review to the record created before the city council; (2) permitting and considering the testimony of plaintiffs' expert witness; (3) permitting and considering certain cross-examination testimony from the City's expert witness; (4) determining that an accounting and payment should be made to plaintiffs for the time period beginning February 29, 1993, and until such

time as plaintiffs were reclassified under the CMF II classification, as such damage award "was given under the influence of passion and/or prejudice"; (5) ordering the City to pay plaintiffs' attorney fees pursuant to the Nebraska Wage Payment and Collection Act; (6) sustaining plaintiffs' motion for new trial and holding the new trial without giving the City adequate time to prepare; and (7) refusing to recuse itself. The sixth and seventh assignments of error are not argued in the City's brief. Errors that are assigned but not argued will not be addressed by an appellate court. *State ex rel. NSBA v. Flores, ante* p. 256, 622 N.W.2d 632 (2001). Therefore, the sixth and seventh assignments of error will not be addressed.

STANDARD OF REVIEW

[2] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below. *Brandon v. County of Richardson, ante* p. 636, 624 N.W.2d 604 (2001).

[3] 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. *Snyder v. Contemporary Obstetrics & Gyn.*, 258 Neb. 643, 605 N.W.2d 782 (2000).

[4] The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved. *Jameson v. Liquid Controls Corp.*, 260 Neb. 489, 618 N.W.2d 637 (2000).

ANALYSIS

Trial De Novo

The City claims the district court erred in holding a trial de novo on plaintiffs' claims rather than applying the standard of review applicable to proceedings in error.

[5] Plaintiffs filed their claims against the City pursuant to and in compliance with § 14-804. The filing of a claim pursuant to § 14-804 is a procedural prerequisite to the prosecution of a

wage claim against a city in the district court. *Thompson v. City of Omaha*, 235 Neb. 346, 455 N.W.2d 538 (1990).

Appeal from a denial of a claim filed pursuant to § 14-804 is provided by § 14-813. This section provides in relevant part:

> Whenever the right of appeal is conferred by this act, the procedure, unless otherwise provided shall be substantially as follows: The claimant or appellant shall, within twenty days from the date of the order complained of, execute a bond to such city with sufficient surety to be approved by the clerk . . . . It shall be the duty of the city clerk . . . to prepare a complete transcript of the proceedings of the city relating to their decision thereon. It shall be the duty of the claimant or appellant to file a petition in the district court as in the commencement of an action within thirty days from the date of the order or award appealed from, and he shall also file such transcript before answer day. The proceedings of the district court shall thereafter be the same as on appeal from the county board.

Plaintiffs complied with this section by executing a bond with the city clerk on December 13, 1995, and filing a petition and transcript of the city council proceedings with the district court on December 22, 1995. The City claims plaintiffs did not file a transcript of the city council proceedings and, as a result, the court lacked jurisdiction over plaintiffs' appeal. This allegation is not supported by the record. The record shows that plaintiffs filed a transcript in the district court on December 22. Once the petition and transcript have been filed in the district court, § 14-813 then provides that proceedings in the district court shall "be the same as on appeal from the county board." Appeals from a county board are set forth in Neb. Rev. Stat. § 23-137 (Reissue 1997), which states that such appeal "shall be entered, tried, and determined and costs awarded in the manner provided in sections 25-1901 to 25-1937."

[6] Neb. Rev. Stat. §§ 25-1901 to 25-1937 (Reissue 1995, Cum. Supp. 1998 & Supp. 1999) provide for reversal or modification by courts sitting in an appellate capacity of judgments and orders entered by lower courts or inferior tribunals. Sections 25-1901 to 25-1908 provide for review in the district court of a decision of an inferior tribunal exercising judicial functions by

way of petition in error. Sections 25-1911 to 25-1929 provide for appeals from the district court to the Court of Appeals or to this court. Sections 25-1930 to 25-1936 are general appeal provisions that are not relevant to the matter at issue in this case. Section 25-1937 provides the procedure for appeal when a statute confers a right to appeal but fails to prescribe the procedure. *Prucha v. Kahlandt*, 260 Neb. 366, 618 N.W.2d 399 (2000). The City claims that §§ 25-1901 to 25-1908, which deal with proceedings in error, were applicable to plaintiffs' appeal in the district court.

[7,8] The City then asserts that the standard of review for error proceedings should have been applied by the district court, rather than conducting a trial de novo. That standard of review would limit the district court to a determination of whether the inferior tribunal acted within its jurisdiction and whether the inferior tribunal's decision is supported by sufficient relevant evidence. *Crown Products Co. v. City of Ralston*, 253 Neb. 1, 567 N.W.2d 294 (1997). When making such determination, the City argues that the district court's review is limited to the record created before the lower tribunal and that the district court cannot reweigh evidence or make independent findings of fact. See *id.*; *State Farm Mut. Auto. Ins. Co. v. Cheeper's Rent-A-Car*, 259 Neb. 1003, 614 N.W.2d 302 (2000).

Plaintiffs, however, claim that because there was never a hearing before the city council, there was no record to review by error proceedings. Therefore, to apply the standard of review for error proceedings would deny them due process. Plaintiffs contend that under § 25-1937, a trial de novo was appropriate under these circumstances.

As previously stated, § 25-1937 provides the procedure for appeal when a statute confers a right to appeal but fails to prescribe the procedure. *Prucha v. Kahlandt, supra*. This section provides in relevant part:

> When the Legislature enacts a law providing for an appeal without providing the procedure therefor, the procedure for appeal to the district court shall be the same as for appeals from the county court to the district court in civil actions. Trial in the district court shall be de novo upon the issues made up by the pleadings in the district court.

[9,10] Orders made in the *exercise of judicial functions* by a board or tribunal inferior to the district court are reviewable by proceedings in error. *Emry v. Lake*, 181 Neb. 568, 149 N.W.2d 520 (1967). It is only when the inferior board or tribunal acts judicially that a review by error proceedings is allowed. *Longe v. County of Wayne*, 175 Neb. 245, 121 N.W.2d 196 (1963). See, also, *Kosmicki v. Kowalski*, 184 Neb. 639, 171 N.W.2d 172 (1969); *In re Application of Frank*, 183 Neb. 722, 164 N.W.2d 215 (1969). Thus, in order for §§ 25-1901 to 25-1908 to apply, the city council must have been exercising judicial functions when it denied plaintiffs' claims. See, *Kropp v. Grand Island Pub. Sch. Dist. No. 2*, 246 Neb. 138, 517 N.W.2d 113 (1994); *Thomas v. Lincoln Public Schools*, 228 Neb. 11, 421 N.W.2d 8 (1988).

[11-15] A board or tribunal exercises a judicial function if it decides a dispute of adjudicative fact or if a statute requires it to act in a judicial manner. *Kropp v. Grand Island Pub. Sch. Dist. No. 2, supra*. "Adjudicative facts" are facts which relate to a specific party and are adduced from formal proof. *Id.* Adjudicative facts pertain to questions of who did what, where, when, how, why, and with what motive or intent. *Id.* They are roughly the kind of facts which would go to a jury in a jury case. *Id.* Whether the board or tribunal was required to conduct a hearing and receive evidence may be considered in determining whether the inferior board or tribunal exercised judicial functions. See *Richardson v. Board of Education*, 206 Neb. 18, 290 N.W.2d 803 (1980). See, also, *Chaloupka v. Area Vocational Tech. School No. 2*, 184 Neb. 196, 165 N.W.2d 719 (1969); *School Dist. No. 23 v. School Dist. No. 11*, 181 Neb. 305, 307, 148 N.W.2d 301, 303 (1967) (" 'trial type of hearing' " is ordinarily required for disputes of adjudicative facts). Where an inferior board or tribunal decides no question of adjudicative fact and no statute requires the board or tribunal to act in a judicial manner, such orders are not reviewable by error proceedings. *Thomas v. Lincoln Public Schools, supra*.

In the present case, the city council did not exercise judicial functions in denying plaintiffs' claims. The city council did not decide a dispute of adjudicative fact. No facts relating to the specific parties were adduced from formal proof, and the city council decided no dispute regarding questions of who did what,

where, when, how, why, and with what motive or intent. The city council simply issued a resolution denying the claims based upon a recommendation by the city attorney. Furthermore, the city council was not statutorily required to act in a judicial manner. The city council did not conduct a hearing, did not hear testimony, and did not take evidence. The city council was not statutorily required to do so. The procedure utilized by the city council did not allow for the creation of a record which would provide for meaningful appellate review. Because the city council was not exercising judicial functions, §§ 25-1901 to 25-1908, which provide for review by petition in error, do not apply. Thus, the standard of review applicable to error proceedings does not apply in this case.

[16] Section § 14-813 ultimately directs us to §§ 25-1901 to 25-1937 to provide a procedure for appeal once a claimant has properly filed a petition under § 14-813. Sections 25-1901 to 25-1908 do not provide a procedure for appeal in situations in which the inferior board or tribunal does not exercise judicial functions. Thus, § 25-1937, which provides for a trial de novo in the district court when no other procedure is provided, applies under the circumstances of this case.

Under the circumstances presented, we determine the district court properly held the trial de novo. Because error proceedings were not applicable in this case, a trial de novo as provided under § 25-1937 was appropriate.

Plaintiffs' Expert Testimony

The City claims the trial court erred in considering the testimony of plaintiffs' expert witness, Troutman, when Troutman "clearly did not have hardly any experience in the specific area of classification specifications and lacked the educational qualifications and the hands on experience of the [City's] experts." Brief for appellant at 22.

[17] We interpret the City's brief as first arguing that Troutman was not qualified to render expert testimony in this case. However, the record reveals that the City did not object to Troutman's qualifications as an expert. A litigant's failure to make a timely objection waives the right to assert prejudicial error on appeal. *Blue Valley Co-op v. National Farmers Org.*, 257 Neb. 751, 600 N.W.2d 786 (1999).

[18] The City then argues that its experts, Svevad and Ottemann, were more qualified than plaintiffs' expert and that the court should have accepted their opinions instead of Troutman's opinion. This argument is similar to that advanced and rejected in the recent case of *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 609 N.W.2d 338 (2000), wherein the defendant argued that its expert was more qualified than the two experts called by the plaintiff. In *Norman*, we recognized that such an argument goes only to the weight of the testimony and that determining the weight that should be given expert testimony is uniquely the province of the fact finder. *Id.* See, also, *Sherrod v. State*, 251 Neb. 355, 557 N.W.2d 634 (1997). The City's assignment of error regarding plaintiffs' expert testimony is without merit.

CROSS-EXAMINATION TESTIMONY FROM CITY'S EXPERT WITNESS

The City next claims the trial court erred in permitting and considering certain testimony elicited by plaintiffs on cross-examination from the City's expert witness Ottemann. The City contends that Ottemann's cross-examination testimony regarding the intention of the person drafting the job descriptions should not have been permitted. The City claims that such testimony was beyond the scope of direct examination and was beyond the area of Ottemann's expertise. At trial, the City objected to the testimony on these grounds.

[19] A ruling regarding the extent, scope, and course of the cross-examination rests within the discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *Elstun v. Elstun*, 257 Neb. 820, 600 N.W.2d 835 (1999). On direct examination, Ottemann testified extensively regarding his interpretation of the job descriptions. Ottemann's opinion that plaintiffs were not improperly classified was based in part on his interpretation of the job descriptions. Plaintiffs' cross-examination of Ottemann regarding whether he believed there were certain areas of ambiguity in the two job descriptions was not beyond the scope of direct examination. Such cross-examination was also not outside Ottemann's areas of expertise. Ottemann testified that he had graduated from law school and was familiar with the proposition that the intention of the drafter of a document is relevant in interpreting that document. He then testified that Troutman was the drafter of the job descriptions

and that Troutman's intent was relevant. The trial court did not abuse its discretion in admitting this testimony into evidence.

DAMAGE AWARD

The City next asserts that the trial court's damage award was "given under the influence of passion and/or prejudice, is not supported by the record and is contrary to law." Brief for appellant at 25. In support of this claim, the City argues that the trial court erred in its assessment of damages by determining that plaintiffs were entitled to damages resulting from the misclassification for the time period beginning February 29, 1993, and until such time as plaintiffs were reclassified under the CMF II classification. The City claims that the damage award should be "limited to the period of time as identified in the plaintiffs' response to interrogatories." Brief for appellant at 26. However, a review of plaintiffs' answers to the City's interrogatories shows that no such limiting time period is identified in those answers. Each plaintiff simply states that he has been performing the duties of the CMF II classification "[s]ince at least January, 1993."

The City also contends in further support of its argument regarding damages that "[f]or the first time at trial, the plaintiffs sought to include among the description of duties they performed for which they were seeking compensation, duties they performed after the job study was completed and after they were reassigned by their superior to each other's previous areas of responsibility." Brief for appellant at 26-27. From this statement, it appears the City is arguing that the trial court erred in awarding plaintiffs damages for the period of time after plaintiffs changed jobs in early 1994. However, the record shows that at all relevant times, plaintiffs were classified under the CMF I classification and claimed they were performing the duties of the CMF II classification, regardless of whether they were assigned to the pavement markings section or parking meter section.

The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved. *Jameson v. Liquid Controls Corp.*, 260 Neb. 489, 618 N.W.2d

637 (2000). In the present case, the court ordered the City to make an accounting and pay plaintiffs the wages they were due had they been properly classified under the CMF II classification for the time period beginning February 29, 1993, and continuing until such time as the City properly classified plaintiffs and placed them at the proper rate of pay. The evidence supports the district court's finding that plaintiffs were improperly classified for the time period over which the damages were awarded. The City's contention is without merit.

Applicability of Nebraska Wage Payment and Collection Act

The City contends the trial court erred in awarding plaintiffs attorney fees pursuant to the Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. § 48-1228 et seq. (Reissue 1998). Section 48-1231 of the act provides in relevant part:

> An employee having a claim for wages which are not paid within thirty days of the regular payday designated or agreed upon may institute suit for such unpaid wages in the proper court. If an employee establishes a claim and secures judgment on the claim, such employee shall be entitled to recover (1) the full amount of the judgment and all costs of such suit and (2) if such employee has employed an attorney in the case, an amount for attorney's fees assessed by the court, which fees shall not be less than twenty-five percent of the unpaid wages.

The City claims the act is inapplicable in the present case. In support of this argument, the City cites the definition of the term "wages" included in § 48-1229, the definitional section of the act. Section 48-1229(4) provides:

> Wages shall mean compensation for labor or services rendered by an employee, including fringe benefits, when previously agreed to and conditions stipulated have been met by the employee, whether the amount is determined on a time, task, fee, commission, or other basis. Wages shall include commissions on all orders delivered and all orders on file with the employer at the time of termination of employment less any orders returned or canceled at the time suit is filed.

The City asserts that in order for the act to apply, wages must be "'previously agreed to,'" and that because in the present case "there is no agreement that the plaintiffs are to be paid at the city maintenance foreman II level," the act does not apply. Brief for appellant at 19. In support of its contention, the City cites *Freeman v. Central States Health & Life Co.*, 2 Neb. App. 803, 515 N.W.2d 131 (1994). In *Freeman*, the Court of Appeals determined that the act did not apply to claims bought by two employees against their employer for failure to pay overtime wages. The Court of Appeals determined that because "there was no previous agreement calling for payment of overtime wages," the act did not apply. 2 Neb. App. at 807, 515 N.W.2d at 135.

The situation in the present case is distinguishable from that in *Freeman*. In the present case, although the City did not agree to pay plaintiffs at the rate of pay for the CMF II classification, the City did agree to pay plaintiffs at the appropriate rate of pay for the duties they were performing. There is no dispute that plaintiffs were employees of the City and were subject to the job classification plan and the corresponding pay ranges. The Omaha Mun. Code, ch. 23, art. III, § 23-115 (1980) provides that "the personnel director shall be charged with the responsibility for the proper continued administration of the classification plan so that it will reflect the duties being performed by each employee in the classified service." The Code further provides that "the personnel director shall develop a recommended compensation or pay plan for all positions in the classified service, which shall be based upon the position classification plan and adhere to the general principle of like pay for like work." Omaha Mun. Code, ch. 23, art. III, § 23-141 (1980). These ordinances, as well as the pay rate schedule admitted into evidence, demonstrate that the City did agree to pay plaintiffs at the proper pay range for the work they were performing. The City's contention that there was no agreement between plaintiffs and the City to pay plaintiffs appropriate wages making the act inapplicable is without merit.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED.

BETTY LOU DOSSETT, APPELLANT, V. FIRST STATE BANK, LOOMIS, NEBRASKA, APPELLEE.

627 N.W.2d 131

Filed June 8, 2001. No. S-00-245.

1. **Constitutional Law: Termination of Employment.** The inquiry into whether a terminated employee's speech is protected under Neb. Const. art. I, § 5, is a question of law.
2. **Appeal and Error.** When an appeal presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
3. **Summary Judgment.** Summary judgment is proper 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.
4. **Summary Judgment: Final Orders: Appeal and Error.** Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over all motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just.
5. **Summary Judgment: Trial: Pleadings: Pretrial Procedure.** When it appears in a motion for summary judgment that an opposing party has failed to state a cause of action, then the motion may be treated, as to that issue, as one for judgment on the pleadings.
6. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not passed upon by the trial court.
7. **Summary Judgment: Pleadings.** A motion for summary judgment is not a proper method to challenge the sufficiency of a petition to state a cause of action.
8. **Termination of Employment.** Nebraska is an employment-at-will state, where, unless constitutionally, statutorily, or contractually prohibited, an employer may terminate an at-will employee at any time with or without reason, without incurring liability.
9. **Statutes: Constitutional Law.** Neb. Rev. Stat. § 20-148 (Reissue 1997) is a procedural statute which does not create any new substantive rights.
10. **Constitutional Law.** The guarantee of freedom of speech under the Nebraska Constitution is the same as under the First Amendment to the federal Constitution.
11. ___. In order to bring a claim for violation of the Nebraska Constitution's guarantee of freedom of speech under Neb. Const. art. I, § 5, the alleged violation must involve state action, and in order to state a cause of action for violation of the guarantee of free speech under article I, § 5, a plaintiff must allege state action.
12. **Trial: Pleadings: Pretrial Procedure.** When a party challenges the sufficiency of a petition to state a cause of action, a motion for judgment on the pleadings should be sustained only when an amendment cannot cure the defect.

Appeal from the District Court for Phelps County: STEPHEN ILLINGWORTH, Judge. Reversed and remanded for further proceedings.

William A. Tringe, Jr., for appellant.

Roger L. Shiffermiller, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

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

MILLER-LERMAN, J.

I. NATURE OF CASE

Betty Lou Dossett appeals from the order of the district court for Phelps County overruling her motion for summary judgment; granting the motion for summary judgment filed by First State Bank, Loomis, Nebraska (the bank); and dismissing her petition with prejudice. We reverse, and remand for further proceedings.

II. STATEMENT OF FACTS

In her petition, Dossett has alleged the following facts: Dossett began working for the bank in February 1994 as a teller and bookkeeper. On January 15, 1998, on her own time and not during her working hours at the bank, Dossett attended an open meeting of the Phelps County "R-6" school board. During the meeting, Dossett spoke publicly against a proposed school district merger between the R-6 school and the Loomis Public Schools.

On January 29, 1998, 2 weeks after the school board meeting, the bank terminated Dossett's employment. On February 10, the bank sent Dossett a letter signed by the bank president, John R. Nelsen, explaining the basis for her termination. The letter stated that Dossett's employment was terminated "as a result of comments made by [Dossett] during a meeting on January 15, 1998, which were negative about [the] local school board and superintendent, thereby reflecting poorly on [the] community and placing at risk substantial customers of the Bank."

On July 28, 1998, Dossett filed suit against the bank in the district court for Phelps County. Her amended petition was filed on September 18 and purports to state two causes of action. In her petition, Dossett alleged that the bank's termination of her

employment was a result of her exercise of her state constitutional right to free speech, as set forth in Neb. Const. art. I, § 5, and that such discharge violated state "public policy." Neb. Const. art. I, § 5, provides that "[e]very person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth when published with good motives, and for justifiable ends, shall be a sufficient defense." Dossett did not identify in her petition what state public policy she claimed had been violated by her termination. In her petition, Dossett further alleged that as a result of her wrongful termination, she was entitled to damages pursuant to Neb. Rev. Stat. § 20-148 (Reissue 1997). Section 20-148 provides, inter alia, as follows:

> (1) Any person or company . . . except any political subdivision, who subjects or causes to be subjected any citizen of this state or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the United States Constitution or the Constitution and laws of the State of Nebraska, shall be liable to such injured person in a civil action or other proper proceeding for redress brought by such injured person.

On November 6, 1998, the bank filed a demurrer to Dossett's petition on the ground that the petition failed to state facts sufficient to constitute a cause of action. In an order entered January 27, 1999, the district court sustained the bank's demurrer as to Dossett's allegations relating to an alleged violation of public policy, with an indication that such "defect" could not be cured. The district court overruled the demurrer as to the allegations brought under § 20-148.

On March 5, 1999, the bank filed its answer to Dossett's petition. In its answer, the bank pled, as an affirmative defense, the allegation that Dossett's petition failed to state facts sufficient to constitute a cause of action.

On January 6, 2000, the bank filed a motion for summary judgment. On January 7, Dossett filed a cross-motion for summary judgment. The cross-motions for summary judgment came on for hearing on January 12. Nelsen's and Dossett's depositions were offered and received into evidence without objection. No other evidence was offered at the hearing.

In her deposition testimony, Dossett essentially recounted the facts recited above. Nelsen testified that the Loomis Public Schools was the bank's biggest depositor and that following Dossett's remarks concerning the proposed school district merger, he met with both the superintendent and a board member of the Loomis Public Schools and that he thereafter concluded that these persons did not want to do business with the bank if Dossett was working there.

In an order filed January 21, 2000, the district court overruled Dossett's motion for summary judgment and granted the bank's motion for summary judgment. The district court ruled that § 20-148 was a procedural statute only and did not provide Dossett with any substantive rights. The district court noted that Dossett's claim for wrongful termination brought under § 20-148 was based on an alleged violation of Neb. Const. art. I, § 5, and that this constitutional provision required proof of state action. The court concluded that because Dossett had not alleged the requisite state action, the allegations in her petition "must fail." Accordingly, the district court granted the bank's motion for summary judgment and dismissed Dossett's petition. Dossett appealed.

III. ASSIGNMENTS OF ERROR

On appeal, Dossett claims that the district court erred in granting the bank's motion for summary judgment and dismissing her petition. Dossett also argues, inter alia, that the district court erred in granting the bank's demurrer as to the allegations relating to her claim of a violation of public policy and in considering the legislative history of § 20-148 in connection with its ruling on the cross-motions for summary judgment.

IV. STANDARDS OF REVIEW

[1,2] The inquiry into whether a terminated employee's speech is protected under Neb. Const. art. I, § 5, is a question of law. See, *Cox v. Civil Serv. Comm. of Douglas Cty.*, 259 Neb. 1013, 614 N.W.2d 273 (2000); *Millennium Solutions v. Davis*, 258 Neb. 293, 603 N.W.2d 406 (1999). When an appeal presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the

court below. *Sharkey v. Board of Regents*, 260 Neb. 166, 615 N.W.2d 889 (2000).

[3] Summary judgment is proper 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. *Morrison Enters. v. Aetna Cas. & Surety Co.*, 260 Neb. 634, 619 N.W.2d 432 (2000).

[4] Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over all motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just. *Shivvers v. American Family Ins. Co.*, 256 Neb. 159, 589 N.W.2d 129 (1999).

[5] When it appears in a motion for summary judgment that an opposing party has failed to state a cause of action, then the motion may be treated, as to that issue, as one for judgment on the pleadings. *Rodriguez v. Nielsen*, 259 Neb. 264, 609 N.W.2d 368 (2000); *Hoch v. Prokop*, 244 Neb. 443, 507 N.W.2d 626 (1993).

V. ANALYSIS

1. Termination as Violative of Public Policy

On appeal, Dossett claims that the district court erred in sustaining the bank's demurrer regarding the adequacy of the allegations in her petition pertaining to an alleged violation of public policy. Dossett alleged that the termination of her employment resulted from the exercise of free speech and that her termination violated "public policy." For the first time, on appeal, she argues in her brief that the termination of her employment violates the public policy embodied in Nebraska's public meetings law, Neb. Rev. Stat. § 84-1408 (Reissue 1999). It is well settled that the purpose of the public meetings law is to ensure that public policy is formulated at open meetings. See *Marks v. Judicial Nominating Comm.*, 236 Neb. 429, 461 N.W.2d

551 (1990). Dossett did not identify this public policy in her petition, nor did she raise an issue regarding the formulation of public policy at open meetings in argument before the district court.

[6] This court has previously indicated that an appellate court will not consider an issue on appeal that was not passed upon by the trial court. *Prucha v. Kahlandt*, 260 Neb. 366, 618 N.W.2d 399 (2000); *Torres v. Aulick Leasing*, 258 Neb. 859, 606 N.W.2d 98 (2000). Accordingly, we do not consider this argument further on appeal.

2. Grant of Bank's Motion for Summary Judgment

Dossett claims that the district court erred in granting the bank's motion for summary judgment and dismissing her petition with prejudice. For reasons different than those asserted by Dossett, we agree with Dossett that the district court erred in granting the bank's motion for summary judgment and in dismissing the petition. Accordingly, we reverse, and remand for further proceedings.

(a) Bank's Motion for Summary Judgment Treated as Motion for Judgment on Pleadings

Prior to ruling on the propriety of the district court's dismissal of Dossett's petition, we set forth the relevant procedural history of this case. In its answer to Dossett's petition, the bank alleged, as an affirmative defense, that Dossett's petition failed to state facts sufficient to constitute a cause of action. Approximately 10 months later, the bank filed its motion for summary judgment. Although the bank's motion does not set forth the basis for the motion, during the summary judgment hearing, the bank outlined the basis for its motion for summary judgment to the district court.

With respect to the adequacy of Dossett's petition, the bank's counsel argued that "in order to proceed under this statute [§ 20-148], the plaintiff has to assert — have merits to assert a cause of action of a substantive nature." The bank did not contend it was entitled to summary judgment as a matter of law on the ground that there were no genuine issues of material fact. Rather, we understand the affirmative defense raised in the bank's answer and the bank's argument for summary judgment as a challenge to the sufficiency of the petition to state a cause of

action. See, *Rodriguez v. Nielsen*, 259 Neb. 264, 609 N.W.2d 368 (2000); *Hoch v. Prokop*, 244 Neb. 443, 507 N.W.2d 626 (1993).

[7] We have held that a motion for summary judgment is not a proper method to challenge the sufficiency of a petition to state a cause of action. See, *Rodriguez, supra*; *Ruwe v. Farmers Mut. United Ins. Co.*, 238 Neb. 67, 469 N.W.2d 129 (1991). When it has been asserted in a summary judgment motion that the petition of the opposing party has failed to state a cause of action, as far as that issue is concerned, the motion may be treated as one in fact for a judgment on the pleadings, notwithstanding its designation as something other than that. See, *Rodriguez v. Nielsen, supra*; *Hoch v. Prokop, supra*. Because the substance of the bank's motion for summary judgment in effect challenged the sufficiency of Dossett's petition, we shall treat the motion as one for judgment on the pleadings. See *id.* Accordingly, we consider whether Dossett's petition states a cause of action.

(b) Neb. Const. art. I, § 5, Requires State Action

In her petition, Dossett has alleged that her termination of employment was wrongful because it was a result of her exercise of her state constitutional right to free speech under Neb. Const. art. I, § 5, and thus, the bank is liable to her for damages under § 20-148. We have previously held in *Goolsby v. Anderson*, 250 Neb. 306, 549 N.W.2d 153 (1996), that § 20-148 provides a procedural avenue for pursuit of certain employment-related claims without exhausting the available administrative remedies and that the legislative history of § 20-148 so indicates. To the extent that the district court referred to the purpose of § 20-148 and its legislative history in its order on summary judgment of January 21, 2000, the district court did not err, but was merely relying on this court's exposition in *Goolsby, supra*.

[8,9] Nebraska is an employment-at-will state, where, unless constitutionally, statutorily, or contractually prohibited, an employer may terminate an at-will employee at any time with or without reason, without incurring liability. *Huff v. Swartz*, 258 Neb. 820, 606 N.W.2d 461 (2000); *Walpus v. Milwaukee Elec. Tool Corp.*, 248 Neb. 145, 532 N.W.2d 316 (1995); *Hamersky v. Nicholson Supply Co.*, 246 Neb. 156, 517 N.W.2d 382 (1994). Section 20-148 provides that

> [a]ny person or company . . . who subjects . . . any citizen of this state . . . to the deprivation of any rights, privileges, or immunities secured by the . . . Constitution and laws of the State of Nebraska, shall be liable to such injured person in a civil action or other proper proceeding for redress brought by such injured person.

In *Goolsby*, we stated that § 20-148 provided an "alternative method for pursuing civil rights claims that are defined elsewhere in constitutional or statutory law." 250 Neb. at 313, 549 N.W.2d at 158. We have previously recognized that § 20-148 "is a procedural statute which does not create any new substantive rights." 250 Neb. at 313, 549 N.W.2d at 157. See, also, *Adkins v. Burlington Northern Santa Fe RR. Co.*, 260 Neb. 156, 615 N.W.2d 469 (2000) (citing to *Goolsby* with approval and recognizing § 20-148 as alternative civil avenue of remedy which does not create expanded civil rights). Thus, in order to succeed under § 20-148 in this employment-related case, Dossett must successfully seek vindication of rights already existing under constitutional or statutory law. See *Goolsby, supra*.

The bank contends that Dossett failed to properly allege a cause of action for wrongful discharge. Specifically, the bank argues that in order for Dossett to allege that her employment was wrongfully terminated as a result of her exercise of her state constitutional right to free speech under Neb. Const. art. I, § 5, she must allege that her underlying free speech rights were violated by state action.

[10] We have not specifically stated that Nebraska's constitutional guarantee of free speech, as set forth in article I, § 5, of the Nebraska Constitution, requires state action. However, this court has repeatedly and consistently stated that the guarantee of freedom of speech under the Nebraska Constitution is the same as under the First Amendment to the federal Constitution. See, *State v. Moore*, 258 Neb. 738, 605 N.W.2d 440 (2000); *Pick v. Nelson*, 247 Neb. 487, 528 N.W.2d 309 (1995); *State v. Simants*, 194 Neb. 783, 236 N.W.2d 794 (1975), *reversed on other grounds sub nom. Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976). In order to bring a claim for violation of the U.S. Constitution's guarantee of free speech under the First Amendment, the alleged violation must involve state

action. *Hudgens v. NLRB*, 424 U.S. 507, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976). That is, in order to seek redress for a violation of the federal constitution's guarantee of free speech, a plaintiff must allege government or state involvement in the purported violation of the exercise of his or her right to free speech.

[11] Having equated the guarantee of free speech under the Nebraska Constitution with that under the federal Constitution, we conclude that in order to bring a claim for violation of the Nebraska Constitution's guarantee of freedom of speech under Neb. Const. art. I, § 5, the alleged violation must involve state action, and that in order to state a cause of action for violation of the guarantee of free speech under article I, § 5, a plaintiff must allege state action.

We note that numerous state courts which have considered the issue under their own state constitutions' free speech provisions consisting of varying language have held that, like the federal constitution, state action is a requirement under their state constitutional free speech provisions. See, e.g., *Fiesta Mall Venture v. Mecham Recall Com.*, 159 Ariz. 371, 767 P.2d 719 (Ariz. App. 1988) (state constitution is limitation upon power of state legislature, and nothing in state constitution's free speech provision was intended to restrain private conduct); *Cologne v. Westfarms Associates*, 192 Conn. 48, 469 A.2d 1201 (1984) (nothing in history of state bill of rights suggests it was intended to guard against private interference with such rights); *Woodland v Citizens Lobby*, 423 Mich. 188, 212, 378 N.W.2d 337, 348 (1985) (interpreting state constitution's free speech provision "as implicitly limited to protection against state action"); *SHAD Alliance v. Smith Haven Mall*, 66 N.Y.2d 496, 500, 488 N.E.2d 1211, 1213, 498 N.Y.S.2d 99, 101 (1985) ("history of the State action requirement, traditional usage and understanding and contemporary approaches to constitutional adjudication" led court to conclude state constitution's provision regarding free speech requires state action); *Eastwood Mall, Inc. v. Slanco*, 68 Ohio St. 3d 221, 626 N.E.2d 59 (1994) (state constitution's guarantee of free speech no broader than First Amendment); *Jacobs v. Major*, 139 Wis. 2d 492, 407 N.W.2d 832 (1987) (free speech provision of state constitution prohibits only state interference with speech). But see, *Robins v. Pruneyard Shopping Center*, 23 Cal.

3d 899, 592 P.2d 341, 153 Cal. Rptr. 854 (1979) (state constitution's free speech provision protects speech, reasonably exercised, at privately owned shopping centers); *State v. Schmid*, 84 N.J. 535, 560, 423 A.2d 615, 628 (1980) (state constitution's guarantee of free speech protects "unreasonably restrictive or oppressive conduct on the part of private entities that have otherwise assumed a constitutional obligation not to abridge the individual exercise of such freedoms because of the public use of their property"); *Alderwood Assocs. v. Envtl. Council*, 96 Wash. 2d 230, 635 P.2d 108 (1981) (interpreting state constitution's free speech provision as not requiring state action). For the sake of completeness we note that, unlike the present case, none of these cases involved the issue of free speech in the context of a wrongful discharge from employment.

(c) Insufficiency of Allegations in Petition

Having concluded that state action is a requirement for the pleading and proof of an action based on a violation of the guarantee of free speech under Neb. Const. art. I, § 5, we must examine Dossett's petition to determine if it adequately states a cause of action. Under Neb. Rev. Stat. § 25-804(2) (Reissue 1995), a petition must contain "a statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition." Although Dossett alleges she was damaged by her termination from employment, she does not allege that her state constitutional rights to the exercise of free speech were violated as a result of state action. Without a statement of facts to support an allegation of state action, Dossett's petition does not sufficiently plead a cause of action for wrongful discharge brought under § 20-148 for a violation of her state constitutional right to free speech under Neb. Const. art. I, § 5.

[12] We have held that when a party challenges the sufficiency of a petition to state a cause of action, a motion for judgment on the pleadings should be sustained only when an amendment cannot cure the defect. *Rodriguez v. Nielsen*, 259 Neb. 264, 609 N.W.2d 368 (2000); *Hoch v. Prokop*, 244 Neb. 443, 507 N.W.2d 626 (1993). We determine that there is a reasonable possibility that Dossett could cure the defect as to the petition's allegations which purport to state a cause of action for violation

of Neb. Const. art. I, § 5, brought under § 20-148, by an adequate allegation of state action. Thus, the district court erred in dismissing Dossett's petition.

VI. CONCLUSION

The district court committed error by granting summary judgment in favor of the bank and dismissing Dossett's petition. Because, as the bank argued, Dossett's petition failed to allege state action and therefore failed to state a cause of action under § 20-148 for violation of Dossett's state constitutional right to free speech under Neb. Const. art. I, § 5, the bank's motion for summary judgment should have been treated by the district court as a motion for judgment on the pleadings. Because there is a reasonable possibility of curing the defect, the motion for judgment on the pleadings should be treated as a demurrer for failure to state a cause of action, and Dossett should be given leave to amend her petition as to the allegations brought pursuant to § 20-148. The district court's decision as to the allegations claiming a violation of public policy is unaffected by this decision. Regarding those issues raised by Dossett's allegations brought pursuant to § 20-148, the judgment of the district court dismissing Dossett's petition is reversed, and the cause is remanded to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

EASTROADS, L.L.C., AND JACQUELINE A. SULLIVAN, TRUSTEE OF THE JACQUELINE A. SULLIVAN LIVING TRUST, DATED APRIL 29, 1994, APPELLANTS, V. OMAHA ZONING BOARD OF APPEALS ET AL., APPELLEES.

628 N.W.2d 677

Filed June 15, 2001. No. S-99-586.

1. **Zoning: Appeal and Error.** On appeal, a district court may disturb the decision of a zoning appeals board only when the decision was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong.
2. ____: ____. In reviewing a decision of the district court regarding a zoning appeal, the standard of review is whether the district court abused its discretion or made an error

of law. Where competent evidence supports the district court's factual findings, an appellate court will not substitute its factual findings for those of the district court.

3. **Moot Question: Words and Phrases.** A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
4. **Zoning: Moot Question: Appeal and Error.** A variance appeal is not rendered moot by the fact that construction has taken place in reliance upon the challenged variance during the appeal process.
5. **Zoning: Administrative Law.** Ordinarily, a claim of unnecessary hardship as a ground for a variance cannot be based upon conditions created by the owner or applicant.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and SIEVERS and CARLSON, Judges, on appeal thereto from the District Court for Douglas County, GERALD E. MORAN, Judge. Judgment of Court of Appeals affirmed in part and in part reversed, and cause remanded with directions.

Ralph A. Froehlich for appellants.

Alan M. Thelen, Assistant Omaha City Attorney, for appellees.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MILLER-LERMAN, JJ.

HENDRY, C.J.

INTRODUCTION

The Omaha Zoning Board of Appeals (board) approved a variance in reference to a parcel of land located north of Interstate 80 between 15th and 13th Streets in Omaha, Nebraska. Eastroads, L.L.C., and the Jacqueline A. Sullivan Trust (collectively Eastroads) appealed, and the district court affirmed the board's decision. Eastroads then appealed to the Nebraska Court of Appeals, which reversed the judgment of the district court, finding that the decision of the board granting the variance was illegal. The board petitioned for further review, which this court granted.

FACTUAL BACKGROUND

On April 3, 1995, TCLA, Inc., submitted an area variance request to the board regarding a parcel of land in Omaha,

Nebraska, commonly referred to as the "Thirteenth Street Development." The development is zoned "CC-Community Commercial District" (CC), while the adjacent land to the north and south is zoned "R-5-Urban Family Residential District" (R-5). The development is bounded on the east by 13th Street and on the west by 15th Street. The Omaha Municipal Code requires that a 30-foot bufferyard consisting of landscaped vegetation be maintained on CC-zoned land abutting R-5 land.

TCLA requested that the board waive the 30-foot bufferyard requirement on four vacant lots located generally in the northern half of the development. Of these four lots, three are adjacent to the development, while one lot is located within the development, bounded on all four sides by CC-zoned land. These four lots are owned by Eastroads.

At the first hearing before the board on April 20, 1995, TCLA presented evidence to show why the variance was needed in order to develop the property. TCLA first pointed out that the irregular shape of the development's property line in the north section, due to the four lots owned by Eastroads, created a practical difficulty in that the 30-foot bufferyard was increased by the irregular boundary. Second, TCLA explained that the development contained an old rubble fill site located primarily in the center of the land. This rubble fill area was unsuitable for supporting commercial or residential buildings, and removing the fill from the land was impracticable. Thus, because of the rubble fill, any buildings in the development had to be placed on the perimeter of the development. Finally, TCLA produced evidence that due to a state-owned right-of-way created as a result of an on ramp to Interstate 80 along 13th Street, the only point where a road into the development from 13th Street could be located was at the north end. These factors made the amount of available land at the north perimeter especially crucial for the development. TCLA asserted that the rubble fill, the shape of the parcel, and the state's right-of-way created practical difficulties such that a variance was necessary to make development feasible.

Eastroads then produced its evidence in opposition to the variance. At the conclusion of the hearing, the board granted the variance. Eastroads appealed the board's decision to the Douglas County District Court. The district court, determining

that Eastroads was denied the opportunity to present all of its evidence to the board, remanded for a new hearing.

The second hearing before the board was held on April 18, 1996. TCLA again presented its evidence regarding the rubble fill, the irregular shape of the parcel, and the state's right-of-way. Regarding TCLA's intentions for the development, an engineer testifying on behalf of TCLA stated:

> We [TCLA] are requesting that the [variance] be granted today in order to free up that buildable area adjacent to these undeveloped lots for purposes of landscaping, as was mentioned, parking areas, driveways and buildings — any buildings placed on these properties would meet the requirements of the zoning ordinance for building setbacks.

Another witness testifying for TCLA stated to the board, "[W]e need the [variance] in order to develop the property. But no, there is no intent on building buildings with a zero setback, which wouldn't be allowed by current zoning regulations."

Eastroads again appeared in opposition to the variance and produced for the board's consideration plans to build "domed homes" on the four vacant lots. Eastroads' president stated:

> I'm asking that you deny the request of this [variance]. This is possible violations [sic] of the environmental laws and future environmental liability for the City of Omaha. . . .
>
> . . . .
>
> . . . TCLA is the intruder into the residential area. TCLA . . . will devalue the lots . . . it will harm future persons living in the dome homes. They will violate common law air and sun rights . . . . They have not secured all needed permits . . . . They will harm surrounding residential homes when and if they are allowed to dig up the dump. . . .
>
> . . . It is not the proper development for the area at the present time and the dome home development will help the area . . . .

In considering the variance application, the board discussed with Eastroads the building setback requirements on CC-zoned land. These requirements state that CC-zoned land has a 25-foot setback on the front yard, a 10-foot setback on parking lots, a 15-foot setback on the street-side yard, and a zero setback on the interior-side yard. As one member of the board stated, the over-

all regulations of the zoning code would preclude TCLA from building "right on top" of Eastroads, even if the 30-foot buffer-yard was waived. The board then voted to grant the variance.

Eastroads again appealed to the district court, and the board moved for summary judgment. After a hearing, the district court granted the board's motion and dismissed Eastroads' claim. Eastroads then appealed to the Court of Appeals. The Court of Appeals reversed, and remanded, finding that the district court did not have authority under Neb. Rev. Stat. § 14-414 (Reissue 1997) to grant summary judgment. *Eastroads v. Omaha Zoning Bd. of Appeals*, 7 Neb. App. 951, 587 N.W.2d 413 (1998).

Upon remand, the district court held an evidentiary hearing on April 23, 1999. At this hearing, Eastroads presented additional evidence for the court's consideration in determining whether the decision to grant the variance was illegal. See *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 660, 663-64, 515 N.W.2d 390, 393 (1994) (" '[i]n deciding whether a board's decision is supported by the evidence, the district court shall consider any additional evidence it receives' ").

The additional evidence revealed the following pertinent facts regarding the development: The rubble fill was created between approximately 1950 and 1970 when the area was used for depositing construction waste. In 1988, the board granted a request by Thirteenth Street Associates, Inc., a prior owner, to rezone the development to CC. Thirteenth Street Associates later sold the development to Okahoma, Inc., which in turn was purchased and merged with TCLA on April 19, 1990. After TCLA purchased the property in 1990, the state acquired a right-of-way along the southeast edge of the development. Furthermore, at the hearing before the district court, the parties also stipulated that during the course of the present litigation and after the board granted the variance, a restaurant had been built on one lot at the northeast corner of the development.

On April 23, 1999, the trial court issued its ruling. The trial court found that the decision of the board granting the ordinance was not illegal, arbitrary, or capricious. The court found that the board's decision was supported by the following facts:

> [N]umber one . . . the rubble fill on the property is on a majority of this TCLA property; secondly, the Zoning

> Board considered, and correctly, in my opinion, took into account the state controlled [right-of-way] which must begin at the north end of the property and this, in effect, forecloses the possibility of any reasonable development in this area; third, the irregular boundary between the TCLA property and the Plaintiffs' R-5 property. The irregular boundaries which are part of the evidence in this case increase the required buffer yard and, once again, this forecloses the possibility of any reasonable development.

The court also found that the appeal was moot with respect to the lot upon which the restaurant had been built.

Eastroads again appealed to the Court of Appeals contending, among other things, that the variance was illegal because the asserted difficulties justifying the variance were self-created conditions caused by TCLA. The Court of Appeals agreed, relying upon our decision in *Frank v. Russell*, 160 Neb. 354, 70 N.W.2d 306 (1955), and concluded that the board acted illegally in granting the variance. *Eastroads v. Omaha Zoning Bd. of Appeals*, 9 Neb. App. 767, 619 N.W.2d 618 (2000). The Court of Appeals also reversed the district court's determination that the appeal was in part moot. The board then petitioned for further review, which we granted.

ASSIGNMENTS OF ERROR

The board asserts, rephrased, that the Court of Appeals erred in (1) reversing the district court's finding of mootness and (2) interpreting *Frank v. Russell, supra*, to determine the variance was illegal.

STANDARD OF REVIEW

[1] On appeal, a district court may disturb the decision of a zoning appeals board only when "the decision was illegal or is not supported by the evidence and is thus arbitrary, unreasonable, or clearly wrong." *Fitzke v. City of Hastings*, 255 Neb. 46, 56, 582 N.W.2d 301, 309 (1998).

[2] In reviewing a decision of the district court regarding a zoning appeal, the standard of review is whether the district court "abused its discretion or made an error of law." *Id.* at 55, 582 N.W.2d at 308. Where competent evidence supports the district

court's factual findings, an appellate court will not substitute its factual findings for those of the district court. *Id.*

ANALYSIS

MOOTNESS

[3] The board first asserts the Court of Appeals erred in reversing the trial court's determination that with respect to the lot where the restaurant had been built, the present appeal was moot. A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *Prucha v. Kahlandt*, 260 Neb. 366, 618 N.W.2d 399 (2000).

[4] However, in the context of a variance, an appeal is not rendered moot by the fact that construction has taken place in reliance upon the challenged variance during the appeal process. *Bowman v. City of York*, 240 Neb. 201, 482 N.W.2d 537 (1992). Thus, the fact that a restaurant has been built on the development does not render any part of this appeal moot. The board's first assignment of error is without merit.

AREA VARIANCE

The board next assigns as error the Court of Appeals' determination that the board's decision granting the variance was illegal under *Frank v. Russell*, 160 Neb. 354, 70 N.W.2d 306 (1955). The board argues that *Frank* is inapplicable to a variance granted under Neb. Rev. Stat. § 14-411 (Reissue 1997) in that *Frank* was decided under Neb. Rev. Stat. § 19-910 (Reissue 1997) and the two statutes as currently written are not analogous. Section 19-910 defines the authority of boards of adjustment to grant a variance in cities of the first and second class and villages. Section 14-411 defines the authority of zoning boards of appeal to grant a variance in cities of the metropolitan class, such as Omaha.

However, the current version of § 19-910 was not in effect at the time *Frank v. Russell, supra*, was decided in 1955. The version of § 19-910 in effect in 1955, § 19-910 (Reissue 1954), stated in pertinent part:

> The board of adjustment shall . . . authorize upon appeal in specific cases such variance from the terms of the [zoning] ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

This language is analogous to that found in § 14-411. Section 14-411, which has not been amended since 1929, states in pertinent part:

> Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of such [zoning] ordinance, the board of appeals shall have the power in passing upon appeals, to vary or modify the application of any of the regulations or provisions of such ordinance relating to the use, construction or alteration of buildings or structures or the use of land, so that the spirit of the ordinance shall be observed, public safety and welfare secured, and substantial justice done.

Both ordinances allowed the respective decisionmakers the general authority to grant a variance from the "strict letter" or "literal enforcement" of a zoning ordinance when "unnecessary hardships" or "practical difficulties" exist, so long as the "spirit of the ordinance" was upheld and "substantial justice" done. § 14-411; § 19-910 (Reissue 1954). Due to the similarity between §§ 14-411 and 19-910 when *Frank* was decided, *Frank* is applicable to the issues presented in this appeal. Accordingly, we turn to a consideration of the self-created conditions rule enunciated in *Frank*.

In *Frank v. Russell, supra*, the applicants sought an area variance after commencing construction of a building in violation of the local zoning code. The applicants' building was placed 27 feet from the front lot line. During construction, nearby landowners brought an injunction to halt construction, asserting the local zoning ordinances required that the building be placed 40 feet from the front lot line. After the injunction was granted, the applicants petitioned the local board of adjustment for a variance under § 19-910 to allow them to complete the structure with a 27-foot setback. The board of adjustment granted the variance.

On appeal, this court reversed, finding that the undue hardship asserted by the applicants, having to tear down a partially completed building, was a self-created condition because the applicants began building the structure in violation of existing zoning ordinances. As such, the board acted illegally in granting the variance.

[5] In *Frank v. Russell*, 160 Neb. 354, 361-62, 70 N.W.2d 306, 311 (1955), we stated that " '[o]rdinarily, a claim of unnecessary hardship cannot be based upon conditions created by the owner or applicant.' " Quoting Annot., 168 A.L.R. 13 (1947). The Court of Appeals, in applying this proposition, determined that TCLA's knowing purchase of CC-zoned property containing a rubble fill necessitated the conclusion that the practical difficulties asserted in this case were a self-created condition. The Court of Appeals concluded that this self-created condition rendered the board's decision illegal. Assuming without deciding that the Court of Appeals was correct in its determination, there was an additional finding made by the district court regarding the state's right-of-way which the Court of Appeals failed to consider.

In affirming the board's decision, the district court found that the state's right-of-way running alongside the southeast edge of the development created a practical difficulty which, if not ameliorated, "forecloses the possibility of any reasonable development in this area." Eastroads did not assert, either in its brief or at oral argument, that the state's right-of-way was a self-created condition. The record is uncontroverted that the right-of-way was created by the state after TCLA acquired the property. The record is further devoid of any evidence showing that at the time TCLA acquired the property, it had any knowledge that such a right-of-way would be created in the future. Due to the limitations placed on the development by the state's right-of-way, the only access to the property along 13th Street is in the northern section. At the 1995 hearing, a witness for TCLA testified that due to the right-of-way, it would not be possible to place a road in the north section of the development without the variance.

Upon review, where competent evidence supports the district court's factual findings, an appellate court will not substitute its factual findings for those of the district court. *Fitzke v. City of*

Hastings, 255 Neb. 46, 582 N.W.2d 301 (1998). In reviewing the district court's decision, the question is whether the district court abused its discretion or made an error of law. *Id.* There is competent evidence in the record to support the district court's finding that the state's right-of-way created a situation where strictly applying the 30-foot bufferyard requirement with respect to the four vacant lots would foreclose the possibility of reasonable development. This is a significant factor supporting the board's decision which the Court of Appeals failed to consider.

The facts of this case as applied to the right-of-way distinguish it from *Frank v. Russell*, 160 Neb. 354, 70 N.W.2d 306 (1955). In *Frank*, the sole difficulty asserted by the applicants was having to tear down a partially completed building which the applicants themselves placed upon the land in violation of the local zoning ordinances. We stated that "[i]t would certainly be unreasonable to allow one to create his own hardship and difficulty and take advantage of it to the prejudice of innocent parties." *Id.* at 361, 70 N.W.2d at 311. In the present case, the state's right-of-way is simply not a condition created by the "owner or applicant," TCLA. *Id.* at 362, 70 N.W.2d at 311. The district court found that the state's right-of-way created a practical difficulty in the strict application of the zoning code in this case. This finding by the district court was supported by competent evidence. As such, its determination was neither an abuse of discretion nor an error of law.

Having determined that the state's right-of-way was not a self-created condition, we next consider the second proposition from *Frank v. Russell, supra*, which the Court of Appeals relied upon in determining that the variance was illegal. The second proposition states, " 'The claim of unnecessary hardship as a ground for a variance is not ordinarily available to one who purchased the premises after the enactment of the regulation in question.' " *Id.* at 362, 70 N.W.2d at 312, quoting Annot., 168 A.L.R. 13 (1947).

This dicta in *Frank v. Russell, supra*, however, has never been applied by this court as an absolute bar to granting a variance in the cases succeeding *Frank*. In fact, the use of the word "ordinarily" in *Frank* signifies that there may be occasion to vary the application of this rule. While the zoning restrictions in place at

the time TCLA purchased the property may be considered by the board in deciding whether the variance should be granted, such restrictions do not remove the board's discretion, in an appropriate case, to relax the "strict letter" of the zoning code by granting a variance. § 14-411.

Our review in this case is narrowly limited to whether the trial court abused its discretion or committed an error of law in affirming the board's decision granting the variance. As noted in *Bowman v. City of York*, 240 Neb. 201, 210, 482 N.W.2d 537, 544 (1992), administrative boards such as the board of zoning appeals provide

> "expertise and an opportunity for specialization unavailable in the judicial or legislative branches. They are able to use these skills, along with the policy mandate and discretion entrusted to them by the legislature, to make rules and enforce them in fashioning solutions to very complex problems. Thus, their decisions are not to be taken lightly or minimized by the judiciary."

We find no abuse of discretion or error of law committed by the trial court in affirming the decision of the board. We conclude, based on the foregoing reasons, that the Court of Appeals erred in reversing the district court's decision.

CONCLUSION

The Court of Appeals' determination that the appeal is not moot is affirmed. The Court of Appeals' determination that the board acted illegally in granting the variance is reversed. Accordingly, we affirm in part, and in part reverse and remand with directions to the Court of Appeals to enter judgment consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

McCORMACK, J., not participating.

GEORGE W. WOODWARD III, INDIVIDUALLY AND ON BEHALF OF ALL SHAREHOLDERS OF WE AND NW, INC., A NEBRASKA CORPORATION, APPELLANT, V. NANCY K. ANDERSEN, FORMERLY KNOWN AS NANCY K. WOODWARD, AND WE AND NW, INC., A NEBRASKA CORPORATION, APPELLEES.

627 N.W.2d 742

Filed June 15, 2001. No. S-99-1430.

1. **Actions: Equity: Accounting.** A derivative action which seeks an accounting and the return of money is an equitable action.
2. **Actions: Equity: Corporations.** An action seeking corporate dissolution is an equitable action.
3. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided that where credible evidence is in conflict on a material issue of fact, 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.
4. **Summary Judgment.** Summary judgment is proper 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.
5. **Judgments: Collateral Estoppel: Res Judicata.** The applicability of the doctrines of collateral estoppel and res judicata is a question of law.
6. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
7. **Judgments: Res Judicata.** The doctrine of res judicata provides that a final judgment on the merits is conclusive upon the parties in any later litigation involving the same cause of action.
8. **Judgments: Collateral Estoppel.** Under collateral estoppel, when an issue of ultimate fact has been determined by a final judgment, that issue cannot again be litigated between the same parties in a future lawsuit.
9. **Collateral Estoppel.** There are four conditions that must exist for the doctrine of collateral estoppel to apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.
10. **Corporations.** An officer or director of a corporation occupies a fiduciary relation toward the corporation and its stockholders, and is treated by the courts as a trustee.
11. **Corporations: Accounting.** Although the burden is ordinarily upon the party seeking an accounting to produce evidence to sustain the accounting, when another person is in control of the books and has managed the business, that other person is in the position of a trustee and must make a proper accounting.

12. **Principal and Agent: Proof.** The burden of proof is upon a party holding a confidential or fiduciary relation to establish the fairness, adequacy, and equity of a transaction with the party with whom he or she holds such relation.
13. **Corporations: Proof.** In a claim for dissolution of a corporation, the burden of proof is on the party seeking the dissolution.
14. **Corporations: Words and Phrases.** The meaning of the term "deadlocked" within the context of Neb. Rev. Stat. § 21-20,162 (Cum. Supp. 2000) is a corporation which, because of decision or indecision of the stockholders, cannot perform its corporate powers.
15. **Corporations: Courts.** Although the Business Corporation Act has given to the courts the power to relieve minority shareholders from oppressive acts of the majority, the remedy of dissolution and liquidation is so drastic that it must be invoked with extreme caution.

Appeal from the District Court for Douglas County: MICHAEL W. AMDOR, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

James D. Sherrets and Theodore R. Boecker, Jr., of Sherrets & Boecker, for appellant.

Dennis E. Martin and Kevin J. McCoy, of Martin & Martin, P.C., for appellees.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, and MILLER-LERMAN, JJ.

CONNOLLY, J.

The appellant, George W. Woodward III, was married to the appellee Nancy K. Andersen. As part of a divorce settlement, Andersen gave Woodward 245 shares of a corporation and retained 255 shares. Woodward filed suit alleging that before the divorce, Andersen took excess funds from the corporation, and that after the divorce, Andersen mismanaged the corporation and oppressed the shareholders. Woodward sought an accounting, a return of money to the corporation, and dissolution of the corporation. The district court granted partial summary judgment in Andersen's favor for events occurring before the divorce. After a trial, the court denied Woodward relief on his other claims. Woodward appeals. We affirm in part, and in part reverse and remand for further proceedings.

I. BACKGROUND

Woodward and Andersen were married in 1980. In 1986, Andersen incorporated WE and NW, Inc., for the purpose of acquiring and developing a parcel of land along the Platte River for use as a private campground. Since that time, Andersen has served as president and director of the corporation. Initially, the corporation issued 500 shares of stock to G.W. Egermayer, Jr., and 500 shares to Andersen. The property was conveyed to the corporation in 1988. The campground was named "Woods Landing" and operated by selling memberships as part of a nationwide chain of campgrounds known as Coast-to-Coast.

In 1988, Egermayer redeemed his 500 shares in the corporation. This left Andersen as the sole shareholder in the corporation. Woodward did not own any shares in the corporation, but testified that he had an interest in the corporation due to his marriage to Andersen and has contended that Andersen held shares in trust for him. Both parties testified that they took active roles in the management and development of the campground.

Woodward testified that he never received a salary from the corporation and that when he wanted to be paid, he asked Andersen for money. In addition, the couple used revenue from the corporation to pay a majority of their bills and to purchase items. Woodward testified that "millions" were taken out of the corporation, stating that an average of $30,000 to $60,000 was taken out per month and that up to $300,000 might be taken out in a month in order to buy things such as a farmhouse, jewelry, or a Jaguar convertible. Andersen testified that she believed less than $20,000 per month was taken out and that there were probably instances where over $200,000 was taken out, but not over $250,000.

1. Prior Divorce Proceedings and Property Settlement Agreement

Andersen filed for divorce in June 1992. A temporary restraining order was issued precluding any transfers from the corporation outside of the ordinary course of business. Woodward then began to claim that Andersen was wrongfully withdrawing money from the corporation. At a deposition taken in November, Woodward stated that he was investigating

amounts Andersen had received from the corporation and indicated that there were payments made outside of the ordinary course of business. In his deposition, Woodward also stated that he was concerned about where money from the corporation was going and that he wanted an accounting. The record contains evidence indicating that money withdrawn by Andersen in 1992 was used to finance purchases for Woodward and to pay to him $30,000 per month under a temporary support order in the divorce proceedings.

The record contains letters exchanged between Woodward's and Andersen's attorneys during the divorce proceedings. These letters indicate that there was considerable disagreement over the amount of information that was provided through discovery regarding the corporation. The record shows, however, that in response to a motion to compel, Andersen made the financial records of the corporation available for review and inspection by Woodward. A letter from Woodward's attorney dated February 1, 1993, states that he hired an accountant to perform a review of all corporate records at the campground office. The record indicates that Andersen did not allow such an audit to be performed. Instead, the record contains a letter dated March 8, 1993, stating that such a request was too broad and stating that a document request should be provided. A letter dated March 11, 1993, indicates that a settlement was then reached between the parties.

On March 29, 1993, a shareholder agreement was executed which was incorporated into the divorce decree. Under the decree, Andersen transferred 245 shares of her 500 shares to Woodward. The decree states that "[Woodward] acknowledges that [Andersen] is not indebted to W.E. & N.W., Inc. nor does W.E. & N.W., Inc. have any claims against [Andersen]." The agreement indemnifies both Woodward and Andersen for all liabilities asserted against them as past or present officers, directors, or employees of the corporation. The agreement provides that to the extent not indemnified by the corporation, the parties agreed to bear in equal shares any liabilities that arose by virtue of any distribution, compensation payment, cash transfer, or other property transfer from the corporation to any person at any time or any liabilities by virtue of Andersen's or Woodward's actions or admissions as a shareholder, officer, or director of the corporation. The

parties also agreed to indemnify each other against liability transpiring after entry of the decree. The agreement also has provisions for indemnification between the parties. The record does not contain evidence of a resolution or provision allowing the corporation to indemnify Andersen for attorney fees.

The agreement states that it was designed in part to provide for past and future liabilities and to place certain restrictions on Andersen's control of the corporation. Woodward contends that he and Andersen agreed that he would be made an officer of the corporation. The agreement, however, does not include such a provision. After the divorce, Woodward was made an officer of the corporation, but was later removed.

2. Trial

As noted, the trial court granted summary judgment against Woodward's claims occurring before the divorce. At trial, on the claims after the divorce concerning the dissolution of the corporation and the accounting action, Woodward attempted to provide evidence of an oral agreement between himself and Andersen providing that he would be made an officer and director of the corporation after March 1993. Andersen's attorney objected on the basis that the parol evidence rule barred testimony of any agreements that were not ultimately included in the shareholder agreement. The trial court did not allow the testimony on the basis that Woodward did not plead that he was wrongfully induced to sign the shareholder agreement. Woodward then made a motion to amend his petition, which the district court denied. The articles of incorporation dealing with officers and directors state that when the shares of the corporation are owned by either one or two stockholders, the number of directors may be less than three but not less than the number of shareholders.

Andersen presented evidence that after the divorce, Woodward encouraged campground members to withhold their dues and he broke into the campground office and took some documents. Woodward denies these allegations and contends that an anonymous camper called him and told him that missing documents were on the clubhouse steps. Woodward states that he then picked up the documents and gave them to his attorney.

The record reflects a litany of charges and countercharges between the parties. Woodward testified that Andersen was not holding annual shareholders' meetings. Andersen testified that one meeting was held but that it "didn't work," that she and Woodward could not agree, and that they could not be in the same room together. At trial, Woodward testified that he believed the campground was being poorly run. Andersen disagrees.

In 1996, Woodward hired a certified fraud examiner to examine the books of the corporation. The examiner concluded that Andersen took $423,400 from the corporation in 1992, mostly through telephone transactions. The record contains a short affidavit from the examiner which does not provide any detailed information regarding the examiner's experience in conducting fraud examinations. The examiner did not testify at trial.

In December 1996, Woodward filed suit individually and on behalf of the shareholders alleging that Andersen received excessive compensation, withdrawals, and benefits from the corporation before the divorce. Woodward alleged that he was unable to discover the extent and nature of the excessive payments until November and December 1996. He also alleged that after the divorce, Andersen acted in an oppressive and fraudulent manner with respect to Woodward and the corporation in breach of her fiduciary duties to both. Woodward alleged that he was improperly ousted as an officer and director of the corporation, that Andersen allowed her mother and a sibling to run the corporation, and that he was denied access to records. Woodward further alleged that Andersen received excessive payments from the corporation and that the corporation's books show a loan made to Woodward and a dividend resolution that never occurred. Finally, under a section labeled "Dissolution," Woodward alleged that Andersen had mismanaged the corporation, failed to keep Woodward informed of business decisions, and was in violation of the shareholder agreement by receiving a salary that was ordered by the Internal Revenue Service. Woodward sought an accounting, money judgment on behalf of the corporation, removal of the loan and the dividend resolution from the books, attorney fees, and dissolution of the corporation. In the alternative, Woodward alleges that Andersen should

be removed as officer and director or that Woodward should be reinstated as an officer or director.

The district court granted Andersen's motion for partial summary judgment for claims arising before the divorce decree, finding that all matters in dispute occurring before the decree had been settled in the divorce action. At the hearing on the motion for summary judgment, Woodward sought a continuance on the grounds that a motion to compel remained outstanding. The outstanding motion to compel does not appear in the record. The district court did not allow a continuance.

A trial was later held on the remaining claims. The district court determined that Andersen's actions did not diminish the value of the corporation, that Andersen had provided Woodward with all the information she was required to provide, and that none of her actions rose to the level of a breach of the shareholder agreement. The district court then concluded that Woodward had failed to meet his burden of proof on all claims and dismissed Woodward's operative petition with prejudice. Woodward appeals.

II. ASSIGNMENTS OF ERROR

Woodward assigns, rephrased, that the district court erred in (1) entering partial summary judgment on his claims for actions occurring before March 29, 1993; (2) dismissing his operative petition with prejudice; (3) overruling his motion for a new trial; (4) failing to grant his motion for a continuance; (5) failing to allow him to amend his petition; and (6) failing to award attorney fees. Woodward also assigns that the district court erred "in its evidentiary rulings at trial."

III. STANDARD OF REVIEW

[1,2] A derivative action which seeks an accounting and the return of money is an equitable action. *Evans v. Engelhardt*, 246 Neb. 323, 518 N.W.2d 648 (1994). See *Anderson v. Clemens Mobile Homes*, 214 Neb. 283, 333 N.W.2d 900 (1983). An action seeking corporate dissolution is also an equitable action. See, *Ammon v. Cushman Motor Works*, 128 Neb. 357, 258 N.W. 649 (1935); *Miller v. M. E. Smith Building Co.*, 118 Neb. 5, 223 N.W. 277 (1929). See, generally, *Anderson v. Clemens Mobile Homes, supra.*

[3] In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided that where credible evidence is in conflict on a material issue of fact, 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. *Hall v. Progress Pig, Inc.*, 259 Neb. 407, 610 N.W.2d 420 (2000); *Anderson v. Cumpston*, 258 Neb. 891, 606 N.W.2d 817 (2000).

[4] Summary judgment is proper 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. *Morrison Enters. v. Aetna Cas. & Surety Co.*, 260 Neb. 634, 619 N.W.2d 432 (2000).

[5,6] The applicability of the doctrines of collateral estoppel and res judicata is a question of law. *In re Estate of Wagner*, 246 Neb. 625, 522 N.W.2d 159 (1994). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Riggs v. Riggs, ante* p. 344, 622 N.W.2d 861 (2001); *Jones v. Paulson, ante* p. 327, 622 N.W.2d 857 (2001).

IV. ANALYSIS

1. Collateral Estoppel

Woodward argues that the district court erred in determining that claims based on actions taken by Andersen before March 29, 1993, were barred by res judicata or collateral estoppel. Woodward argues that he did not know of withdrawals made by Andersen until after November or December 1996 and that he was unable to raise the issue of improper withdrawals at the time of the divorce because he was not a shareholder.

[7-9] The doctrine of res judicata provides that a final judgment on the merits is conclusive upon the parties in any later litigation involving the same cause of action. *In re Estate of Wagner, supra.* Under collateral estoppel, when an issue of ultimate fact has been determined by a final judgment, that issue cannot again be litigated between the same parties in a future

lawsuit. *Id.* There are four conditions that must exist for the doctrine of collateral estoppel to apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action. *Id.*; *Farm Credit Bank v. Stute*, 248 Neb. 573, 537 N.W.2d 496 (1995). We analyze this case under the doctrine of collateral estoppel.

Woodward argues that he was unable to raise issues regarding withdrawals Andersen made from the corporation before the divorce. The corporation, however, was marital property subject to distribution. In order to equitably distribute the property, a necessary determination involved the value of the corporation. Any claim that Woodward or the corporation had against Andersen at the time of the divorce would affect the valuation of the corporation, bringing directly into issue whether Andersen improperly withdrew money from the corporation. Woodward and Andersen entered into a settlement agreement under which the property was distributed and the parties agreed that Andersen was not indebted to the corporation and that the corporation did not have any claims against Andersen. This agreement was made a part of the divorce decree that was ultimately approved by the court, creating a final judgment on the merits. By logical implication, this judgment included a determination that there were no existing claims by the corporation against Andersen and decided any issues Woodward had regarding the valuation of the corporation. See *Hofsommer v. Hofsommer Excavating, Inc.*, 488 N.W.2d 380 (N.D. 1992). See, generally, *Eggland v. Eggland*, 240 Neb. 393, 482 N.W.2d 245 (1992).

Woodward argues that he lacked the opportunity to fully and fairly litigate issues regarding withdrawals Andersen made from the corporation because Andersen hid withdrawals from him. He claims that he relied on a statement by Andersen that money which was taken out of the corporation in the form of a bonus was deposited back into the corporation. In support of his argument, Woodward relies on *Larkin v. Ethicon, Inc.*, 251 Neb. 169, 556 N.W.2d 44 (1996).

In *Larkin*, we reversed a summary judgment when a plaintiff was provided with incorrect information during discovery. Without the cooperation of the defendant, the plaintiff in *Larkin* had no means by which to discover the information. In this case, however, the record shows that Woodward expressed concerns about withdrawals Andersen made from the corporation and that he brought numerous discovery motions. Woodward then sought to hire an accountant to thoroughly examine the books, something Andersen resisted. But instead of making a motion to compel or attempting to pursue additional discovery into transactions made by Andersen, Woodward chose to enter into a settlement agreement. In the agreement, he stipulated that the corporation had no claims against Andersen. Therefore, Woodward had the opportunity to investigate the issue further and either go forward with litigation or structure the settlement accordingly. Unlike *Larkin*, where a court entered summary judgment against the plaintiff's wishes, Woodward freely chose to discontinue investigating his concerns and enter into a settlement agreement. Further, Woodward did not later seek to set aside the decree based on an allegation of fraud. See *Grant Fritzsche Enterprises v. Fritzsche*, 107 Ohio App. 3d 23, 667 N.E.2d 1004 (1995).

We determine that Woodward was collaterally estopped from relitigating issues concerning withdrawals Andersen made from the corporation before March 29, 1993. These issues were conclusively decided as part of the divorce action. Accordingly, the district court was correct in sustaining Andersen's motion for partial summary judgment.

2. Dissolution and Accounting

Woodward next argues that the district court erred in failing to dissolve the corporation. Woodward argues that after March 29, 1993, Andersen breached her fiduciary duties and engaged in oppressive conduct. In particular, Woodward alleges that Andersen mismanaged the corporation, failed to hold shareholders' meetings, failed to retain him as an officer of the corporation, and wrongfully withdrew funds from the corporation in order to pay attorney fees. Woodward argues that the corporation is deadlocked and must be dissolved.

The district court concluded that Andersen had the authority and discretion to operate the corporation without consulting Woodward, that she had done nothing to diminish the value of the corporation, and that she had done nothing that rose to the level of violating the shareholder agreement. The district court found Andersen's assertions of unreasonable conduct on the part of Woodward to be "quite credible" and were corroborated by Woodward's vague responses at trial. The court then concluded that Woodward had failed to meet his burden of proof on all claims.

(a) Burden of Proof

[10-12] The district court assumed that Woodward bore the entire burden of proof. An officer or director of a corporation, however, occupies a fiduciary relation toward the corporation and its stockholders, and is treated by the courts as a trustee. *Evans v. Engelhardt*, 246 Neb. 323, 518 N.W.2d 648 (1994). Although the burden is ordinarily upon the party seeking an accounting to produce evidence to sustain the accounting, when another person is in control of the books and has managed the business, that other person is in the position of a trustee and must make a proper accounting. *Anderson v. Clemens Mobile Homes*, 214 Neb. 283, 333 N.W.2d 900 (1983). The burden of proof is upon a party holding a confidential or fiduciary relation to establish the fairness, adequacy, and equity of a transaction with the party with whom he or she holds such relation. *Rettinger v. Pierpont*, 145 Neb. 161, 15 N.W.2d 393 (1944).

[13] In this case, once a fiduciary relationship between Woodward and Andersen was established and evidence was presented that certain transactions existed that allegedly breached a fiduciary duty, the burden shifted to Andersen to prove the fairness of those transactions. See, *Coduti v. Hellwig*, 127 Ill. App. 3d 279, 469 N.E.2d 220, 82 Ill. Dec. 686 (1984), *overruled on other grounds, Schirmer v. Bear*, 174 Ill. 2d 63, 672 N.E.2d 1171, 220 Ill. Dec. 159 (1996). In a claim for dissolution of a corporation, however, the burden of proof remains on the party seeking the dissolution. *Id.*; *Churchman v. Kehr*, 836 S.W.2d 473 (Mo. App. 1992). See *Hockenberger v. Curry*, 191 Neb. 404, 215 N.W.2d 627 (1974). Woodward had the burden to prove that the corporation should be dissolved.

(b) Dissolution

[14] The Business Corporation Act provides:

> [T]he court may dissolve a corporation:
>
> . . . .
>
> (2)(a) In a proceeding by a shareholder if it is established that:
>
> (i) The directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and irreparable injury to the corporation is threatened or being suffered or the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally because of the deadlock;
>
> (ii) The directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent;
>
> (iii) The shareholders are deadlocked in voting power and have failed, for a period that includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired; or
>
> (iv) The corporate assets are being misapplied or wasted.

Neb. Rev. Stat. § 21-20,162 (Cum. Supp. 2000). The meaning of the term "deadlocked" within the context of § 21-20,162 is a corporation which, because of decision or indecision of the stockholders, cannot perform its corporate powers. *Kollbaum v. K & K Chevrolet, Inc.*, 196 Neb. 555, 244 N.W.2d 173 (1976).

[15] Although the Business Corporation Act has given to the courts the power to relieve minority shareholders from oppressive acts of the majority, the remedy of dissolution and liquidation is so drastic that it must be invoked with extreme caution. *Hockenberger v. Curry, supra*. We have stated that the ends of justice would not be served by too broad an application of the statute, for that would merely eliminate one evil by the substitution of a greater one—oppression of the majority by the minority. *Id.*

We agree with the district court that Woodward has failed to meet his burden of proof. Woodward is correct that the articles of incorporation state that the corporation must have at least two directors when there are two shareholders. However, nothing in the articles of incorporation dictates that a shareholder must be the additional officer or director. Nothing in the shareholder

agreement or the articles of incorporation entitles Woodward to act as an officer or director of the corporation. Woodward is also correct that Andersen has failed to properly hold shareholders' meetings. We determine, however, that Andersen's failure to appoint a second director and to hold shareholders' meetings are insufficient reasons to dissolve the corporation. In this case, Woodward has failed to show how Andersen's actions affect the corporation in a manner that would allow dissolution under § 21-20,162. Further, the Business Corporation Act provides other remedies for Woodward's complaints. See, e.g., Neb. Rev. Stat. § 21-2053 (Reissue 1997).

Although Woodward may disagree with certain management decisions made by Andersen, it is Andersen who is the majority stockholder, officer, and director of the corporation. Absent a showing that the factors enumerated in § 21-20,162 apply, a minority shareholder's disagreement with management's decisions or the shareholder's dislike of another shareholder does not create a corporate deadlock. Woodward has failed to show that the corporation cannot perform its corporate powers. We also agree with the district court that the record shows that the corporation has made a profit and that Woodward has failed to show how corporate assets are being misapplied or wasted. We conclude that the district court was correct in determining that Woodward failed to meet his burden of proof and in refusing to dissolve the corporation.

(c) Accounting

In alleging a breach of fiduciary duty and seeking an accounting, Woodward argues that Andersen improperly withdrew approximately $2,000 from the corporation to pay attorney fees before trial of this case. Any withdrawals made after trial are not the subject of this action. Andersen argues that she could use corporate funds to pay attorney fees under the shareholder agreement. The shareholder agreement, however, only provides for indemnification between Andersen and Woodward. The agreement is silent regarding indemnification by the corporation to Andersen. Therefore, the agreement does not provide for indemnification by the corporation to Andersen.

Accordingly, Woodward is entitled to an accounting of indemnification of expenses Andersen received before trial. If Andersen cannot show that she was entitled to an advance for expenses, she must reimburse the corporation for the improperly received indemnification.

We have reviewed Woodward's remaining assignments of error and determine they have no merit.

V. CONCLUSION

We determine that the district court was correct in sustaining Andersen's motion for partial summary judgment on the basis of collateral estoppel. We also determine that the district court was correct in finding that Woodward failed to meet his burden of proof when seeking a dissolution of the corporation and in his other claims. We further conclude that the district court did not err in overruling Woodward's motions for a continuance and directed verdict and did not err in the evidentiary rulings that Woodward assigns as error. We do determine, however, that Woodward is entitled to an accounting of money Andersen withdrew from the corporation to pay attorney fees before trial. Accordingly, we reverse, and remand for further proceedings on that issue only.

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

McCORMACK, J., not participating.

LAURENCE E. TIGHE, APPELLANT, V. COMBINED INSURANCE COMPANY OF AMERICA, A CORPORATION, APPELLEE.

628 N.W.2d 670

Filed June 15, 2001. No. S-00-143.

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. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independent of the determination made by the lower court.
4. **Insurance: Contracts.** In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous.
5. **Insurance: Contracts: Appeal and Error.** Whether an insurance contract is ambiguous and therefore in need of construction is a question of law.
6. **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.
7. **Contracts.** The fact that parties to a document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous.
8. **Insurance: Contracts.** Interpretation of an unambiguous term or provision in an insurance policy presents a question of law.
9. ____: ____. While an ambiguous insurance policy will be construed in favor of the insured, ambiguity will not be read into policy language which is plain and unambiguous in order to construe against the preparer of the contract.
10. **Insurance: Contracts: Wages.** Self-employment income, as used in an insurer's reduction-of-benefits clause, is net of business expenses.

Appeal from the District Court for Dodge County: F.A. GOSSETT III, Judge. Reversed.

Daniel A. Martin for appellant.

Jonathan Nash, Jr., and Robert M. Slovek, of Kutak Rock, L.L.P., for appellee.

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

CONNOLLY, J.

The appellant, Laurence E. Tighe, filed suit for benefits under a disability insurance policy issued by Combined Insurance Company of America (Combined). The district court granted Combined's motion for summary judgment. The court found that the terms of the disability insurance policy issued to Tighe were unambiguous; that Tighe had received income from his employer, Credit Bureau Services, Inc. (CBS), and from self-employment through Associated Business Management (ABM) following his disability; and that Combined had properly reduced the amount of his benefits.

The primary issue in this appeal is what income is considered to be self-employment income under Combined's reduction-of-benefits clause (reduction clause). Combined argues that self-employment income consists of gross receipts, thereby reducing Tighe's benefits to zero. Tighe argues that income from self-employment should be gross receipts minus business expenses. We determine that income from self-employment in Combined's reduction clause means the net income of the insured after subtracting business expenses from gross receipts and that Tighe's benefits should not have been reduced. Accordingly, we reverse.

BACKGROUND

The relevant portion of the reduction clause in Combined's policy, entitled "Coordination With Other Compensation," states: "The Monthly Indemnity will be reduced by: (A) Income received from any employer, [or] from self-employment . . . ."

Tighe purchased CBS in 1961 and is the sole shareholder of that subchapter S corporation. He remained president of CBS until 1991. Although he was not president after 1991, he remained actively involved in the management of CBS. From approximately 1973 to July 1994, he was paid a management fee from CBS of $3,200 a month. This amount was not paid to Tighe as a salary but was paid directly to ABM, a sole proprietorship that Tighe also owned. The $3,200 a month was reflected as part of ABM's gross receipts.

Tighe's accountant, Jerome C. Bahm, testified by deposition that although CBS was Tighe's employer in 1994, the $3,000 to $4,000 that Tighe received from CBS through ABM was a management consultation fee, which was self-employment income. Tighe's federal income tax returns showed little income in the form of wages: in 1994, his wages were $218; in 1995, his wages were $319; and in 1996, his wages were $445. Bahm also testified that the management consultation fees would usually not show up as self-employment income on Tighe's tax returns because ABM's receipts—which included such fees from CBS—were always offset by various business expenses. ABM has shown a net loss for almost every year since the 1960's. In 1994, Tighe's Schedule C for ABM showed a net profit of $117. In

1995, ABM showed net losses of $9,676. In 1996, the company's net losses were $13,758, and in 1997, the losses were $68,715.

Tighe testified that on average, he worked 30 hours a week at CBS until he had a heart attack in July 1994. After that time, he stated that he was no longer an employee of CBS and that he did not receive a management consultation fee from CBS because he was unable to perform his original duties. He said that he tried working 2 to 3 hours a week in October 1994, but was unable to continue at that time. He reported in a claim letter to Combined that he worked approximately 10 hours a week from February 1995 until February 1997, when his doctor advised him to stop working altogether.

Tighe admitted that he continued to take $3,000 to $4,000 a month from CBS after July 1994, but he stated that this money was not taken as income for services provided. Instead, he said that the money he received from CBS after his heart attack was a draw on his accumulated earnings and profits from CBS. In 1994, 1995, and 1996, however, the money Tighe received from CBS continued to be paid directly to ABM and was reflected as part of that company's gross receipts.

In February 1997, Tighe apparently became aware of his coverage under Combined's policy and filed a claim for disability benefits. In May, Combined issued a check for $9,450 to Tighe to cover his total disability up to February 15, 1995. The record does not indicate how Combined calculated that benefits payment. Tighe sent another claim letter to Combined in August 1997, asking for an additional $31,948 in benefits. In that letter, Tighe deducted 25 percent from his disability benefits for the period of time during which he worked 10 hours a week.

ASSIGNMENTS OF ERROR

Tighe assigns that the district court erred in (1) finding that the disability policy was unambiguous, (2) finding that Tighe received income from CBS, (3) finding that Tighe received self-employment income through ABM following his disability, (4) finding that the term "self-employment income" means gross earnings from self-employment rather than net earnings, and (5) sustaining Combined's motion for summary judgment.

STANDARD OF REVIEW

[1] 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. *Daniels v. Allstate Indemnity Co., ante* p. 671, 624 N.W.2d 636 (2001); *Kirwan v. Chicago Title Ins. Co., ante* p. 609, 624 N.W.2d 644 (2001).

[2] 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. *Daniels v. Allstate Indemnity Co., supra*; *Kirwan v. Chicago Title Ins. Co., supra.*

[3] The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independent of the determination made by the lower court. *Callahan v. Washington Nat. Ins. Co.*, 259 Neb. 145, 608 N.W.2d 592 (2000).

ANALYSIS

The parties in this case are not disputing the amount of Tighe's insured monthly benefits of $1,500 under the policy. Combined stated at the summary judgment hearing that the sole issue was whether Tighe had received income from an employer or from self-employment following his disability, which under the reduction clause would offset his benefits. Combined's position was that if Tighe had received income, it was entitled to have the disability payments offset by the amount of that income under the reduction clause. Combined contends that the $3,000 to $4,000 a month that Tighe received from CBS following his disability reduced his benefits to zero.

Income From Employer

The district court found that Tighe had received income from his employer, CBS, following his disability, but did not specify the amount of that income. Tighe's federal income tax returns show his wages were $218 in 1994, $319 in 1995, and $445 in

1996. These are the only wages in the record that fairly represent Tighe's income from an employer following his disability.

We note that at oral argument, Combined contended that the $3,000 to $4,000 a month Tighe received from CBS following his disability was income from CBS, as his employer. The evidence in the record on this issue consists of Tighe's income tax returns which show nominal wages and Bahm's testimony that the management consultation fees that CBS paid to Tighe were self-employment income to him through ABM. Bahm also stated that the $3,000 to $4,000 that Tighe received from CBS through ABM was included in gross receipts on the Schedule C for ABM.

In addition, Tighe testified that after his heart attack in July 1994, he was no longer an employee of CBS and that he did not receive a management consultation fee from CBS because he was unable to perform his original duties. Instead, he stated that the money he received from CBS after his heart attack was a draw on his accumulated profits from CBS. No contradicting evidence was submitted by Combined to show that the $3,000 to $4,000 Tighe received from CBS was income from an employer. We conclude that the record does not support Combined's contention.

Self-Employment Income

Tighe contends that Combined should not have been allowed to reduce his disability benefits because he showed a net loss through ABM for every year except 1994, when ABM had a net profit of $117. He further contends that the district court erred in finding that self-employment income means gross receipts from self-employment. Combined contends that the gross receipts from ABM are Tighe's self-employment income regardless of any business expenses he reported for federal income tax purposes. Therefore, the issue is whether Tighe had self-employment income that reduced the amount of his disability benefits.

In its order, the district court did not explicitly state that it was using gross receipts for Tighe's self-employment income. Net profits, however, would have only marginally reduced Tighe's benefits. Tighe's Schedule C for 1994 showed that ABM's net profits were $117. After 1994, ABM had net losses of $9,676 for 1995, $13,758 for 1996, and $68,715 for 1997. In contrast, ABM's gross receipts were $104,632 for 1994,

$106,670 for 1995, $103,783 for 1996, and $44,583 for 1997. Therefore, the district court could have used only gross receipts to determine that the reduction of Tighe's benefits was correct.

The reduction clause does not specify whether the benefits are to be reduced by gross or net self-employment income. Tighe's position is that the district court erred in failing to find that the term "self-employment income" as used in the reduction clause is ambiguous. He argues that because the phrase is ambiguous, he is entitled to a construction favorable to him. He relies on the Internal Revenue Code, I.R.C. § 1402(b) (1994), which defines self-employment income as net earnings from self-employment.

Combined argues that the terms of the exclusionary clause are clear and should not be construed to create an ambiguity, but should be given their plain and ordinary meaning as an average or reasonable person would understand them. Combined argues an ordinary person would consult the dictionary, not the tax code.

[4] In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous. *Callahan v. Washington Nat. Ins. Co.*, 259 Neb. 145, 608 N.W.2d 592 (2000).

[5] Whether an insurance contract is ambiguous and therefore in need of construction is a question of law. *Moller v. State Farm Mut. Auto. Ins. Co.*, 252 Neb. 722, 566 N.W.2d 382 (1997).

[6,7] 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. *Callahan v. Washington Nat. Ins. Co., supra.* But the fact that parties to a document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous. *Id.*; *Moller v. State Farm Mut. Auto. Ins. Co., supra.*

[8] Interpretation of an unambiguous term or provision in an insurance policy presents a question of law. *Callahan v. Washington Nat. Ins. Co., supra*; *American Family Ins. Group v. Hemenway*, 254 Neb. 134, 575 N.W.2d 143 (1998).

[9] While an ambiguous insurance policy will be construed in favor of the insured, ambiguity will not be read into policy language which is plain and unambiguous in order to construe against the preparer of the contract. *Callahan v. Washington Nat. Ins. Co., supra*; *American Family Ins. Group v. Hemenway, supra.*

Although Combined correctly argues that "[t]here is no legal requirement that each word used in an insurance policy must be specifically defined in order to be unambiguous," *American Family Ins. Group v. Hemenway*, 254 Neb. at 143, 575 N.W.2d at 149, Combined fails to articulate the plain and obvious meaning of the phrase "income from self-employment." The dictionary defines "income" as revenue or receipts. See Webster's Third New International Dictionary, Unabridged 1143 (1993). However, neither Webster's nor Black's Law Dictionary defines "self-employment income."

In *Hull v. Aetna Ins. Co.*, 249 Neb. 125, 541 N.W.2d 631 (1996), a self-employed claimant for workers' compensation argued that his benefits should be based on his gross income. This court held that "business expenses should be deducted in determining the wage of a self-employed claimant and that business expenses set forth on a claimant's tax return shall be presumed correct." *Id.* at 131, 541 N.W.2d at 635. Net business profits of a sole proprietorship have also been held to be a self-employed claimant's income under a no-fault automobile provision for disability benefits. See *Zyck v. Hartford Insurance Group*, 143 N.J. Super. 580, 364 A.2d 32 (1976). The Mississippi Supreme Court has specifically held that net profits must be used for determining the amount of a self-employed insured's benefits under a disability insurance policy. See *Prudence Life Ins. Co. v. Prisock*, 254 Miss. 316, 180 So. 2d 636 (1965). See, also, 12 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 182:18 at 182-24 (1998) ("[g]enerally, the [self-employed] insured's income should be calculated for benefit purposes in the same manner that it is for tax purposes").

Although we recognize that the courts in the cited cases were dealing with the amount of an insured's benefits, the same reasoning applies to self-employment income as used in Combined's reduction clause. The reduction clause was designed to allow Combined to reduce an insured's benefits by income he or she receives from an employer or self-employment. In the case of a self-employed insured, however, it is the net profits of a business that are the true representation of the value of the insured's services to himself or herself. See *Zyck v. Hartford Insurance Group, supra.*

[10] To interpret income from self-employment as gross receipts in a reduction of benefits clause would allow an insurer to reduce its liability by gross revenues which do not represent actual income to the insured. Therefore, it would be unreasonable to interpret self-employment income to mean gross receipts. A contract is not ambiguous unless a word, phrase, or provision has, or is susceptible of, at least two *reasonable* but conflicting interpretations or meanings. *Callahan v. Washington Nat. Ins. Co.*, 259 Neb. 145, 608 N.W.2d 592 (2000). Because it would be unreasonable to interpret self-employment income under Combined's reduction clause to mean gross receipts, the contract is not ambiguous. We conclude that self-employment income, as used in Combined's reduction clause, is net of business expenses.

This interpretation is supported by the fact that net business profits are reported as self-employment income under the Internal Revenue Code. Although Combined argues that self-employment income under the tax code is a complicated determination, the basic premise that business expenses should be deducted from gross receipts is not difficult. See I.R.C. § 1402(b) ("term 'self-employment income' means the net earnings from self-employment derived by an individual").

CONCLUSION

We conclude that the district court erred in granting Combined's motion for summary judgment because the district court should have used net earnings for Tighe's self-employment income, and using net earnings, Combined has not proved its reduction of benefits was proper or that it was entitled to judgment as a matter of law. Tighe's attorney is allowed $2,700 in attorney fees for services in this court. Therefore, we reverse.

REVERSED.

STATE OF NEBRASKA, APPELLEE, V.
ROBERT RAY JOHNSON, APPELLANT.
627 N.W.2d 753

Filed June 15, 2001. No. S-00-592.

1. **Jury Instructions.** Whether jury instructions given by a trial court are correct is a question of law.

2. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of erroneous jury instructions, the appellant has the burden to show that the questioned instructions were prejudicial or otherwise adversely affected a substantial right of the appellant.
3. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.
4. **Lesser-Included Offenses: Jury Instructions: Evidence.** A court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.
5. **Controlled Substances: Lesser-Included Offenses.** The offense of possession of a particular controlled substance is a lesser-included offense of distribution of such particular controlled substance.
6. **Lesser-Included Offenses: Jury Instructions: Evidence.** It is not prejudicial error not to instruct upon a lesser-included offense when the evidence entirely fails to show an offense of a lesser degree than that charged in the information. Where the prosecution has offered uncontroverted evidence on an element necessary for a conviction of the greater offense but not necessary for the lesser offense, a duty rests on the defendant to offer at least some evidence to dispute this issue if he or she wishes to have the benefit of a lesser-offense instruction.
7. **Controlled Substances: Words and Phrases.** To possess a narcotic drug means to have actual control, care, and management of, and not a passing control, fleeting and shadowy in its nature.
8. **Criminal Law: Directed Verdict.** In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.
9. **Directed Verdict.** If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law.
10. **Corroboration: Witnesses: Testimony.** Corroboration is sufficient to meet the requirement of Neb. Rev. Stat. § 28-1439.01 (Reissue 1995) if the witness is corroborated as to material facts and circumstances which tend to support the testimony as to the principal fact in issue.
11. **Corroboration: Controlled Substances.** Corroboration required by Neb. Rev. Stat. § 28-1439.01 (Reissue 1995) may be supplied by observation that a meeting between the subject and a cooperating individual actually took place, coupled with searches of the cooperating individual both before and within a reasonable time after the drug purchase took place.

12. **Corroboration: Witnesses: Testimony.** Evidence is legally insufficient to sustain a conviction when the State has failed to corroborate the testimony of a cooperating individual which identifies the defendant as the person involved in a distribution.
13. **Corroboration: Evidence.** The evidence supporting each count must independently satisfy the requirements of Neb. Rev. Stat. § 28-1439.01 (Reissue 1995).

Petition for further review from the Nebraska Court of Appeals, SIEVERS, HANNON, and MOORE, Judges, on appeal thereto from the District Court for Adams County, TERRI HARDER, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Arthur C. Toogood, Adams County Public Defender, for appellant.

Don Stenberg, Attorney General, and Thomas J. Olsen for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Robert Ray Johnson was convicted by a jury of two counts of distribution of a controlled substance, marijuana. Johnson was sentenced by the district court for Adams County to 2 to 3 years' imprisonment on each count, with the sentences to run concurrently.

Johnson appealed to the Nebraska Court of Appeals claiming that the district court erred in (1) refusing to give an instruction on the lesser-included offense of possession of marijuana, (2) denying his motion for a directed verdict at the close of all the evidence based on the claim that the convictions were not supported by sufficient evidence, and (3) imposing excessive sentences. The Court of Appeals rejected Johnson's assignments of error and affirmed his convictions and sentences. *State v. Johnson*, No. A-00-592, 2001 WL 47009 (Neb. App. Jan. 16, 2001) (not designated for permanent publication).

Johnson filed a petition for further review, which this court granted. We reverse the decision of the Court of Appeals and remand the cause to the Court of Appeals, directing the court to

remand the cause to the district court for a new trial on the first count relating to the charge of distribution on January 14, 1999, and dismissal of the second count relating to the charge of distribution on January 15.

STATEMENT OF FACTS

Johnson was convicted of two counts of distribution of a controlled substance, marijuana, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1998). The charges arose out of incidents which were alleged to have occurred on January 14 and 15, 1999. Count I pertains to January 14, and count II pertains to January 15. The direct testimonial evidence against Johnson consisted primarily of the testimony of a confidential informant who assisted the city of Hastings and Adams County by participating in controlled drug transactions for which she was compensated by the drug task force. Johnson testified in his own defense. The confidential informant's and Johnson's versions of events differed.

The confidential informant's testimony regarding two alleged controlled buys on January 14 and 15, 1999, was as follows: As to the January 14 incident, the confidential informant testified that she contacted Johnson and arranged to meet him at the Olive Saloon in Hastings. Prior to the meeting, the confidential informant was searched by a police officer, given a transmitter disguised as a pager, and given "buy money." At the bar, the confidential informant told Johnson she needed to buy an ounce of marijuana. Johnson replied that he did not have that much with him, and the two arranged to meet later at the Reno Bar. The two met at the Reno Bar, then went outside to Johnson's car where Johnson gave the confidential informant two baggies of marijuana in exchange for $75. Four law enforcement personnel testified at trial that they had seen Johnson and the confidential informant leave the bar together and go to Johnson's car on January 14.

As to the January 15, 1999, incident, the confidential informant testified that she again contacted Johnson to make another purchase. As on January 14, she was searched and given a transmitter and "buy money" prior to the meeting. The confidential informant testified that she and Johnson met again at the Reno

Bar where Johnson gave her three baggies of marijuana in exchange for $90. No law enforcement personnel or any other witness testified as to having seen Johnson at the Reno Bar or to having observed Johnson meeting with the confidential informant on January 15.

After each purchase, the confidential informant delivered the marijuana to the police officers with whom she was working. On cross-examination, the confidential informant testified that she was being compensated for each occasion. Johnson was ultimately arrested and charged with two counts of distribution on July 16, 1999. He pled not guilty, and the case went to trial.

In addition to the testimony of the confidential informant and law enforcement personnel as outlined above, Johnson testified at trial. Johnson denied having sold marijuana to the confidential informant on either January 14 or 15, 1999. Johnson, however, recalled an incident which he thought may have occurred on January 14. Johnson testified he met the confidential informant at the bar and went to his car with her at her invitation to smoke marijuana which she, rather than Johnson, provided. According to Johnson, the confidential informant handed him a small amount of marijuana which he placed in a pipe. Before he could light it, the confidential informant said she had to go and left the car. Johnson thought her behavior was strange because they had smoked marijuana together in the past. Johnson returned to the bar without smoking any marijuana.

With respect to the January 15, 1999, incident, Johnson testified that although he frequented the bar, he did not specifically recall being there on January 15 and did not recall any conversation or incident involving marijuana on that date.

During the course of the trial, Johnson requested that the jury be instructed on the lesser-included charge of possession. The request was denied by the district court. The jury convicted Johnson of two counts of distribution of a controlled substance.

Johnson appealed his convictions and sentences to the Court of Appeals. The Court of Appeals, in an unpublished decision, rejected Johnson's assignments of error and affirmed his convictions and sentences. Johnson petitioned this court for further review. We granted his petition.

ASSIGNMENTS OF ERROR

Johnson asserts that the Court of Appeals erred in concluding that the district court did not err when it (1) refused to give a lesser-included offense instruction on possession, (2) denied Johnson's motion for directed verdict at the close of all the evidence based on the claim that his convictions were not supported by sufficient evidence, and (3) imposed allegedly excessive sentences. Because we reverse the decision of the Court of Appeals with respect to the first two assignments of error, we do not consider Johnson's third assigned error with regard to sentencing.

STANDARDS OF REVIEW

[1,2] Whether jury instructions given by a trial court are correct is a question of law. *State v. Wright, ante* p. 277, 622 N.W.2d 676 (2001). In an appeal based on a claim of erroneous jury instructions, the appellant has the burden to show that the questioned instructions were prejudicial or otherwise adversely affected a substantial right of the appellant. *Id.*

[3] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000).

ANALYSIS

Lesser-Included Offense Instruction.

Johnson was charged with two counts of distribution of a controlled substance. Johnson asserts that the Court of Appeals erred in affirming the district court's refusal to instruct the jury on what he asserts is the lesser-included offense of possession. We agree with Johnson that possession is a lesser-included offense of distribution and, for the reasons explained below, reverse the decision of the Court of Appeals and remand the

cause to the Court of Appeals, directing the court to remand the cause to the district court to conduct a new trial on count I.

[4] In analyzing the lesser-included offense issue, the Court of Appeals properly used the statutory elements test from *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993), which provides that a court must instruct on a lesser-included offense if (1) the elements of the lesser offense for which an instruction is requested are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.

The Court of Appeals concluded under the first step in *Williams* that possession of marijuana is a lesser-included offense of distribution of marijuana. However, under the second step, the Court of Appeals determined that the evidence in the present case did not produce a rational basis for acquitting Johnson of the offense of distribution and convicting him of the offense of possession. In reaching this conclusion, the Court of Appeals reasoned that because Johnson had denied possession of marijuana, the only basis for convicting him of the lesser offense would be if the jury believed only part of the confidential informant's story, i.e., that Johnson was in possession of marijuana but did not distribute it to her. Although we agree with the legal conclusion of the Court of Appeals that possession is a lesser-included offense of distribution, we conclude that the Court of Appeals erred in its determination that the evidence did not support the giving of a lesser-included offense instruction in this case.

At the jury instruction conference, Johnson requested a lesser-included offense instruction and described the lesser offense as "possession of less than one ounce of marijuana." Although Johnson did not specify the statutory section which serves as the source of the proposed lesser-included offense instruction, we construe his proposal as a reference to § 28-416(13), which describes an offense of "knowingly or intentionally possessing marijuana weighing one ounce or less."

The first step of the *Williams* analysis is to determine whether the elements of the offense of possession of marijuana are such

that one cannot commit the greater offense of distribution of marijuana without simultaneously committing the purported lesser offense of possession of marijuana. The Court of Appeals analyzed the first step under the *Williams* test as follows:

> There was evidence that the marijuana involved in count I weighed a little less than one-half ounce and that in count II, the amount involved was about two-thirds ounce. We have held in *State v. Malone*, 4 Neb. App. 904, 552 N.W.2d 772 (1996), that possession of marijuana is a lesser-included offense of possession of marijuana with intent to distribute. See, also, *State v. Bernth*, 196 Neb. 813, 246 N.W.2d 600 (1976). Although *Bernth* was not decided under our present, strict statutory-elements approach to lesser-included offenses, both this case and *Malone* were decided under § 28-416(1)(a). Section 28-416(1)(a) provides that it is a crime to "manufacture, distribute, deliver, dispense, or possess with intent to manufacture, distribute, deliver, or dispense a controlled substance." Whereas *Malone* involved a charge for possession with intent to distribute, in this case, Johnson was charged with distribution.
>
> The hallmark of possession of an illegal drug is not necessarily physical custody thereof, because it is dominion and control over the drugs which denominate possession. See *State v. Massa*, 242 Neb. 70, 493 N.W.2d 175 (1992), *overruled on other grounds, State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993). Thus, even though one could conjure up a factual scenario where a distributor may not physically possess the drugs which he or she distributes, the distributor still exercises dominion and control of the drugs, as in a straight possession case. In determining whether a crime is a lesser-included offense of a greater crime, we compare the statutory elements of each to determine if it is impossible to commit the greater offense without also committing the lesser offense. See *State v. Schmidt*, 5 Neb. App. 653, 562 N.W.2d 859 (1997). After such comparison, it appears that simple possession of marijuana, putting aside questions of the amount possessed, is a lesser-included offense of distribution of marijuana.

State v. Johnson, No. A-00-592, 2001 WL 47009 at *3 (Neb. App. Jan. 16, 2001) (not designated for permanent publication).

We agree with the Court of Appeals that under the first step of the *Williams* test, one cannot commit the offense of distribution of a controlled substance without simultaneously committing the offense of possession of a controlled substance and that, therefore, possession is a lesser-included offense of distribution.

[5] We note that the statutory description of the greater offense in this case refers to distribution of a "controlled substance," § 28-416(1)(a), and the statutory description of the lesser offense specifically involved in this case refers to possession of "marijuana weighing one ounce or less," § 28-416(13). Marijuana is a "controlled substance." Neb. Rev. Stat. § 28-405(c)(10) [Schedule I] (Cum. Supp. 1998). Under § 28-416, the offenses of possession of different types of controlled substances are stated separately in subsections in order to assign each such possession of a controlled substance offense to a different class of crime depending on the type and/or weight of the controlled substance. Therefore, one can distribute a "controlled substance" by possessing one of a variety of "controlled substances." One cannot, however, commit the greater crime of distribution of a controlled substance without committing the lesser offense of possession of a controlled substance, notwithstanding the fact that there are several forms of illegal possession. Compare *State v. Wright, ante* p. 277, 622 N.W.2d 676 (2001) (concluding motor vehicle homicide not lesser-included offense of manslaughter because it is possible to commit greater offense of manslaughter while committing unlawful act other than unlawful act involving motor vehicle). We therefore conclude that the offense of possession of a particular controlled substance is a lesser-included offense of distribution of such particular controlled substance. In the present case, the specific controlled substance is marijuana weighing 1 ounce or less.

[6] Having concluded that the elements of the lesser offense for which Johnson requested an instruction are such that one cannot commit the greater offense of distribution without simultaneously committing the lesser offense of possession, under *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993), we must analyze whether the evidence in this case produces a rational basis

for acquitting Johnson of the greater offense of distribution of marijuana and convicting him of the lesser offense of possession of marijuana weighing 1 ounce or less. It is not prejudicial error not to instruct upon a lesser-included offense when the evidence entirely fails to show an offense of a lesser degree than that charged in the information. *State v. Becerra, ante* p. 596, 624 N.W.2d 21 (2001). Where the prosecution has offered uncontroverted evidence on an element necessary for a conviction of the greater offense but not necessary for the lesser offense, a duty rests on the defendant to offer at least some evidence to dispute this issue if he or she wishes to have the benefit of a lesser-offense instruction. *Id.*

The Court of Appeals determined that under the second step of the *Williams* test, the evidence as to each count did not produce a rational basis for acquitting Johnson of the offense of distribution and convicting him of the lesser-included offense of possession, and therefore, the evidence did not support giving the lesser-included offense instruction. With respect to count I relating to the January 14, 1999, incident, we conclude that there was sufficient evidence to support the giving of the lesser-included instruction and that the Court of Appeals erred in concluding to the contrary. However, with respect to count II relating to the January 15 incident, as explained more fully below, we do not reach the lesser-included offense issue because the evidence against Johnson was based solely on the uncorroborated testimony of the confidential informant who was a cooperating individual, and count II must be dismissed for insufficient evidence.

[7] As to count I, Johnson testified that on January 14, 1999, he accepted a small amount of marijuana from the confidential informant and put the marijuana into a pipe. The Court of Appeals nevertheless stated that "Johnson did not admit to possessing marijuana." *State v. Johnson*, No. A-00-952, 2001 WL 47009 at *3 (Neb. App. Jan. 16, 2001) (not designated for permanent publication). We disagree with this statement of the Court of Appeals. Although not cited by the Court of Appeals, this court has stated that "[t]o possess a narcotic drug means to have actual control, care, and management of, and not a passing control, fleeting and shadowy in its nature." *State v. Coca*, 216 Neb. 76, 81, 341 N.W.2d 606, 610 (1983). See, also, *State v.*

Williams, 211 Neb. 650, 655, 319 N.W.2d 748, 751 (1982) (word " 'possess,' when used in a criminal statute, means something more than momentary control"). The Court of Appeals appears to have concluded that Johnson's testimony would not amount to an admission that he had "possessed" marijuana because his testimony indicated only "passing" or "momentary" control. Johnson's testimony regarding putting the marijuana in a pipe indicates more than passing or momentary control of marijuana.

Given the record, the jury could have believed, inter alia, either the confidential informant's testimony that Johnson delivered two baggies of marijuana to her on January 14, 1999, and found that Johnson had distributed marijuana or believed Johnson's testimony and found that he possessed but did not distribute marijuana on January 14. The giving of the lesser-included instruction was warranted by the evidence, and the district court erred when it rejected the proffered instruction. The Court of Appeals erred in rejecting Johnson's assignment of error regarding count I with regard to the district court's failure to give the lesser-included offense instruction.

Denial of Johnson's Motion for Directed Verdict at Close of Evidence and Sufficiency of Evidence.

[8,9] Johnson next asserts that the Court of Appeals erred in affirming the district court's denial of Johnson's motion for directed verdict at the close of all the evidence and in concluding that his convictions were supported by sufficient evidence. In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Severin*, 250 Neb. 841, 553 N.W.2d 452 (1996). If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law. *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996). We conclude that the evidence was sufficient to submit count I to the jury but that count II should not have been submitted to the jury due to the lack of evidence corroborating the cooperating individual's testimony.

With regard to the sufficiency of evidence, the Court of Appeals stated that "if the testimony of the confidential informant is believed by a finder of fact, there is ample evidence to sustain [both] the convictions for distributing marijuana." *State v. Johnson*, 2001 WL 47009 at *2. In connection with our consideration of the sufficiency of evidence in this case, we note that Neb. Rev. Stat. § 28-1439.01 (Reissue 1995) provides: "No conviction for an offense punishable under any provision of the Uniform Controlled Substances Act shall be based solely upon the uncorroborated testimony of a cooperating individual." We agree with the conclusion of the Court of Appeals that there was sufficient evidence to submit count I regarding the January 14, 1999, incident to the jury where properly instructed. However, with regard to count II involving the incident on January 15, we conclude that the testimony of the confidential informant regarding the critical events of January 15 is uncorroborated and, therefore, insufficient under § 28-1439.01. Johnson's motion for a directed verdict on count II should have been sustained, and such count should have been dismissed.

"Cooperating individual" is defined for purposes of the Uniform Controlled Substances Act as "any person, other than a commissioned law enforcement officer, who acts on behalf of, at the request of, or as agent for a law enforcement agency for the purpose of gathering or obtaining evidence of offenses punishable under the Uniform Controlled Substances Act." Neb. Rev. Stat. § 28-401(32) (Cum. Supp. 1998). The confidential informant in this case is a "cooperating individual" under § 28-1439.01. We further note that Johnson was charged with two counts of distribution of a controlled substance, marijuana, in violation of § 28-416(1)(a), which is a provision of the Uniform Controlled Substances Act. Therefore, pursuant to § 28-1439.01, neither of Johnson's convictions in this case may be based solely upon the uncorroborated testimony of the confidential informant serving as a cooperating individual.

[10-12] We have held that corroboration is sufficient to meet the requirement of § 28-1439.01 if the witness is corroborated as to material facts and circumstances which tend to support the testimony as to the principal fact in issue. *State v. Goodro*, 251 Neb. 311, 556 N.W.2d 630 (1996). We have further held that

corroboration may be supplied by observation that a meeting between the subject and a cooperating individual actually took place, coupled with searches of the cooperating individual both before and within a reasonable time after the drug purchase took place. *State v. Knoefler*, 227 Neb. 410, 418 N.W.2d 217 (1988). We have held, however, that the evidence is legally insufficient to sustain a conviction when the State has failed to corroborate the testimony of a cooperating individual which identifies the defendant as the person involved in a distribution. *State v. Jimenez*, 248 Neb. 255, 533 N.W.2d 913 (1995).

Although the Court of Appeals did not directly address the corroboration issue, it did note that the confidential informant testified that she was searched for drugs prior to both her meetings with Johnson, on January 14 and 15, 1999. Although not mentioned by the Court of Appeals, law enforcement personnel involved in the operation testified that the confidential informant had been searched prior to both meetings with Johnson; that the confidential informant was wired for both meetings; and that on January 14, they saw Johnson enter the bar and later exit the bar with the confidential informant and go to Johnson's vehicle, where according to the confidential informant, the actual distribution took place. However, aside from the confidential informant, no one testified as to having seen Johnson enter or exit the bar or meet with the confidential informant on January 15.

As to count I involving the incident on January 14, 1999, there is sufficient corroborating evidence because the police officers searched the confidential informant prior to and after the meeting with Johnson and because police officers observed Johnson going into the bar and later leaving the bar with the confidential informant and going to his car where, according to the confidential informant's testimony, the distribution occurred. The fact of Johnson's having met with the confidential informant on January 14 is further corroborated by Johnson's testimony regarding the events of January 14, about which he testified that he met the confidential informant in the bar and that the two of them went to his car.

However, as to count II involving the January 15, 1999, incident, the record lacks sufficient evidence corroborating the testimony of the confidential informant serving as a cooperating

individual. Although there was evidence that the confidential informant was searched by police prior to and after her alleged meeting with Johnson on January 15, the police officers did not testify that they observed Johnson on January 15, nor did they testify that they observed the confidential informant and Johnson meet on January 15. There was no testimony by police officers or anyone other than the confidential informant that Johnson was actually at the bar on January 15 or that he met with the confidential informant on that date.

We have previously identified the objectives of the predecessor statute to § 28-1439.01 by referring to the legislative history. *State v. Beckner*, 211 Neb. 442, 318 N.W.2d 889 (1982). The introducer of the bill, Senator Fowler, indicated the concerns sought to be addressed by the legislation. Senator Fowler noted that cooperating individuals "often have ulterior motives in accusing others of drug offenses . . . [s]uch as monetary gain or relieving themselves of criminal liability from drug offenses they themselves have committed." Judiciary Committee Hearing, L.B. 276, 85th Leg., 1st Sess. 66 (Feb. 22, 1977). Senator Fowler also noted:

> [A]rrests for delivery of controlled substances violations often do not occur until weeks and often months after the date upon which the violation was alleged to have occurred. This means that even . . . innocent person[s] charged with such . . . violation[s] [have] little if any effective means of defending [themselves] against the unjust charge[s] unless they can succeed in establishing their innocence by the often difficult if not impossible task of establishing that they could not have been in the place at that time the offense was alleged to have occurred.

Id. at 65.

Both concerns noted by Senator Fowler were present in the instant case because the confidential informant was paid for her work and because Johnson was not arrested until July 1999 for the violation alleged to have occurred on January 15, 1999. Regarding the January 15 incident, there was no evidence to corroborate the confidential informant's testimony that she met with Johnson at the Reno Bar or any evidence other than her testimony that Johnson was at the bar on that date. As noted by the

introducer, testimony to corroborate a defendant's presence at the time and place of the alleged violation is especially vital when a period of months exists between the alleged violation and the defendant's arrest.

[13] The State argues that the evidence is sufficient as to count II because the testimony by Johnson and the law enforcement officers specifically corroborating the confidential informant's testimony regarding the January 14, 1999, incident also corroborates her testimony regarding the January 15 incident. We reject this argument. Although both counts were charged in the same information, each count represents a separate offense. See Neb. Rev. Stat. § 29-2002(1) (Reissue 1995) (providing that two or more offenses may be charged in same information in separate count for each offense if offenses charged are of same or similar character). Because § 28-1439.01 requires that "[n]o conviction for *an offense* punishable under any provision of the Uniform Controlled Substances Act shall be based solely upon the uncorroborated testimony of a cooperating individual," we conclude that each count represents a separate offense and that the evidence supporting each count must independently satisfy the requirements of § 28-1439.01.

We conclude that Johnson's conviction on count II was not based on sufficient evidence because it was based solely on the uncorroborated testimony of the confidential informant who was serving as a cooperating individual. In enacting § 28-1439.01, the Legislature has indicated that such uncorroborated testimony cannot be the sole basis for a conviction under the Uniform Controlled Substances Act. Accordingly, Johnson's motion for directed verdict at the close of all the evidence should have been granted as to count II. The district court erred in denying this motion as to count II, and the Court of Appeals erred in affirming the district court's denial of Johnson's motion for a directed verdict as to count II made at the close of the evidence.

CONCLUSION

We conclude that possession of a controlled substance is a lesser-included offense of distribution of a controlled substance and that as to count I, the evidence in this case justified giving the lesser-included offense jury instruction. The decision of the

Court of Appeals affirming the district court's denial of Johnson's request for a lesser-included jury instruction as to count I was error and is reversed.

As to count II, the Legislature has indicated by the passage of § 28-1439.01 that the uncorroborated testimony by a cooperating individual is insufficient to support a conviction for an offense under the Uniform Controlled Substances Act. As to count II, the testimony of the confidential informant serving as a cooperating individual is uncorroborated. Because the evidence against Johnson in connection with count II is legally insufficient to sustain the conviction due to a lack of evidence corroborating the testimony of the cooperating individual as required by § 28-1439.01, Johnson's motion for a directed verdict at the close of all the evidence should have been granted as to count II. The Court of Appeals erred in affirming the district court's denial of Johnson's motion for a directed verdict as to count II. Count II against Johnson may not be retried, and count II must be dismissed. See *State v. Jimenez*, 248 Neb. 255, 533 N.W.2d 913 (1995).

We therefore reverse the decision of the Court of Appeals and remand the cause to the Court of Appeals, directing the court to remand the cause to the district court for a new trial on count I and to dismiss count II.

REVERSED AND REMANDED WITH DIRECTIONS.

JOSE L. TORRES, APPELLANT, V. AULICK LEASING, INC., AND ST. PAUL FIRE AND MARINE INSURANCE COMPANY, ITS WORKERS' COMPENSATION INSURANCE CARRIER, APPELLEES.

628 N.W.2d 212

Filed June 15, 2001. No. S-00-1187.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2000), 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. **Judgments: Appeal and Error.** In connection with questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the inferior court.
4. **Workers' Compensation.** An employee may recover workers' compensation benefits for injury caused by an accident arising out of and in the course of his or her employment.
5. ____. Prior to our decision in *La Croix v. Omaha Public Schools*, 254 Neb. 1014, 582 N.W.2d 283 (1998), Nebraska adhered to a bright-line version of the going to and from work rule. This rule stated that an injury sustained by an employee while going to and from work, at a fixed place of employment, does not arise out of and in the course of employment.
6. ____. Under *La Croix v. Omaha Public Schools*, 254 Neb. 1014, 582 N.W.2d 283 (1998), the going to and from work rule as currently applied in Nebraska is that injuries sustained by an employee while going to and from work do not arise out of and in the course of employment unless it is determined that a distinct causal connection exists between an employer-created condition and the occurrence of the injury.
7. ____. Whether an injury arose out of and in the course of employment must be determined from the facts of each case.
8. ____. Where an employee, in the performance of his or her duties, is required to travel and an accident occurs while he or she is so engaged, the accident arises out of and in the course of his or her employment and is within the scope of the Nebraska Workers' Compensation Act.
9. ____. A commercial traveler is regarded as acting in the course of his or her employment during the entire period of travel on the employer's business.
10. ____. Traveling employees are generally within the course of their employment from the time they leave home on a business trip until they return, for the self-evident reason that the traveling itself is a large part of the job.
11. ____. Commercial travelers are not subject to the going to and from work rule because they are already on the job during the time they are traveling.
12. **Workers' Compensation: Appeal and Error.** Whether travel falls within the scope and course of employment under the Nebraska Workers' Compensation Act in a particular case must be determined by the facts in that case.
13. ____: ____. The determination of whether a particular activity arises out of and in the course of employment is a factual determination and may not be reversed unless clearly wrong.
14. **Workers' Compensation.** Under the special errand exception to the going to and from work rule, when an employee, having identifiable time and space limits on the employment, makes an off-premises journey which would normally not be compensable under the usual going to and from work rule, the journey may be brought within the course of employment by the fact that the trouble and time of making the journey, or the special inconvenience, hazard, or urgency of making it in the particular circumstances, is itself sufficiently substantial to be viewed as an integral part of the service itself.

15. ____. The special errand exception applies when there is instruction, direction, requirement, or suggestion by the employer that the employee make the journey.
16. **Workers' Compensation: Appeal and Error.** Whether an employee's activity is covered by the special errand exception and is within the course and scope of employment is a factual determination and will not be reversed unless clearly wrong.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Samuel W. Segrist, of Meister & Segrist, for appellant.

Marvin O. Kieckhafer, of Smith Peterson Law Firm, for appellees.

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

HENDRY, C.J.

INTRODUCTION

Jose L. Torres brought a workers' compensation claim against his employer, Aulick Leasing, Inc. (Aulick), for injuries he received as the result of an automobile accident which occurred while Torres was traveling from his home to the jobsite at which he was working. The trial judge of the Workers' Compensation Court dismissed Torres' claim, and the Workers' Compensation Court review panel affirmed. Torres now appeals.

FACTUAL BACKGROUND

Aulick is a trucking company engaged in the business of hauling aggregate materials, including rock, sand, and dirt, to highway construction projects. The trucks used in Aulick's operations are owned by Aulick. Aulick's drivers are paid a percentage of the gross amount hauled by the driver. Although Aulick's home office is located in Scottsbluff, Nebraska, the nature of Aulick's business requires that it move its operations from one location to another on a regular basis.

Torres began working as a driver for Aulick in April 1996. Torres lived in Scottsbluff but worked for Aulick on several projects at various locations throughout Nebraska, South Dakota, and Wyoming. Torres drove a truck owned by Aulick while working on each job.

Aulick's drivers generally worked Monday through Friday, with occasional work on Saturdays. Drivers were not required to stay at the jobsite on weekends and could go home if they chose to do so. Aulick's general policy regarding such travel was that for jobs lasting less than 30 days, employees were allowed to take an Aulick truck to return to their homes for the weekends. If the job was to last more than 30 days, employees were required to use their personal vehicles to return home on weekends. Generally, employees were allowed to use Aulick trucks to return home on weekends during the first 2 weeks of any new job.

In August 1996, Torres was assigned to a project in the area of Sundance and Gillette, Wyoming. The job was expected to last 4 to 5 months. Aulick established a "hub" facility at a location in Gillette consisting of fuel tanks, a maintenance van, and a mailbox in which drivers deposited their paperwork. The trucks were usually parked at this hub facility overnight and on weekends. For the first 2 weeks of this job, Torres used an Aulick truck to go home on the weekends. Torres was not paid any mileage during these trips. Thereafter, Torres used his personal vehicle to travel home on weekends as he was instructed to do by the project foreman.

In August and September 1996, while working on the Sundance-Gillette project, Torres began experiencing certain mechanical problems with the truck he was driving. He informed the project foreman of these problems. The foreman told Torres that upon returning to work on Monday, September 23, Torres should haul one load that morning and thereafter take his truck to Newcastle, Wyoming, to have the truck repaired. On Friday, September 20, Torres parked the Aulick truck in Gillette. He then traveled to his home in Scottsbluff in his personal vehicle. Torres was not being paid by Aulick during this time. During this weekend, Torres had no contact with anyone from Aulick, did not do any work for Aulick, and was not being paid by Aulick. Torres engaged in personal activities over the weekend, including helping his brother move into a new home, attending church, visiting his sister, and spending time with his family. Torres was to report back to his truck in Gillette at 6 a.m. Monday.

On Monday, September 23, 1996, at approximately 12:30 a.m., Torres began the return trip to Gillette, Wyoming, from

Scottsbluff. At approximately 3 a.m., while driving his personal vehicle back to the jobsite, Torres swerved to avoid a deer and rolled his vehicle into a ditch. Torres suffered severe injuries as a result of the accident.

On October 6, 1997, Torres filed a petition seeking workers' compensation benefits. Trial was held on August 4, 1998. One issue presented at trial was whether Torres had a fixed place of employment such that the "going to and from work rule" applied. Other issues presented at trial were whether Torres was a commercial traveler and whether Torres was on a "special errand" for his employer at the time of the injury.

On August 27, 1998, the trial judge of the Workers' Compensation Court dismissed Torres' petition with prejudice without making any findings of fact or conclusions of law with respect to whether Torres had a fixed place of employment such that the going to and from work rule applied, or whether Torres was a commercial traveler or on a special errand at the time of his injury. On May 3, 1999, the Workers' Compensation Court review panel affirmed the dismissal of Torres' petition, finding that it was "implicit in the order of dismissal" that the trial judge did not find that Torres had a fixed place of employment and that sufficient evidence existed in the record to support the trial judge's conclusions. Torres appealed.

On appeal, this court determined that because the trial court failed to make explicit findings of fact and conclusions of law on the issues presented as required by Workers' Comp. Ct. R. of Proc. 11 (1998), there could be no meaningful appellate review. *Torres v. Aulick Leasing*, 258 Neb. 859, 606 N.W.2d 98 (2000) (*Torres I*). We remanded the cause to the trial court with directions to "enter an order which complies with the requirements of rule 11, taking into consideration how the going to and from work rule applies to the facts of the instant case and whether Torres was a commercial traveler or on a special errand at the time of his injury." *Id.* at 864, 606 N.W.2d at 103.

On remand, the trial court found that Torres had a fixed place of employment, the Sundance-Gillette jobsite, and that the going to and from work rule applied. The trial court then found that there was no causal connection between an employer-created condition and Torres' injury which would entitle Torres to recover

workers' compensation benefits for injuries which occurred while on his way to work. The court further determined that Torres was not a commercial traveler, and he was not on a special errand at the time of the injury. The court then denied Torres' claim for workers' compensation benefits for the injuries sustained in the September 23, 1996, accident. An order dismissing Torres' claim was entered by the trial court on May 3, 2000. On October 20, the review panel affirmed the decision of the trial court. Torres appealed and filed a petition to bypass, which this court granted.

ASSIGNMENTS OF ERROR

Torres claims, restated, that the trial court erred in (1) applying the going to and from work rule, (2) finding that Torres was not a commercial traveler, and (3) finding that Torres was not on a special errand at the time of his injury.

STANDARD OF REVIEW

[1-3] Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2000), 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. *Gebhard v. Dixie Carbonic, ante* p. 715, 625 N.W.2d 207 (2001); *Hagelstein v. Swift-Eckrich, ante* p. 305, 622 N.W.2d 663 (2001). 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. *Id.* In connection with questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the inferior court. *La Croix v. Omaha Public Schools*, 254 Neb. 1014, 582 N.W.2d 283 (1998).

ANALYSIS

Going To and From Work Rule

[4,5] Torres first claims that the trial court erred in applying the going to and from work rule. An employee may recover

workers' compensation benefits for injury caused by an accident arising out of and in the course of his or her employment. See, *Torres I*; Neb. Rev. Stat. § 48-101 (Reissue 1998). Prior to our decision in *La Croix v. Omaha Public Schools, supra*, Nebraska adhered to a "bright-line" version of the going to and from work rule. This rule stated: "An injury sustained by an employee while going to and from work, at a fixed place of employment, does not arise out of and in the course of employment." *Id.* at 1017, 582 N.W.2d at 285. See, also, *Johnson v. Holdrege Med. Clinic*, 249 Neb. 77, 541 N.W.2d 399 (1996); *Acton v. Wymore School Dist. No. 114*, 172 Neb. 609, 111 N.W.2d 368 (1961). This rule was characterized as a "bright-line" rule because an employee could recover for an injury sustained while going to and from work only if that injury occurred on premises owned by the employer. See, *La Croix v. Omaha Public Schools, supra*; *Johnson v. Holdrege Med. Clinic, supra*. Thus, this rule was sometimes referred to as the "premises" rule. See *id.*

We abandoned the bright-line premises rule in *La Croix* and adopted a different approach to analyzing cases dealing with injuries sustained by an employee while going to and coming from work. This approach allows an employee to recover for injuries sustained off the employer's premises when there is a distinct causal connection between an employer-created condition and the occurrence of the injury. *Id.*

In *La Croix*, plaintiff was encouraged by her employer to park in a parking lot not owned by the employer and to use a shuttle service supplied by the employer to get to her work premises. Plaintiff fell and was injured in the parking lot while on her way to board the shuttle. We held that by encouraging employees to park in the lot and providing transportation to the workplace from the lot, the employer created a condition under which its employees will necessarily encounter hazards while traveling to the premises where they work. Thus, we held that there was a distinct, causal connection between the employer's sponsoring of the parking lot and plaintiff's injury. Because such a causal connection was present, plaintiff's injury arose out of and in the course of her employment.

[6,7] Under *La Croix v. Omaha Public Schools*, 254 Neb. 1014, 582 N.W.2d 283 (1998), the going to and from work rule

as currently applied in Nebraska is that "injuries sustained by an employee while going to and coming from work do not arise out of and in the course of employment unless it is determined that a distinct causal connection exists between an employer-created condition and the occurrence of the injury." *Torres I* at 862, 606 N.W.2d at 101. See, also, *La Croix v. Omaha Public Schools, supra*. Whether an injury arose " 'out of' " and " 'in the course of' " employment must be determined from the facts of each case. *Cords v. City of Lincoln*, 249 Neb. 748, 753, 545 N.W.2d 112, 117 (1996). Factual determinations made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Gebhard v. Dixie Carbonic, ante* p. 715, 625 N.W.2d 207 (2001).

Torres argues that he had no fixed place of employment such that the going to and from work rule cannot be applied. However, the trial court found that Torres did have a fixed place of employment, that being the Sundance-Gillette jobsite. The record supports this finding. The record shows that Torres was assigned to work on a construction project with work to be performed in the area of Sundance and Gillette. A "hub" facility consisting of fuel tanks, a maintenance van, and a mailbox in which drivers deposited their paperwork was located in Gillette. Aulick's trucks were usually parked at this hub facility overnight and on weekends. Torres performed his work duties at the Sundance-Gillette jobsite. The job was expected to last 4 to 5 months. The trial court was not clearly wrong in finding that Torres had a fixed place of employment.

The trial court also made a specific finding that there was no distinct causal connection between an employer-created condition and the occurrence of Torres' injury. The trial court stated,

> Other than the fact that plaintiff had to drive from his home in Scottsbluff to the workplace or job site in Northeast Wyoming, there is no causal connection between the employer-created condition and the occurrence of the injury . . . . The location of a job site or workplace for three to four months does not rise to the level of an employer-created condition as found in LaCroix, supra.

The trial court was not clearly wrong in finding that the establishment of a jobsite in an area to which Torres must travel did

not constitute an employer-created condition similar to that found in *La Croix v. Omaha Public Schools, supra.* In *La Croix*, the employer created the condition which caused the employee's injury by encouraging her to park in the employer-sponsored parking lot and providing the shuttle service. The employee was injured in the parking lot while boarding the shuttle. In the present case, Torres was injured while traveling on a public highway when he swerved to avoid a deer. The employer did not create this condition. The trial court's findings were not clearly wrong. Thus, the going to and from work rule applies in this case unless it is determined that Torres was a commercial traveler or that the "special errand" exception to the going to and from work rule applies.

Commercial Traveler

Torres next claims that the trial court erred in determining Torres was not a commercial traveler. The trial court found that "Torres had no business duties whatsoever in driving back and forth between Northeast Wyoming and Scottsbluff, Nebraska. The trip was personal in nature and had no business purpose." Thus, the trial court found that Torres was not a commercial traveler.

[8-11] Where an employee, in the performance of his or her duties, is required to travel and an accident occurs while he or she is so engaged, the accident arises out of and in the course of his or her employment and is within the scope of the Nebraska Workers' Compensation Act. *Torres I*; *McGee v. Panhandle Technical Sys.*, 223 Neb. 56, 387 N.W.2d 709 (1986). A commercial traveler is regarded as acting in the course of his or her employment during the entire period of travel on the employer's business. *Torres I*; *McGee v. Panhandle Technical Sys., supra.* The mission of the employer must be the major factor in the journey or movement, and not merely incidental thereto. *McGee v. Panhandle Technical Sys., supra.* " '[T]raveling employees are generally within the course of their employment from the time they leave home on a business trip until they return, for the self-evident reason that the traveling itself is a large part of the job.' " *Torres I*, 258 Neb. at 862, 606 N.W.2d at 102, quoting 1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 14.01 (1999). Commercial travelers are not subject to the

going to and from work rule because they are already "on the job" during the time they are traveling. *Torres I.*

[12,13] Whether travel falls within the scope and course of employment under the Nebraska Workers' Compensation Act in a particular case must be determined by the facts in that case. *Reynolds v. School Dist. of Omaha*, 236 Neb. 508, 461 N.W.2d 758 (1990). The determination of whether a particular activity arises out of and in the course of employment is a factual determination and may not be reversed unless clearly wrong. *Id.*

In order to be a commercial traveler, Torres must be required to travel in the performance of his duties and be on the employer's business during the travel, with the employer's mission being the major factor in the travel and not merely incidental thereto. See *McGee v. Panhandle Technical Sys., supra.* The record shows that the travel during which the accident occurred was not required by the employer and that Torres was not traveling in the performance of his job duties. On weekends, employees were free to return home if they chose to do so. The record shows that it was Torres' personal decision to leave the jobsite on Friday to return to his home in Scottsbluff, thus necessitating the return trip to the jobsite the following Monday, during which time the accident occurred. He was not required to do so by Aulick. The record further shows that Torres was not "on the employer's business" when the accident occurred, and the mission of the employer was not the major factor in the journey or movement. Torres was not engaged in the performance of his job duties or performing any business of his employer while traveling to and from Scottsbluff or while in Scottsbluff. He was not being paid by Aulick during any of this time. The trial court's findings that Torres had no business duties while on the trip during which the accident occurred and that the trip was "personal in nature and had no business purpose" are supported by the record. The trial court was not clearly wrong in finding that Torres was not a commercial traveler.

Special Errand Exception

[14,15] Finally, Torres claims that the trial court erred in finding that the "special errand" exception to the going to and from work rule did not apply in this case. The special errand

exception to the going to and from work rule has been stated as follows:

> When an employee, having identifiable time and space limits on the employment, makes an off-premises journey which would normally not be covered under the usual going and coming rule, the journey may be brought within the course of employment by the fact that the trouble and time of making the journey, or the special inconvenience, hazard, or urgency of making it in the particular circumstances, is itself sufficiently substantial to be viewed as an integral part of the service itself.

1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 14.05[1] at 14-5 (2001). The special errand exception applies when there is instruction, direction, requirement, or suggestion by the employer that the employee make the journey. *Reynolds v. School Dist. of Omaha*, 236 Neb. 508, 461 N.W.2d 758 (1990).

[16] As previously stated, the determination of whether a particular activity arises out of and in the course of employment is a factual determination and may not be reversed unless clearly wrong. *Reynolds v. School Dist. of Omaha, supra.* Thus, whether an employee's activity is covered by the special errand exception and is within the course and scope of employment is a factual determination and will not be reversed unless clearly wrong. See *Reynolds v. School Dist. of Omaha, supra.* See, also, *Publix Supermarkets v. Finocchi*, 650 So. 2d 1122 (Fla. App. 1995) (application of special errand doctrine generally depends on factual determinations); *Electronic Service Clinic v. Barnard*, 634 So. 2d 707 (Fla. App. 1994); *Tampa Airport Hilton Hotel v. Hawkins*, 557 So. 2d 953 (Fla. App. 1990) (whether employee's activity is covered by special errand exception is factual determination and cannot be disturbed on appeal unless clearly erroneous); *Schell v. Blue Bell, Inc.*, 637 P.2d 914 (Okla. App. 1981) (whether employee's activities are encompassed within special errand exception to going and coming rule presents question of fact for trial judge).

The trial court found that Aulick did not instruct, direct, require, or suggest that Torres return to Scottsbluff for the

weekend, and that Torres was not on a special errand while returning to the jobsite near Gillette. Torres, however, argues that because he was instructed to take his truck to Newcastle, Wyoming, for repairs on Monday, September 23, 1996, the return trip from Scottsbluff to the jobsite to pick up the truck constituted a special errand. In support of his argument, Torres relies on *Westcoatt v. Lilley*, 134 Neb. 376, 278 N.W. 854 (1938).

In *Westcoatt*, the employee was employed to haul gravel from the employer's gravel pit and was killed in an accident which occurred while the employee was returning to the gravel pit from his home. On the day prior to the accident, the employee was instructed by the employer to take a gas tank owned by the employer, fill it with gas, and bring it back with him to the gravel pit the next day. While on his way to work the next day with the filled gas tank, the employee was killed in a collision with another vehicle. The trial court's award of workers' compensation benefits to the employee's survivors was affirmed by this court, determining that the accident arose out of and in the course of the employee's employment.

Torres' argument that he was on a special errand at the time of the accident is without merit. Unlike the employee in *Westcoatt v. Lilley, supra*, at the time of the accident in this case, Torres was not engaged in a journey that was made due to the employer's instruction, direction, requirement, or suggestion. The employer did not direct Torres to make the journey to and from his home in Scottsbluff, and Torres was not engaged in any activity that the employer instructed or directed him to perform as was the employee in *Westcoatt*. Furthermore, the record shows that Torres was instructed to take the truck to Newcastle for repairs after he hauled one load on the morning of September 23, 1996. Thus, even if taking the truck to Newcastle to be repaired would have constituted a special errand, Torres had not yet begun that task. Torres was not making the trip from Scottsbluff to the jobsite for the purpose of having the truck repaired. Torres first had to arrive back at the jobsite, pick up his truck, and haul one load before he could take the truck for repairs. The trial court's finding that Torres was not on a special errand at the time of the accident was not clearly wrong.

CONCLUSION

For the above-stated reasons, the judgment of the Workers' Compensation Court is affirmed.

AFFIRMED.

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